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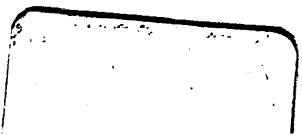
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THE LAWYERS REPORTS ANNOTATED

BOOK XXVIII.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE WITH FULL ANNOTATION
BURDETT A. RICH, EDITOR, HENRY
P. FARNHAM, ASSISTANT

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LAWYERS' REPORTS,

ANNOTATED.

NEVADA SUPREME COURT.

STATE of Nevada

v.

Alice M. HARTLEY, *Appt.*

(.....Nev.....)

***1. Section 8 of article 1 of the Constitution declares:** "No person shall be held to answer for a capital or other infamous offense . . . except on presentment or indictment of a grand jury." *Held*, that, when the people adopted these provisions of the bill of rights, they had in view a grand jury as it existed under the common law and the statutes at the time the constitution was adopted: *Held*, further, that the Acts of the Legislature of 1893, providing that ten persons shall constitute the grand jury, and that eight of the number may find an indictment, are unconstitutional.

*Headnotes by BONNIFIELD, J.

NOTE.—Number of grand jurors necessary to concur in finding an indictment.

- I. Effect of indorsement "true bill."
- II. Record of finding.
- III. Concurrence by twelve grand jurors.
- IV. Impeaching indictment by showing that twelve did not concur.
- V. Concurrence by proper number of grand jurors, as in the parties, crimes, counts, and degree of crime charged.
- VI. Concurrence by majority when grand jury exceeds twenty-three.
- VII. Provisions for concurrence by less than twelve. Constitutional questions.
- VIII. Statutes and constitutions.

For number necessary to form a grand jury, see note to *State v. Belvel* (Iowa) 27 L. R. A. 846.

The indorsement "a true bill" shows that the proper number of grand jurors concurred in finding an indictment, and the same result follows from record or journal entry that twelve grand jurors agreed and that the indictment was presented by the foreman in their presence. In the absence of statutes changing the common law, indictments must be found by the concurrence of twelve grand jurors, and no more than twelve need ever concur in any finding. It is generally held that the finding of an indictment by the necessary number cannot be impeached by evidence of grand jurors though there are a few cases in which evidence has been heard pro and con, and a few where indictments have been held invalid on such a showing. And where an indictment charges a certain crime, or certain parties, or has several counts and degrees of crime, it has been held that the accused cannot show that the indictment was not intended in the concurrence as against all parties, or that they did not intend to concur as to the degree of crime or count. When the grand jurors number

2. Under the common law, the statutes, and constitution, the defendant may waive his objections to the qualifications of jurors, and if he fail to challenge before the jury is completed, knowing of the disqualifications, he waives his objections, and is estopped from demanding, as matter of right, a new trial on the ground of such disqualification; and, in contemplation of the constitution, he has not in such case constitutional grounds for the objection that he has not been tried by a constitutional jury.

3. On appeal a party cannot complain of the ruling of the court in denying his challenge to a juror for cause if it appear that, when the jury was completed, his peremptory challenges had not been exhausted.

4. A view of the premises is not taking evidence in the case. It is means provided by the statute to enable the jury more satisfactorily to weigh the evidence given in court.

over twenty-three, it is generally held that their action is invalid on the ground that there can be no majority of twelve to concur. Several of the states have adopted provisions making the concurrence of less than twelve sufficient to find an indictment. This can only be done when authorized by the constitution.

The abbreviations below are to show the mode in which questions were presented, as by plea in abatement (pl. abate.), motion in arrest (mo. ar.), motion to quash (mo. qu.), objection (obj.).

I. Effect of indorsement "true bill."

The indorsement of an indictment by the foreman, "a true bill" sufficiently shows that it was found by the concurrence of twelve grand jurors. *United States v. Laws*, 3 Low, Dec. 115 (mo. ar.; mo. new tr.); *Caha v. United States*, 163 U. S. 211, 38 L. ed. 415 (dem.); *United States v. Brown*, 1 Sawy. 551 (mo. set aside); *Dawson v. People*, 35 N. Y. 399 (obj.); *Stanley v. State*, 38 Ala. 154 (mo. to strike from files); *McGarry v. People*, 3 Lana. 237 (mo. qu.); *Mo-intre v. Com. (Ky.)* April 16, 1897 (mo. set aside); *Turns v. Com.* 6 Met. 224 (obj.).

And in *Collins v. State*, 18 Fla. 651 (mo. ar.), and *State v. Morrison*, 30 La. Ann. 817, it was said that such indorsement shows that twelve of the grand jury agreed and presented the indictment in open court.

And the indorsement "true bill" by the foreman of the grand jury shows that the required number participated in, and favored, finding the indictment. *Harriman v. State*, 2 G. Greene, 270 (mo. ar.; mo. new tr.); *Creek v. State*, 24 Ind. 151 (pl. abate.).

Under Ky. Crim. Code, section 119, providing that the concurrence of twelve jurors is required to find an indictment and when so found must be indorsed "true bill;" an indictment indorsed "true bill," where the record showed that the grand jury reported an indictment, instead of saying presented,

When the action of the court is taken and the view is made on motion of the defendant, and no request or expression of a desire on his part to be present was made, his absence is not ground for new trial, nor is the absence of the judge legal cause of complaint.

5. Held, that the accused is presumed to be sane until the contrary is shown; and, where there is no evidence tending to show insanity of defendant at the time of the commission of the alleged offense, the action of the court in refusing to give instructions asked for by the defendant or in giving instructions of its own motion on the subject of insanity will not be reviewed by the appellate court.

6. The court instructed the jury: "In considering the weight and effect to be given to her evidence, in addition to noticing her manner and the probability of her statement, taken in connection with the evidence in the case, you should consider her relations and situations under which she gives her testimony, the consequences to her relating from the result of the trial; and all the inducements and temptations which would ordinarily influence a person in her situation. You should carefully determine the

amount of credibility to which her evidence is entitled. If convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it." *Held*, correct.

7. The court instructed that if the defendant shot at the deceased with the intention to kill him, and not in necessary self-defense, then certain facts enumerated in the instruction would not constitute any defense to the shooting. *Held*, as applied to this case, that the instruction was not misleading, nor prejudicial to the defendant, because it only recited a part of the facts relied upon by defense, nor was it a charge upon a matter of fact.

(May 23, 1895.)

A PPEAL by defendant from a judgment of the District Court for Washoe County convicting her of murder. *Affirmed*.

The facts are stated in the opinion.

Messrs. R. M. Clarke and Goodwin & Dodge for appellant.

Mr. John F. Alexander, Atty. Gen., and W. E. F. Deal for the State.

as provided in Ky. Crim. Code, section 121, showed a valid finding and good bill. *Patterson v. Com.* 86 Ky. 313 (obj.).

In *Thomas v. State*, 5 How. (Miss.) 20 (obj.), it was held that the indictment should state the number of the jurors by which it was found.

And in *State v. Bruce*, 77 Mo. 183 (obj.), it was said that the Mississippi statutes from the Act of 1836 to Rev. Stat. 1870, inclusive, all contained the proposition that an indictment cannot be found without the concurrence of at least twelve, and when so found, the foreman shall certify that twelve of the body concurred.

And in 2 Hale, P. C. 167, it was said that the indictment should show who composed the grand jury that presented the offense.

But in *United States v. Terry*, 30 Fed. Rep. 355 (pl. abate.), it was said that the question whether the certificate of the foreman as to the finding of a true bill will preclude questioning the grand jurors to ascertain whether twelve concurred, is still doubtful.

And in *Com. v. Smith*, 9 Mass. 107 (pl. abate.), it was said that indictments not found by twelve are void at common law, but the omission of such statement from the caption is not objectionable in Massachusetts where the indictment says "the jurors for the commonwealth, on their oaths, present," but an irregularity in this respect might become a subject of inquiry upon a suggestion to the court.

Where a bill has been indorsed "true bill" by mistake of the clerk of the grand jury, the finding having been really "not a true bill," the indictment should be quashed, and the foreman should be called and the return corrected, but in his absence, proof may be made in any other legitimate mode and the correction made. *State v. Horton*, 68 N. C. 596 (mo. qu.).

Only such cases in regard to indorsement "true bill" or record as discuss the effect on number concurring are included in this note.

II. Record of finding.

The record showing that twelve grand jurors agreed in finding a bill, and that the same was presented by the foreman, is the most solemn declaration that twelve agreed. *Watts v. Territory*, 1 Wash. Terr. 409 (obj.); *State v. Cox*, 28 N. C. 440 (ev.).

And such a statement of record shows that it was returned by the proper number. *Young v. State*, 6 Ohio, 435 (mo. ar.); *State v. Gainus*, 86 N. C. 632 (mo. ar.); *Peter v. State*, 3 How. (Miss.) 433 (obj.). 28 L. R. A.

In *Logan v. State*, 50 Miss. 289 (mo. new tr.), the objection was made that it did not appear on record that said indictment was found by the assent of twelve grand jurors, but this objection was disposed of by the court by saying that it was cured by Miss. Code 1871, sections 729-2343.

And where it was claimed that the indorsement of the clerk did not show that it was presented by the foreman in the presence of at least twelve, it was held that this was more than Miss. Code, § 2704, requires, and that such objection was made for the first time in that state. *Fitzcox v. State*, 52 Miss. 223 (mo. qu.).

But if the record does not show the presentation in the presence of twelve, it will be invalid. *Pond v. State*, 47 Miss. 39 (mo. new tr.); *Cachute v. State*, 50 Miss. 165 (mo. ar.); *Territory v. Woolsey*, 3 Utah, 470 (mo. ar.).

Where the record shows that the grand jurors returned into court through their foreman, in the presence of more than twelve of the other grand jurors, "numbers 779, 780 . . . which said indictment is in words," etc., the record did not identify the indictment found. *Speed v. State*, 32 Miss. 176 (mo. qu.).

And the record could not be corrected at a subsequent term to show that the indictment was returned in open court by the foreman in the presence of at least twelve of the grand jury, as Miss. Code 1871, § 2705, provides that no entry can be made at the subsequent term unless the defendant is in custody or in bail. *Cornwell v. State*, 53 Miss. 385 (mo. ar.; mo. new tr.).

And in *State v. Cox*, 28 N. C. 440 (obj.), it was said that in order to ascertain who concurs in making a presentment, the grand jury should be in court and should be called by the clerk.

And in *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480, it was said that the custom was for the grand jurors to be called in order to ascertain that the legal quorum was present in court on the return of the bill, but Ga. Code, § 3916, provides for the return of the indictment from the grand jury by the bailiff.

III. Concurrence by twelve grand jurors.

At common law, it is absolutely essential that twelve grand jurors must concur in the finding of an indictment, and statutory provisions requiring that twelve must concur, are mandatory. Therefore an indictment found by a less number than twelve will be void. *State v. Symonds*, 36 Me. 125

Bonfield, J., delivered the opinion of the court:

On the 26th day of July, 1894, the defendant, Alice M. Hartley, killed M. D. Foley, in her rooms, in the building of the Nevada bank, in the town of Reno, Washoe county, Nev., by shooting him with a pistol, for which she was indicted for the crime of murder on the 8d day of August, 1894, by the grand jury of that county. Subsequently she was tried in the district court of said county, found guilty of murder in the second degree by the verdict of the trial jury, and by the judgment of the court was sentenced to serve a term of eleven years in the state prison. The defendant appeals from the judgment of the district court, and from the order of the court denying her motion for new trial. The record is replete with objections made and exceptions taken by the defendant to the proceedings and rulings of the trial court from the beginning to the termination of the case.

1. The grand jury. In the Statutes of

(pl. abate.); State v. Rockafellow, 6 N. J. L. 406 (pl. abate.); Epperson v. State, 5 Lea, 221 (pl. abate.); Sparrenberger v. State, 53 Ala. 481, 25 Am. Rep. 643 (pl. abate.).

It is not enough that an indictment was *per sacramentum*, A. B. C. D. *et aliorum legalium hominum*, etc., and it appeareth not that it was *per sacramentum* twelve, for if it were presented by a lesser number, it was clearly ill. Clyncord's Case, Cro. Eliz. 654.

Prior to 1899 the Arizona law authorized an indictment on the concurrence of twelve, so by federal statute, and the Arizona Act of 1899 did not change this. *Ex parte Wilson*, 140 U. S. 575, 35 L. ed. 513 (hab. corp.).

That twelve must concur is also declared in, 4 Bl. Com. 306-307; Fitzgerald v. State, 4 Wia. 305 (obj.); 2 Hawk. P. C. chap. 8, § 16; State v. Garhart, 35 Iowa, 816 (chal.); People v. Colby, 54 Cal. 37 (mo. set aside); Barney v. State, 12 Smedes & M. 66 (pl. abate.); State v. Wilcox, 104 N. C. 847 (pl. abate.); Com. v. Brown, 1 L. R. A. 630, 147 Mass. 585 (pl. abate.); People v. Strong, 1 Abb. Pr. N. S. 244 (mo. qu.); and Harding v. State, 23 Ark. 210 (pl. abate.).

It was said in People v. Southwell, 46 Cal. 141 (mo. set aside) that Cal. Crim. Proc. Act, § 229, provided that an indictment cannot be "found" without the concurrence of at least twelve and shall be in-duced and presented.

In the case of Bedford v. Alcock, 1 Wils. 248, it was said that the custom for six persons to present is bad, because it could never have any legal commencement, being against a well-known principle of common law which requires that all offenses shall be presented by a jury of twelve men at least, but this case was an action for a penalty for refusing to let a committee test the weight of bread.

Although Ala. Code, § 4363, requires the concurrence of twelve grand jurors to find an indictment, whether it is necessary that twelve should concur in a report, on which an information in impeachment is based, is not decided. State v. Savage, 29 Ala. 1.

And where it is required that more than twelve compose the grand jury, it is not necessary that any of them above the number twelve concur in the indictment, and such indictment will be valid, although the remainder do not agree. Gladden v. State, 12 Fla. 563 (pl. abate.); Com. v. Sayers, 8 Leigh, 722 (pl. abate.); State v. Brainerd, 56 Vt. 532, 48 Am. Rep. 513 (pl. abate.); Pybos v. State, 3 Humph. 49 (mo. qu.).

28 L. R. A.

1898 (page 81) it is provided that twelve persons shall be summoned to appear as grand jurors, and out of the number so summoned the court shall select ten persons, who shall constitute the grand jury. By the same statutes (page 43) it is provided that an indictment shall not be found without the concurrence of eight grand jurors. The grand jury to which objection is made was selected and impaneled under the provisions of the General Statutes (sec. 3795), which require that twenty-four persons shall be selected and summoned, and of this number the court shall select seventeen persons to constitute the grand jury. Sections 4106 and 4107 require the concurrence of twelve grand jurors to find an indictment. The contention of the defendant is that the grand jury should have been organized in pursuance of the provisions of the Statutes of 1893, and, not having been so organized, that it was an illegal body. At common law, the grand jury may consist of any number between twelve, as the minimum, and twenty-three, as the max-

And in State v. Davis, 24 N. C. 158 (mo. ar.), and State v. Causey, 43 La. Ann. 897 (mo. qu.), the same was said to be the rule, but was not the question involved in these cases.

Some courts hold that there need not be more than twelve of the grand jurors present when any bill of indictment shall be found, although a panel may be more than twelve, and that the concurrence of the twelve will be sufficient. State v. Williams, 35 S. C. 344 (pl. abate.); State v. Miller, 3 Ala. 343 (mo. to acquit); State v. Shelton, 64 Iowa, 383 (chal.); State v. Ostrander, 18 Iowa, 425 (mo. qu.); People v. Butler, 8 Cal. 435 (obj.); People v. Gatewood, 20 Cal. 147 (mo. set aside); State v. Copp, 34 Kan. 522 (pl. abate.); People v. Roberts, 6 Cal. 214 (obj.); State v. Clayton, 11 Rich. L. 561 (mo. new tr.; mo. qu.; mo. ar.).

And in Doyle v. State, 17 Ohio, 223 (pl. abate.); Com. v. Clune, 162 Mass. 206 (pl. abate.), and State v. Swift, 14 La. Ann. 839 (mo. ar.), the same was said to be the rule, but was not the question involved in those cases.

But in State v. Hawkins, 10 Ark. 71 (pl. abate.), it was held that Ark. Stat., chap. 52, § 85, providing that no indictment shall be found without the consent of at least twelve grand jurors, while it does not absolutely require the concurrence of more than twelve, yet contemplates that there shall be sixteen in the panel.

And in Baldwin's Case, 2 Tyler (Vt.) 473, it was said that the surplusage over twelve was designed to guard against injury to public justice which might arise, if it were necessary that the whole panel should unite in the indictment, and that twelve of them can find an indictment.

And in Norris's House v. State, 3 Greene, 513 (pl. abate.; mo. set aside), it was said that it only required twelve to concur, but the other three cannot be dispensed with.

IV. Impeaching indictment by showing that twelve did not concur.

Under the statutory provisions of the various states that grand jurors must keep secret their votes, they cannot impeach an indictment, by showing that twelve of them did not agree, after it has been duly presented in open court. State v. Gibbs, 39 Iowa, 318 (mo. set aside); Laurent v. State, 1 Kan. 312 (mo. qu.; mo. ar.); State v. Baker, 20 Mo. 338 (mo. qu.); Gitobell v. People, 146 Ill. 175 (mo. qu.).

And the same was said to be the rule in State v.

imum, and an indictment found without the concurrence of at least twelve grand jurors is invalid. As to these common-law rules, all the elementary writers on the subject are agreed, and they are recognized by a great number of the courts of last resort. Of these we cite 2 Hawk. P. C. 295; Hale, P. C. 161; Co. Litt. 156b; 1 Chitty, Crim. L. 806; Forsyth, Jury Trial, 178; Cooley, Bl. 304; Story, Const. § 1784; *King v. Marsh*, 1 Bennett, Lead. Crim. Cas. 260; *State v. Davis*, 24 N. C. 153; *Com. v. Wood*, 2 Cush. 149; *Low's Case*, 4 Me. 439; *Hudson v. State*, 1 Blackf. 817; *People v. Hunter*, 54 Cal. 65; *State v. Symonds*, 86 Me. 123; *State v. Osterlander*, 16 Iowa, 435.

"No man can be convicted at the suit of the king of any capital offense unless by the unanimous voice of twenty-four of his equals and neighbors; that is, by twelve at least of the grand jury in the first place assenting to the accusation, and afterwards by the whole petit jury of twelve more finding him guilty upon his trial." Cooley, Bl. 3d ed. 304. At the time of the adoption of the

Constitution of Nevada, wherein it is declared, "No person shall be tried for a capital or other infamous offense . . . except on presentment or indictment of a grand jury" (art. 1, § 8), the provisions of the General Statutes (secs. 3795, 4106, 4107) which are declaratory of the common law were in force, being enacted by the Territorial Legislature of 1861. We, therefore, conclude that, when the people of this state adopted this constitutional provision, they had in view a "grand jury," as it existed at common law and under the statutes at the time of the adoption of the constitution. It is so held by this court with reference to the right of trial by jury in construing the third section of the same article of the constitution. *State v. McClear*, 11 Nev. 39. The reasoning in that case is applicable to the question at bar. Defendant's counsel cite a great number of authorities to the effect that a grand jury may consist of a less number than twenty-three, but we are not referred to any authority holding that the number may be less than twelve, or that less

Fasset, 16 Conn. 457 (mo. qu.); *Com. v. Hill*, 11 Cush. 137 (ev.); *State v. Johnson*, 115 Mo. 480 (mo. qu.).

Other cases hold that grand jurors cannot impeach their finding to show that twelve did not concur, but do not put this upon the effect of the statutory oath. *State v. Davis*, 41 Iowa, 311 (obj. to ev.); *United States v. Terry*, 39 Fed. Rep. 365 (pl. abate.); *State v. Oxford*, 30 Tex. 428 (pl. abate.); *Com. v. Twitchell*, 1 Brewst. (Pa.) 551 (mo. qu.); *Turk v. State*, 7 Ohio, pt. 2, p. 240 (pl. abate.); *Ex parte Sontag*, 64 Cal. 526 (mo. set aside); *Shoop v. People*, 45 Ill. App. 110 (mo. qu.); *Spigener v. State*, 62 Ala. 383 (mo. qu.).

And in *State v. Baltimore & O. R. Co.*, 15 W. Va. 363 (dem.); *United States v. Reed*, 2 Blackf. 426 (mo. qu.); *Huidekoper v. Cotton*, 3 Watts, 56 (ev.); *State v. Grady*, 84 Mo. 220 (mo. qu.), and *Com. v. Skeggs*, 3 Bush, 19 (mo. qu. recog.).—the same was said to be the rule, but was not the question involved.

In *People v. Naughton*, 7 Abb. Pr. N. S. 421 (mo. to compel use of minutes), it was held that the minutes of the grand jury could not be used to disclose how any juror voted or what was said by any juror during their deliberations, or to impeach the regular finding of the grand jury, but it was also said that when the grand jury is in session, the court may take measures upon the suggestion of the defendant to determine whether the twelve assented to the bill, citing *State v. Squire*, 10 N. H. 558; *Low's Case*, 4 Me. 439, 443, 16 Am. Dec. 371. But in *Low's Case* the grand jury were examined at the next term. And see *State v. Squire*, *infra*.

In *State v. Squire*, 10 N. H. 558 (mo. ar.), it was held that an indictment once found is unalterable or if it be amended, can only be done by recommitment to the grand jury, and nothing short of indorsement "a true bill" is competent evidence of their proceedings.

In *State v. Mewherter*, 46 Iowa, 86 (mo. qu.), it was held that the grand jurors could not deny that they had consented to the indictment, but it was also held that proof against the indictment was overcome by proof in favor of the indictment.

And in *Manion v. People*, 29 Ill. App. 532 (mo. qu.), it was held that the evidence did not show that twelve did not agree, although the grand jurors testified both ways.

And under North Carolina Acts 1865, chap. 63, § 18, providing that an indictment may be presented by the concurrence of nine jurors, if there

were eighteen, the presumption is that every grand juror concurred, and a plea in abatement that only nine concurred, was not sustained when no evidence was offered. *State v. McNeill*, 98 N. C. 553 (pl. abate.).

This statute is held unconstitutional in *State v. Barker*, 10 L. R. A. 60, 107 N. C. 918, *infra*.

In *State v. Clough*, 40 Me. 573 (pl. abate.), it was said that the presence of an incompetent juror presents a serious question, but not on the ground that without his concurrence there were not twelve jurors in the number who found the indictment, as such a fact, if essential, must have been pleaded.

Under Me. Const., art. 1, § 17, providing for the concurrence of twelve grand jurors where the foreman who was in court at the next term discovered that it required the concurrence of twelve, but had supposed that the majority was sufficient, it was shown by the evidence of the grand jurors that twelve did not agree. The oath of a grand juror requires him to keep secret the states' counsel, his fellows' and his own, but the fact whether twelve or more concurred is not a secret, and whilst no averment by plea can be received against the record, the court may determine whether that which is apparently a record is so in truth, and that twelve did concur is a matter of inference merely from the indorsement of the foreman and delivery into court. *Low's Case*, 4 Me. 439, 16 Am. Dec. 371 (pl. abate.).

In *State v. Benner*, 64 Me. 387 (ev.), it was said that the assertion that less than twelve concurred in an indictment involves the assertion of who did, or who did not concur. *Low's Case* was approved and a grand juror was allowed to testify and contradict a witness.

In *State v. Wood*, 53 N. H. 434 (ev.), it was said that *Low's Case*, *supra*, was contrary to the general holding on that subject, and *Low's Case* was disapproved in *State v. Baker*, 20 Mo. 388.

Under Mont. Rev. Stat., § 150, div. 2, providing that no indictment can be found without the concurrence of twelve, and § 153, that twelve must concur, the indorsement and presentation is only "prima facie" evidence, and the defendant should have the opportunity to prove by the grand jurors that twelve did not concur. *Territory v. Hart*, 7 Mont. 42.

In same case, 7 Mont. 430, where fourteen of these grand jurors were brought into court and the accused was offered the privilege of examining them

than twelve can find an indictment under the common law or constitutional provision similar to ours. The authorities cited are not in point. So, waiving all question as to how the objection to the grand jury should have been raised, or whether it was properly raised by the various motions and objections made in the case, we are of the opinion that the district court did not err in holding that the said Statutes of 1893 are unconstitutional, and that the grand jury which found the indictment was a legal body.

2. The trial jury: The defendant's counsel urge as objections to the trial jury that "seven of the jurors were prejudiced against the defendant, and were disqualified under the common law and under the constitution and statutes of Nevada," and that "the right to have an impartial—that is, a constitutional—jury cannot be waived by the defendant, much less by the defendant's attorneys." Their objections go to the jurors Kinney, Coffin, Haish, Palmer, Fulton, Bryant, and Johnson. In answer to questions asked by defendant's counsel touching their qualifi-

cations as jurors, several of them, each, frankly answered that he had formed an unqualified opinion as to the guilt or innocence of the accused. Under this state of facts, the defendant and her counsel failed to challenge any of the six jurors first above named, but accepted them without objection. It is now urged by counsel with great earnestness and ability that, by reason of the disqualification of these jurors, the defendant did not have a fair and impartial trial,—a trial by jury as guaranteed by the constitution. This contention will not stand the test of reason and authority. At the time of the adoption of the constitution of this state, the manner of impaneling trial jurors, and the mode of determining their qualifications, and the right of the defendant to waive his objections to the qualifications of the jurors, and the consequences of such waiver under the statute and common law, were well understood.

The common law: "When the trial is called on, the jurors are sworn as they appear to the number of twelve, unless they are challenged by the party. Challenges

but declined to do so, the conviction was sustained and the prosecution proved that twelve had concurred in the indictment, this curing the error in the first trial.

V. Concurrence by proper number of grand jurors, as to the parties, crimes, counts, and degrees of crime charged.

It is generally held that non-concurrence of a sufficient number of the grand jury as to a particular crime, or as to the counts in the indictment, or as to the parties indicted, or as to the degree of crime charged, cannot be shown in order to render the indictment invalid. *Reg. v. Cooke*, 8 Car. & P. 582 (ev.); *Johnson v. State*, 22 Tex. App. 206 (mo. set aside); *State v. Hamlin*, 47 Conn. 95, 36 Am. Rep. 54 (pl. abate.); *Zeigler v. Com. (Pa.)* 13 Cent. Rep. 497 (mo. qu.).

Where a motion to discharge was made because the indictment was void for the reason that it contained a count that never was passed upon by the jury and a witness stated that "the indictment was found," it must be assumed that both counts were passed upon. *People v. Sheriff of Chautauqua*, 11 N. Y. Civ. Proc. Rep. 172 (hab. corp.).

And the same was said to be the rule in *People v. Hulbut*, 4 Denio, 133, 135, 47 Am. Dec. 244 (ev.), where the court said in an attempt to show that the offense charged was one upon which they had not concurred, that an indictment or record cannot be attacked collaterally distinguishing *Low's Case*, 4 Me. 430, 16 Am. Dec. 271, claiming that the court recognized the distinction between attacking the record collaterally to show no concurrence, but the court says that if a motion to quash or set aside or strike out had been made, it might have been granted.

And in *People v. Shattuck*, 6 Abb. N. C. 33 (mo. qu.), where it was claimed that twelve did not concur in finding as to the degree of guilt, the court heard evidence upon this question, and denied the motion to quash, as there was only one offense charged and a bill found, and if not found by twelve, the court said it may be proven by the grand jury, but not how each voted.

VI. Concurrence by majority when grand jury exceeds twenty-three.

Where it requires more than twelve to concur from the fact of there being twenty-four on the grand jury, an indictment is not valid. *People v. 36 L. R. A.*

King, 2 Cal. 93, *Coleman & Cal. Cas.* 364 (mo. qu.); *People v. Thurston*, 5 Cal. 69 (obj.); *Com. v. Salter*, 2 Pearson (Pa.) 461 (chal.).

And the same was said to be the rule in *Brucker v. State*, 16 Wis. 334 (pl. abate.).

In *Rex v. Marsh*, 1 Nev. & P. 187, 6 Ad. & El. 236, 2 H. & W. 366, 1 Jur. 38, W. W. & D. 150, where the question was as to more than twenty-three being sworn and an effort was made to attack the record, it was said that no authority can be found for the limitation of the number except the dictum in 2 Burr. 1068, although 4 Bl. Com. 302, and 4 Bacon, Abr. 236, 14 Vin. Abr. 377, say that the finding must be at least on the agreement of twelve and therefore there cannot be more than twenty-three.

In 2 Burr. 1068, it was said that this being grand jury day, it was desired that the principal gentlemen of the county, not less than fourscore, should be sworn as a grand jury to address his majesty upon accession to the crown, but this seemed irregular because if two full juries should be sworn, twelve might find a true bill, though more than twelve should reject it and it would be inconvenient, contradictory, absurd, and ridiculous, and *Lord Mansfield* said it would be monstrous and that the officer cannot properly swear in more than three and twenty.

But under Utah Statute, January 21, 1890, fixing the number at twenty-four, and that said grand jury, or any twelve of them, may find an indictment, and chapter 35, section 11, that when the grand jury or any twelve of them have found a bill, the foreman shall indorse it true bill, the objection that twelve of twenty-four cannot indict is insufficient. *Brannigan v. People*, 3 Utah, 438 (pl. abate.).

VII. Provisions for concurrence by less than twelve.

The Kentucky Constitution, section 243, providing that a grand jury shall consist of twelve persons, nine of whom, concurring, may find an indictment, is self-executing and mandatory, and has been the organic law of the state from September 23, 1891. *Downs v. Com.* 32 Ky. 605 (mo. set aside).

And Mont. Const., art. 3, § 8, providing for a grand jury of seven and that five must concur to indict, is also self-executing. *State v. Ab Jun*, 9 Mont. 167.

And Texas Const., art. 3, § 13, provides for a grand jury of twelve, of whom nine shall be a

may be here made on the part of the king or on the part of the prisoner, either to the whole array or to the separate polls, for the very same reason that they may be made in civil cases." 4 Cooley, Bl. 3d ed. 350; 2 Hale, P. C. 298. "No juror can be challenged without consent after he hath been sworn either in criminal or civil cases, unless it be for some cause which happened since he was sworn." Bacon, Abr. "*Juries*," 365. "If a party have cause of challenge, and know of it in time enough before trial, if he do not challenge he shall not have a new trial." Id. 366.

The statute: By the statute enacted in 1861, and in force at the time our constitution was adopted, it was provided that "a challenge to an individual juror must be taken when the juror appears, and before he is sworn; but the court may, for good cause shown, permit it to be taken after the juror

is sworn, and before the jury is completed." Gen. Stat. § 4214. This statute is confirmatory of the above common-law rules.

From the citations it is clear that, both under the common law and the statute existing at the time the constitution was adopted, a defendant could waive an objection to a juror, and that he did waive it unless the challenge was taken prior to the jury being completed; and especially was this the case when the ground of challenge was then known. As already noted, it was the right of trial by jury as it then existed that the framers of the constitution provided should remain inviolate forever, and there is no reason to suppose they intended any change in the rule as to waiver. These views may be fortified by reference to the decided cases.

The decisions: In the case of *State v. Pritchard*, 16 Nev. 101, in considering the above section (4214) of the statutes, the court

quorum to transact business and present bills. *Lott v. State*, 18 Tex. App. 627 (mo. new tr.; mo. ar.); *McNeese v. State*, 19 Tex. App. 48 (obj.); see further, next subhead.

Constitutional questions.

Under Ga. Const., art. 2, authorizing the creation of corporation courts under such rules as the legislature may direct, the statute may dispense with more than nine grand jurors to concur in such courts. *Thurman v. State*, 25 Ga. 220 (obj.).

Under Iowa Const. 1884, Amend., providing that the grand jury may consist of not less than five nor more than fifteen, Iowa Gen. Laws, chap. 42, providing for a grand jury of five in certain counties, and an indictment on the concurrence of four, is not unconstitutional. *State v. Salts*, 77 Iowa, 193 (dem.).

But N. C. Act of 1888, chap. 63, dispensing with the concurrence of twelve and making the concurrence of nine sufficient to indict, is unconstitutional, as contrary to the bill of rights providing that no freeman shall be put to answer in a criminal charge but by indictment, etc., etc. *State v. Barker*, 10 L. R. A. 50, 107 N. C. 913 (pl. abate.). See *State v. McNeill*, 98 N. C. 582, *supra*.

And Fla. Rev. Stat., § 2802 (June 8, 1891), providing that eight may concur in a grand jury of twelve, is void as contrary to the bill of rights. *Donald v. State*, 31 Fla. 255 (pl. abate.).

But under this act a plea in abatement not alleging that only eight of the grand jury concurred, and not alleging that less than twelve concurred, does not raise the question, as the presumption is that of twelve, all concurred. *English v. State*, 31 Fla. 340 (pl. abate.).

And a similar holding was made in *Reynolds v. State*, 38 Fla. 301 (mo. ar.).

In *Stewart v. State*, 24 Ind. 142 (pl. abate.), it was said that under Indiana, 2 Gavin & Hord. Stat., pp. 394, 431, 432, an indictment can be found by nine grand jurors, where the number is twelve.

And under Iowa Law 1889, providing for a grand jury of five and the concurrence of four, the fact that the panel was not full after one was discharged, will not invalidate the indictment. *State v. Billings*, 77 Iowa, 417 (chal.).

In *Smith v. State*, 19 Tex. App. 95 (obj.), and *Watts v. State*, 22 Tex. App. 572 (obj.), where the grand jury was required to be twelve, with a concurrence of nine, the fact that they had improperly excused some of the other members, but not reduced the quorum to nine, did not prevent their action from being sustained.

So in *Drake v. State*, 25 Tex. App. 293 (mo. qu.) and *Jackson v. State*, Id. 314 (mo. qu.), under Texas Const., art. 5, § 813, providing that grand juries shall

be composed of twelve, but nine may be a quorum to act, the reduction of the panel by death, or absence, if not affecting the quorum, will not invalidate the indictment.

Under Virginia Acts 1889-90, p. 91, providing that seven of a regular jury may find an indictment and five may concur in a special grand jury, a regular grand jury is not mandatory in a felony case. *Lyles v. Com.* 88 Va. 396 (mo. qu.); *Lashley v. Com.* Id. 400.

See also as to number necessary to constitute a grand jury, note to *State v. Belvel* (Iowa) 27 L. R. A. 846.

VIII. Statutes and constitutions.

Alabama Crim. Code 1893, § 4368: The concurrence of at least twelve grand jurors is necessary to find an indictment.

Arizona Penal Code, § 1420: Indictments cannot be found without the concurrence of at least twelve grand jurors.

California Deering's Codes and Statutes of 1895, § 940: An indictment cannot be found without the concurrence of at least twelve grand jurors.

Connecticut Gen. Stat. 1889, § 1599: No bill shall be presented by any grand jury, unless twelve at least of the jurors agree to it.

Dakota Comp. Laws 1887, § 7192: No indictment shall be found, nor shall any presentment or accusation be made, without the concurrence of at least twelve grand jurors.

Dakota Comp. Laws 1887, § 7293: An indictment cannot be found without the concurrence of at least twelve grand jurors.

Idaho Rev. Stat. 1887, § 7647: A presentment cannot be found without the concurrence of at least twelve grand jurors.

Illinois Starr & C. Stat., chap. 78, § 17: The grand jury, or any twelve of them, may find a bill of indictment to be supported by good and sufficient evidence.

Taylor's Kan. Stat., § 5160: No indictment can be found without the concurrence of at least twelve grand jurors.

Michigan How. Anno. Stat. 1882, § 9506: "No indictment can be found without the concurrence of at least twelve grand jurors."

Minnesota Stat. 1894, § 7232: No indictment can be found without the concurrence of at least twelve grand jurors.

Mississippi Anno. Code 1892, § 1245: The concurrence of twelve grand jurors shall be necessary to the finding of an indictment.

Montana Comp. Stat. 1887, § 150, p. 432: No indictment can be found without the concurrence of at least twelve grand jurors.

Nebraska Comp. Stat. 1893, Crim. Code, § 408: At

says: "The state, as well as the defendant, is required to interpose its challenges before the jury is completed. This provision of the statute must be complied with. Whenever it appears from the examination, upon his *voir dire*, that a juror is disqualified by reason of the existence of any fact which is made the ground of challenge, the juror must be challenged, as specified in the statute; otherwise the party, whether the state or the defendant, will be considered as having waived the right of challenge." "If a defendant accept a juror without objection whom he knows to have formed or expressed an unqualified opinion, he cannot after verdict raise this objection. If he willfully take his chances with such juror, he must abide the result." *State v. Anderson*, 4 Nev. 265; *Bronson v. People*, 82 Mich. 84. "The constitution secures to an accused person the right to be tried by an impartial jury, and

the legislature has no power to deprive him of such right; but it can regulate its administration by determining and declaring when and how a juror's partiality shall be ascertained." *State v. Marks*, 15 Nev. 83.

Not only must the defendant make his objections and take his challenges before the jury is completed, as appears from the above authorities, but the particular ground of challenge must be stated. *State v. Squires*, 2 Nev. 280; *State v. Raymond*, 11 Nev. 106; *State v. Gray*, 19 Nev. 212; *State v. Vaughan* (Nev.) (decided at the last term of this court) 89 Pac. Rep. 733. The authorities cited by counsel are cases mainly in which the courts had under consideration the rights of the defendant where the discovery was made after trial that a disqualified person had sat on the jury, and in cases where the juror was challenged for cause, and his challenge denied by the lower court. Such authorities are not

least twelve of the grand jurors must concur in the finding of an indictment.

Nevada Gen. Stat. 1885, § 4097: A presentment must be found through the concurrence of at least twelve grand jurors.

New Mexico Comp. Laws 1884, § 622: An indictment cannot be found without the concurrence of at least twelve grand jurors.

New York, Silvernail's Penal Code, 1893, § 268: An indictment cannot be found without the concurrence of at least twelve grand jurors.

Oklahoma Stat. 1893: No indictment shall be found nor shall any accusation be made without the concurrence of at least twelve grand jurors.

Ohio Rev. Stat., vol. 2 (Glaueque) § 7206: At least twelve must concur in the finding of an indictment.

Tennessee Code 1884, § 5921: An indictment cannot be found without the concurrence of at least twelve grand jurors.

Utah Comp. Laws, § 4922: An indictment cannot be found without the concurrence of at least twelve grand jurors.

Vermont Rev. Laws 1880, § 1617: No bill of indictment shall be presented by a grand jury unless twelve of the jurors agree in the same.

West Virginia Code 1891, chap. 157, § 8: At least twelve of the grand jurors must concur in finding or making an indictment or presentment.

Washington Penal Code 1893, § 1956: An indictment cannot be found without the concurrence of at least twelve grand jurors.

Wisconsin, Sanborn & Berryman, Stat. 1890, § 2552: No presentment shall be made, nor any indictment found by any grand jury, unless at least twelve of their number shall concur therein.

Wyoming Rev. Stat. 1887, § 3236: At least twelve of the grand jurors must concur in the finding of an indictment. Twelve jurors shall be competent to act, and if but twelve, all must concur in finding a bill of indictment.

Colorado Mills' Anno. Stat., vol. 1, Const. § 226: Hereafter a grand jury shall consist of twelve men any nine of whom concurring may find an indictment. Provided the general assembly may change, regulate, or abolish the grand jury system.

Colorado Mills' Anno. Stat., vol. 2, 1891, § 2618: A grand jury shall consist of twelve persons, nine of whom shall assent to the finding of every true bill.

Florida Rev. Stat. 1892, § 2062, chap. 4055, § 6, June 8, 1891: Every grand jury shall consist of not less than twelve nor more than fifteen persons eight of whom may find an indictment.

Chapter 4015, June 8, 1891: Every grand jury shall consist of twelve persons and the assent of eight (8) of them shall be necessary to the finding of indictments.

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Georgia Const., art. 6, § 18: The general assembly may prescribe any number, not less than five, to constitute a trial or traverse jury in courts other than the superior and city courts.

Indiana Burn's Rev. Stat. 1894, § 1717: The grand jury shall be composed of six persons.

Section 1738, in force September, 1881: At least five of the grand jurors must concur in finding an indictment.

Iowa Rev. Stat. 1888, § 5674: An indictment cannot be found without the concurrence of four grand jurors when the grand jury is composed of five members; and five, if composed of seven.

Iowa Const., art. 5, § 14, Am. 1884: The grand jury may consist of any number of members, not less than five, nor more than fifteen, as the general assembly may by law provide.

Kentucky Const. 1891, § 248: A grand jury shall consist of twelve persons, nine of whom concurring may find an indictment.

Kentucky Code (Carroll) 1895, § 110: The concurrence of twelve grand jurors is required to find an indictment.

Const., § 248: Nine.

Missouri Const., art. 2, § 23: A grand jury shall consist of twelve men, any nine of whom concurring may find an indictment or a true bill.

Montana Const., art. 3, § 8: A grand jury shall consist of seven persons, of whom five must concur to find an indictment.

Missouri Crim. Code, § 4060: No indictment can be found without the concurrence of at least nine grand jurors.

Oregon, Hill's Code 1892, § 1259: No indictment can be found without the concurrence of at least five grand jurors.

Oregon Const., art. 7, § 18: Seven shall be chosen by law as grand jurors, five of whom must concur to find an indictment, but the legislature may modify or abolish grand juries.

Texas Const., art. 5, § 13: Grand juries shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills.

Texas Const. 1876, art. 5, § 13: Grand juries in the district court shall be composed of twelve men, but nine members of the grand jury shall be a quorum to transact business and present bills.

Texas Willson's Crim. Stat., art. 300, § 1916: Nine members shall be a quorum for the purpose of discharging any duty, or exercising any right properly belonging to the grand jury.

Virginia Acts 1889-1890, p. 91: At least seven of a regular grand jury, and five of a special grand jury, must concur in finding or making an indictment or presentment.

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in point in this case as to these six jurors, for the defendant was fully informed of the alleged disqualification before trial, and before the jury was completed, and no objection was raised and no challenge taken to any of them.

It is therefore evident from the great weight of the authorities, and from the statute and common law, that a defendant can waive his objections to the qualifications of jurors, and if he fail to challenge before the jury is completed, knowing of the disqualification, he is estopped from demanding, as matter of right, a new trial on the ground that the jury were not *omni exceptiones majores*, and that, in contemplation of the constitution, he has not in such case, after verdict, constitutional ground for the objection that he has not been tried by a "constitutional jury."

8. Juror Johnson: The juror Johnson was challenged upon the ground, as it is alleged, "of having formed an unqualified opinion as to the guilt or innocence of the defendant." The challenge was denied, and exceptions taken. The ruling of the court denying the challenge is assigned as error. When the jury was completed, the defendant had not exhausted her peremptory challenges, but had one left, which she did not use at all. In *Thompson on Trials* (sec. 115) it is said: "The sound and prevailing view is that a party cannot on error or appeal complain of a ruling of the court in overruling his challenges for cause if it appear that, when the jury had been completed, his peremptory challenges were not exhausted, since he might have excluded the obnoxious juror by a peremptory challenge; and therefore the error is to be deemed an error without injury." *State v. Elliott*, 45 Iowa, 486; *Palmer v. People*, 4 Neb. 68; *Sharp v. State*, 6 Tex. App. 650. Many other cases might be cited holding the same rule. In note 1 to section 115, *Thompson* says: "There is some slight and ill-considered authority to the effect that no obligation rests upon a party to make use of his peremptory challenges for the purpose of excluding a juror unsuccessfully challenged for cause." Our opinion as to the true rule of practice in such case accords with "the sound and prevailing view" above named.

4. View of the premises: In strict conformity to the provisions of section 4257 of the General Statutes, and at the repeated requests of the attorneys of the defendant, made in her presence, the court ordered that the jury view the place where the homicide occurred. W. H. Caughlin, the sheriff, was designated by the court to conduct and show the jury the premises. The sheriff and his two deputies were sworn to take charge of the jury during recess of the court, and recess was then taken for the purpose of the jury making the view. Neither the judge, the clerk, the defendant, nor either of her attorneys was present at the view. The defendant and her attorneys were present in court when said orders were made and recess taken as aforesaid, and knew that said view was about to be taken without the presence of said judge and clerk, and without the

presence of the defendant and her attorneys, and without the presence of either of them; and no objection was made thereto, and no suggestion concerning the same was made by the defendant or her attorneys. It was claimed on motion for new trial, and was pressed by counsel in argument here, that the district court committed fatal error in permitting said view to be had without the presence of the judge and the defendant. Concerning a view of the premises made by the jury in the absence of the judge and the defendant, there is great diversity of opinion found in the decided cases, based upon different grounds. It is held by high authority that the judge and officers of the court, as well as the defendant, must be present; that a view is taking testimony in the case, and, when made in the absence of the defendant, is in violation of his constitutional right of being confronted by the witnesses against him; and that such right cannot be waived. Other authorities, of equal high standing, and with greater force of reasoning, hold that the right of the defendant to be present with or without the presence of the judge and court officers, if such right exists, is statutory, and not constitutional, and may be waived; that the defendant in a criminal case who asks the benefit of the provisions of a statute must take the benefit just as the statute gives it; that the view is not taking evidence in the case, and is not intended to be so, but simply to enable the jury the better to understand the testimony given in court; that whatever the nature of the rights of the defendant may be in such case, and from whatever source such rights may be derived, he may and does waive the same when the action of the court is taken and the view made on his request, and without suggestion that he desires to be present at the view; and that in such case it is too late to complain after verdict. *Skular v. State*, 105 Ind. 290, 55 Am. Rep. 211; *State v. Reed* (Idaho) 35 Pac. Rep. 706; *State v. Lee Doon*, 7 Wash. 308; *State v. Adams*, 20 Kan. 811; *State v. Ah Lee*, 8 Or. 217; *State v. Moran*, 15 Or. 262; *Blythe v. State*, 47 Ohio St. 284; *Carroll v. State*, 5 Neb. 32.

5. The instructions: The defendant's counsel assign as error the action of the court in refusing to give certain instructions asked by them, and in giving certain instructions of its own motion, on the subject of insanity. No witness testified to any fact tending to show insanity of the defendant on the day of the homicide, and no opinion was expressed by any witness to that effect. No fact or circumstance was developed at the trial indicating that she was ever of unsound mind; but, on the contrary, in her detailed statement of the conversations had between herself and the deceased in their last interview, and of the acts and movements of each party, and the incidents and circumstances occurring before, during the time of, and after, the fatal tragedy, her testimony shows that upon that day and that occasion her reasoning faculties were in full vigor, and her keen business qualifications were unimpaired and in full activity. The theory of the defense seems to be that the grievous wrong

and atrocious crimes testified to by the defendant as having been inflicted by the deceased upon her six or seven months before the fatal day, in drugging and forcing her to his illicit embraces, upon two occasions, and his refusal on the day of the homicide to sign and give her a paper, duly witnessed, exonerating her to her friends from blame, and acknowledging the paternity of the child she was then carrying as the result of his said illicit intercourse with her, ought to be sufficient to establish her irresponsibility on the ground of insanity, whether or not there is any evidence tending to show insanity at the time of the killing. Such is not the law. It is not sufficient that insanity may exist in the realm of imagination. The rules governing in cases where the defense of insanity is interposed are well established. In the case of *State v. Lewis*, 20 Nev. 338, it is held, on reason and authority, that: (1) "The accused is presumed to be sane until the contrary is shown." (2) "Insanity is an affirmative proposition, and the burden of proving it is upon the defense." (3) "Insanity, as a defense to crime, must be established by a preponderance of the evidence." (4) "If the defendant have capacity and reason sufficient to enable him to distinguish right from wrong as to the particular act in question, and has knowledge and consciousness that the act he is doing is wrong and will deserve punishment, he is, in the eye of the law, of sound mind and memory, and should be held responsible for his acts." It requires pertinent, competent, and satisfactory evidence to establish insanity, as any other alleged fact in the case. It is a well-understood rule that, if there is no evidence given tending to establish an alleged fact, no instructions need be given on the matter. "Where there is no evidence that the defendant was insane, instructions upon the subject of insanity will not be reviewed." *People v. Wheeler*, 65 Cal. 77.

The instructions given by the court were correct as propositions of law, and the contention of counsel that, the court having instructed the jury on the subject of insanity, it should have given those asked for by them, is not tenable. The error, if any, was in submitting the question of insanity to the jury when there was no evidence tending to establish that plea. The instructions authorized the jury to consider the question of insanity raised by the defendant in her counsel's opening statement to the jury, and raised nowhere else and in no other manner, so far as the transcript shows. The submission of the question to the jury can certainly be no just cause of complaint on the part of the defendant under the state of facts and the evidence. It was giving an opportunity to the defendant to escape conviction on the plea of insanity without any evidence to support it.

6. Instructions as to defendant's testimony: Counsel claim that the instructions given concerning the defendant's testimony are error. We think not. The statute (sec. 4562) makes the accused a competent witness in all criminal cases at his own request, but not otherwise; "the credit to be given to his

testimony being left solely to the jury, under the instructions of the court." The instructions complained of were considered and approved in *State v. Hymer*, 15 Nev. 49; *State v. Hing*, 16 Nev. 307; *State v. Streeter*, 20 Nev. 403; and in many cases in other state courts.

7. Instruction on facts cited: The court instructed the jury that even though they should find that at the time of the shooting, and prior thereto, the deceased had perpetrated certain wrongs upon the defendant, enumerating them at considerable length, but that she shot at him, not in self-defense, but with the intention of killing him, these facts constituted no legal excuse or justification for the shooting. The defendant objects to this instruction, first, upon the ground that it is misleading, because it recites only a part of the facts relied upon by the defendant as constituting her defense. But, admitting that it does only recite a part of them, we do not see that it could have worked the defendant any injury. It informs the jury that, as matter of law, certain facts constitute no defense to the indictment. If other facts existed which did constitute a defense, they were not excluded from the attention of the jury; and, if they did not constitute a defense, their omission was rather in defendant's favor, as it left the jury at liberty to infer that they did. There is no intimation that the court considered these the only facts in the case, nor does the language justify such an inference. Furthermore, if the instruction is right as far as it goes, the fact that it does not cover the whole case does not make it erroneous. If other facts existed which the defendant's attorneys wished particularly called to the jury's attention, they should have requested an instruction upon them.

Next, it is objected that it "charges the jury as to the effect of the evidence, and charges them that the evidence relied upon constitutes no excuse or justification." In this connection we must remember what the issue in this case was. The killing being admitted, the only legal excuse or justification there could be was accident or self-defense. Both of these are carefully excluded by the instruction. The jury were told that if the "defendant knowingly, intentionally, and not in necessary self-defense" shot at deceased with the intention to kill him, then the other facts enumerated constituted no excuse or justification. That the instruction states the law correctly cannot be gainsaid. While it was in the power of the jury to acquit the defendant, because of the treatment she testified to having received at the hands of the deceased, as stated in the instruction, they had no legal right to do so. When one human being has been killed by another, what shall constitute excuse or justification for the act is carefully stated in the statute, under the heads of "Involuntary Manslaughter" and "Self-defense." These defenses the statute describes affirmatively; that is, if certain facts are found to exist, then the party doing the killing is excused or justified. This instruction simply puts the matter negatively; that is, that certain facts

which do not march up to the standard established by the statute were not sufficient. The court intimated no opinion as to whether these facts existed or not, nor what their effect might be in connection with other facts. It was in no sense a charge upon a matter of fact, but purely one of law. All instructions must be given in view of a certain state of facts, and whether the court enumerates these facts or leaves the jury to infer them can ordinarily make no difference, so long as no attempt is made to influence or control their conclusions as to what the facts are. *State v. Loeless*, 17 Nev. 424; *State v. Watkins*, 11 Nev. 80; *State v. Anderson*, 4 Nev. 265; *Territory v. Burgess*, 8 Mont. 57, 78, 1 L. R. A. 808; *Hemingway v. State*, 68 Miss. 371, 409; *Kitchens v. State*, 41 Ga. 217.

But, while we find no error in the instruction as applied to this case, we do not wish to be understood as unqualifiedly approving it. It approaches the border line of error, and under some circumstances might require a reversal of the case.

Several other alleged errors are assigned, which we do not consider of such moment or merit as to demand special attention. We have discussed the prominent points in the cases, while we have given the entire record calm and mature consideration. We have found nothing in it militating against the correctness and legality of any of the proceedings of the trial resulting in the judgment we are asked to reverse. While there are many matters and things disclosed in the testimony of the defendant that may justly awaken human sympathies, the sworn duty

of the court, in its judicial administration of the matters submitted for its consideration and final determination, requires that it shall in all cases recognize the wise rules of law, well grounded and long established, so essential for the protection of the rights and safety of the community and of the individual, and that it shall make no distinction therein on account of the sex of the party involved or other personal considerations. Every reasonable request of the defendant was granted by the court below during the progress of the trial, so far as the record shows. She was defended by able counsel of her own choice, and tried by a jury of their selection, which to her and them, before trial, were satisfactory. A wide range was granted to the defendant in bringing before the jury her complaints of the wrongs and alleged crimes committed against her by the deceased, long months before the fatal tragedy. No legal avenue was closed to her in making her defense. Her counsel contested nearly every inch of ground traversed by the prosecution. The jury, under the solemnity of their oaths, found the defendant guilty, from the evidence, of murder in the second degree, for which crime the judgment of the court has been duly made and given. Finding no material error in the record, our duty will not allow us to stay the hand of the law.

The judgment of the District Court is hereby affirmed.

Bigelow, Ch. J., and Belknap, J., concur.

SOUTH CAROLINA SUPREME COURT.

William Manigault HEYWARD, *Recept.*,

v.

FARMERS' MINING CO. *et al.*, *Appts.*

(.....S. C.)

1. **Denial of an allegation** in a complaint that plaintiff is seised in fee and is in possession of land upon which defendant is committing a trespass is sufficient to raise the question of title to the land.
2. **A defense of former action pending** may be waived by the failure to introduce evidence to support it at the hearing.
3. **A finding by the presiding judge**, in a law case tried without a jury, that plaintiff in an action to try title to real estate has sufficiently connected himself with the original grant from the state to maintain the action is a finding of fact that cannot be reviewed by the supreme court upon appeal.
4. **Deeds tending to show title** in plaintiff together with the possession are sufficient color

NOTE.—On the general subject of navigability of streams, see *notes* to Connecticut River Lumber Co. v. Olcott Falls Co. (N. H.) 13 L. R. A. 826; Swanson v. Mississippi & Rum River Boom Co. (Minn.) 7 L. R. A. 673; Gaston v. Mace (W. Va.) 5 L. R. A. 392; Harold v. Jones (Ala.) 3 L. R. A. 406; Fulmer v. Williams (Pa.) 1 L. R. A. 603.
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See also 46 L. R. A. 715.

of title to support an action to try title to real estate.

5. **One bringing an action under the code to try title to real estate**, and alleging that he is seised in fee, has the burden of proving the allegation, especially in an action against the state to recover land under tide water, as to which the prima facie title is in the state.
6. **An amendment to a statute of limitations against the state**, reducing the limitation period, will not apply to cases in which time had already begun to run under the old statute, but as to such cases the required period will remain the same as before the amendment.
7. **The test of the navigability of a stream** is its navigable capacity and not that its surroundings, such as the business done upon it, its connection with other streams or the place where it flows, should be such that it may be useful for the purpose of commerce.
8. **A grant by the state of land** in the usual way, through the land office which covers land under navigable water, will not estop the state or its subsequent grantee from setting up title to such land.

(July 27, 1894.)

A PPEAL by defendants from a judgment of the Common Pleas Circuit Court for

Beaufort County in favor of plaintiff, in an action to try title to certain real estate. *Reversed.*

The first complaint filed by plaintiff at the beginning of the litigation was as follows:

"State of South Carolina, Beaufort County. In the Court of Common Pleas. William Manigault Heyward, Trustee, Plaintiff, vs. The Farmers' Mining Company, a body corporate under the Laws of the state of South Carolina, Defendant. The plaintiff, William Manigault Heyward, trustee, complaining of the defendant above named, the Farmers' Mining Company, alleges: (1) That, at the times hereinafter stated, the plaintiff, William Manigault Heyward, trustee, was, and still is, the owner in fee simple, and in possession, of all that tract of land situate, lying, and being in the county of Beaufort, state aforesaid, containing twenty-four hundred (2,400) acres, more or less, butting and bounding to the north on lands of William Manigault Heyward, trustee; to the south on St. Helena sound; to the east on Combahee river, and to the west on Bull river, having such marks, forms, and bounds as are represented by a certain plat annexed to a grant from the state of South Carolina to Christopher Williman, duly recorded in the office of secretary of state of South Carolina. (2) That, at the times hereinafter stated, the defendant, the Farmers' Mining Company, was, and still is, a body corporate under the laws of this state, having a capital stock of ten thousand dollars (\$10,000.00). (3) That on or about the 4th day of November, 1891, the said defendant, the Farmers' Mining Company, either by themselves, or by their servants and agents, acting with their consent, and by their direction and authority, entered unlawfully upon the premises described in the first paragraph of this complaint, the property of the plaintiff, and committed acts of trespass thereupon, to wit: By proceeding to dig and mine and remove from the said lands deposits of phosphate rock of great value; and, although they (the said defendant) have been so mining only for the period of ten days, yet they have already dug therefrom about four hundred (400) tons, of the value of twenty-eight hundred dollars (\$2,800.00), and are continuing, notwithstanding the protest and warning of the plaintiff, to mine and remove from said lands said valuable phosphate deposits at the rate of about fifty (50) tons per day. That the injury so caused to this plaintiff is of an irremediable and continuing character. That their acts will be destructive to the very substance of the estate, and will tend to its ultimate destruction, the chief value of the property being on account of the deposits of phosphate rock thereon and therein contained, and that, the capital of the defendant company being only ten thousand dollars (\$10,000.00), and its responsibility limited, it will be impossible for it to respond in damages in an action at law; and, even in case of the recovery of judgment against the defendant corporation, the amount of damage which will accrue to the plaintiff before such actions or action can be brought and finally determined will be so large that on a judgment and execution a recovery cannot be had,

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and the money made, and that, except by the intervention of this honorable court, irreparable loss and damage will accrue to the plaintiff. (4) That the plaintiff believes that it is the settled and fixed purpose of the defendant, and their officers, agents, and servants, to continue their course of conduct as above outlined, and to repeat and continue the said trespasses upon the said property of the plaintiff, to the great detriment and damage of the plaintiff, and that the said defendant will, unless restrained by the order of this honorable court, continue such unlawful acts and trespasses, and so continue to annoy and molest the plaintiff, and destroy the value of the property of the plaintiff, and that this course will also cause a multiplicity of suits against the said defendant. (5) That the plaintiff further alleges that he is powerless to stop this constant trespass and wrongs of the defendant by any suit or suits at law, on account of their being repeated so constantly and continuously; that incalculable and irremediable loss and damage will come to the plaintiff unless the defendant, its agents, servants, and attorneys, are restrained and enjoined from the commission of these wrongs; and that, the capital of the defendant being only ten thousand dollars (\$10,000.00), and its means peculiarly being small, the plaintiff has no adequate remedy at law, but that all these matters and things can be remedied only in a court of equity. Wherefore, the plaintiff prays judgment that the defendant, its officers, agents, servants, and attorneys, be restrained and enjoined from proceeding to dig, mine, and remove, or either, any of the phosphate rock or phosphatic deposits from the lands described in this complaint, and that he may have such other and further relief as the nature of the case many demand and to the court seem meet."

Subsequently another complaint was filed as follows: "State of South Carolina, Beaufort County. In the Court of Common Pleas. William Manigault Heyward, Trustee, Plaintiff, vs. The Farmers' Mining Company, a body corporate under the Laws of the State of South Carolina, Defendant. The plaintiff, William Manigault Heyward, trustee, complaining of the defendant, the Farmers' Mining Company, a body corporate under the laws of said state, alleges: (1) That he, the plaintiff, William Manigault Heyward, trustee, is now, and was at the times hereinafter mentioned, seised in fee, and in possession, of the premises hereinafter described, to wit: All that tract of land situate, lying, and being in the county of Beaufort, state aforesaid, containing twenty-four hundred acres (2,400) more or less, butting and bounding on the north on lands of William Manigault Heyward, trustee; to the south on St. Helena sound; to the east on Combahee river, and to the west on Bull river, the said tract of land having been granted to Christopher Williman, by the state of South Carolina, on the 4th day of September, 1786, said grant being recorded in Grant Book MMMM, page 316, of the office of secretary of state of South Carolina, said land having such marks, forms, shapes, and bounds as are represented

by certain plat annexed to said grant, and made a part thereof. (2) That the defendant, the Farmers' Mining Company, is now, and was at the times hereinafter mentioned, a body corporate under the laws of the state of South Carolina. (3) That on or about the 4th day of November, 1891, the defendant, the Farmers' Mining Company, either by themselves, or by their servants and agents, acting with their consent, and by their direction and authority, forcibly broke and entered the plaintiff's said lands, and then and there dug and mined and removed from said lands (the property of the plaintiff) deposits of phosphate rock amounting to about three hundred and fifty (350) tons, of the value of two thousand dollars (\$2,000.00), and converted and disposed of the same to their own use, and did commit and do other wrongs and enormities upon the said lands of the plaintiff, to the damage of the plaintiff two thousand dollars (\$2,000.00). Wherefore, the plaintiff demands judgment against the defendant for the sum of two thousand dollars (\$2,000.00) and costs." Verified.

The second answer of defendant which was adopted by the state was as follows: "State of South Carolina, County of Beaufort. Court of Common Pleas. William Manigault Heyward, Trustee, Plaintiff, against The Farmers' Mining Company, Defendants. The defendants, by Elliott & Townsley, their attorneys, answering the complaint herein: First. For a first defense, allege that at the commencement of this action there was, and now is, another action pending in this court between the same parties as this action, and for the same cause as that set forth in the complaint herein. Second. For a second and further defense (1) say they have no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the first paragraph of the complaint, and therefore deny each and every allegation contained in said paragraph; (2) allege that on the 7th day of November, A. D. 1891, under and in pursuance of the laws in such cases made and provided, the defendants, as the agents and licensees of the state of South Carolina, did, with their dredge and other apparatus used for mining and removing river phosphate, rock and phosphatic deposits, enter Shingle creek, in the county and state aforesaid, which is included within the boundaries of the lands mentioned in the complaint, but which is a navigable stream, and the property of the state of South Carolina, and not the property of the plaintiff, and on the 9th day of said month defendants did commence to mine and remove phosphate rock and phosphatic deposits from the bed of said stream, below low-water mark, and continued in possession thereof as the agent or licensee of the state of South Carolina; (3) deny the allegations contained in the third paragraph of the complaint." Verified.

The judgment of the court below was as follows:

This case was submitted to me at the term of the court held in February, 1893, to be heard, by consent, without a jury, some of the testimony and argument of counsel being, as L. R. A.

by agreement of counsel, and for their convenience, postponed until a later date, and heard at Sumter. In November, 1891, plaintiff commenced an action against the defendant, the Farmers' Mining Company, for an injunction to prevent the defendant from digging, mining, and removing, from a tract of land described in the complaint, the deposits of phosphate rocks found thereon, and to which tract of land and deposits the plaintiff claims title. On November 26, 1891, a few days after the commencement of the action, a temporary injunction was made by order of Judge Wallace, to continue in force until the final hearing of the case upon the merits. In addition to the temporary injunction, it was ordered that within ten days the plaintiff do institute such action as he may be advised, to determine the question of title to the said land, and the deposit of rock thereon. In pursuance of this order, the plaintiff has commenced this action now before me. It is an action of trespass, and it can be used to bring up and determine all the issues which could have been tried in an old action of trespass, *quare clausum fecit*. Such actions are founded on damages to the possession only, but the defendant has a right to justify his alleged trespass by setting up, as it was called, the plea of *liberum tenementum*, which effectually put in issue his title to the land. See *Shettleworth v. Hughey*, 9 Rich. L. 387. The defendant in this case claims to be the lessee or licensee of the state of South Carolina, and, on petition, the state has been made a party defendant; and, on the part of the defendant and the state, it has been set up, as a defense to this action, that the state is entitled to these phosphate deposits, and has a right to dispose of them at her will and pleasure, and that, whatever title the plaintiff has to the lands on the banks of the creek in which these deposits are found, that title does not extend to these deposits. I think that this action is sufficient to test the title as contemplated by the order of Judge Wallace. These deposits have been found in and taken from the bed of what is called 'Shingle Creek.' The place on the creek at which the alleged trespass has been committed is covered by the plat accompanying the grant from the state to Christopher Williman of 2,400 acres of marsh land, dated September 4, 1876. This place is covered by water, and there the tide ebbs and flows, and the defendant and the state claim the deposits in the creek because, although the plat covers the *locus in quo*, Shingle creek is a 'navigable stream,' or is 'navigable water;' and that the beds of such streams are not grantable and did not pass under the grant. I think the plaintiff has sufficiently connected himself with this grant. The only exception brought to my attention is that a deed from Christopher Williman, Sr., to Christopher Williman, Jr., wants a seal. It seems to me that, under the ruling of the supreme court in *Wadsworthville Poor School Trustees v. Bryson*, 34 S. C. 401, this deed is sufficient. The seal seems to have been, as in that case, accidentally omitted. Besides, the plaintiff, and those under whom he claims, have for many years been in possession under this deed

or paper title,—a time sufficient of itself to presume a grant, if none had appeared in the case, to all the land covered by this paper as color of title, "and their possession has been such as this marsh land was capable of, and therefore sufficient. When the alleged trespass was committed, the plaintiff was in possession, and I am not sure that it was necessary for the plaintiff to prove title at all. I am inclined to the opinion that, when the plaintiff proved possession, it was incumbent on the defendant to prove title, in order to justify the trespasses on this possession. I think, therefore, that plaintiff has a right to recover, unless that right is defeated by the better title of the defendant as lessee of the state, under the claim that these phosphate deposits are the property of the state, as being found in the deed of a navigable stream or a navigable water. Is Shingle creek, then, a navigable stream? Bull river and Coosaw river unite at nearly a right angle, the former running north and south and the latter running east and west. Shingle creek runs up into the marsh nearly at a right angle to Coosaw river, in a northerly direction, and another similar creek, called 'Buzzard Island Creek,' runs into the marsh from Bull river, near the quarantine station, in an easterly direction. While these creeks bear towards each other, they do not, as I understand the testimony, unite at any point to form one continuous connection from Coosaw to Bull river, though at high tides a small boat may, with considerable difficulty, be worked from Shingle creek to Buzzard Island creek,—such boats as are used by duck hunters, and sufficient to carry the exploring party of a few men who were examining the location for the purpose of ascertaining the facts on which the claims of the parties to this case depend. Whatever may be the case as to the point in Shingle creek where these phosphate rocks have been dug, I am satisfied that it cannot be held that it is a navigable stream all the way from the mouth of Shingle creek to the mouth of Buzzard Island creek. Both of these creeks are within the boundaries of the land covered by the grant under which the plaintiff claims, and which is now plaintiff's property. Whatever changes may have occurred in these creeks and marshes in past geological epochs—and the very existence of these phosphate deposits shows that they have been great—in the absence of any evidence of changes in them in modern times, or in the absence of the actual present operation of any forces of nature which would have worked changes near the date of this grant in 1786, I am bound to assume that Shingle creek exists to-day in the same condition which it was at the date of the grant, and the failure of the surveyor to note the creek on the plat is not sufficient evidence to the contrary. The plat contains the boundaries and that is sufficient. In locating a grant, the surveyor is stopped by the paramount title of an older grant, and, in the same way, he would be stopped by coming to any boundary of land which the grant could not convey. If the place in Shingle creek where the alleged trespasses were committed was, at the date of the grant, and is now, the bed

of a navigable stream, then it cannot be conveyed by the grant, because not grantable by any law then or now in force, and no length of possession can give the force of a grant where a grant could not have been made. The claim of the defendant stands upon a different footing. The legislature had a right, and did exercise that right, to lease this bed of Shingle creek to the defendant, if Shingle creek at that point is a navigable stream. Is Shingle creek, then, at that point, a navigable stream? While it is important that the state of South Carolina shall be protected in her right to all property not granted to private individuals, and held in trust for the public, it is equally important that private property shall not be taken for public uses, unless in the way provided by the constitution and the law. I propose to state my conclusions on this subject, and my reasons for them, as briefly as possible. *Chief Justice Shaw, in Rowe v. Granite Bridge Co.*, 21 Pick. 344, says: 'It is not every small creek in which a fishing skiff or gunning boat can be made to float at high water which is deemed navigable; but, in order to give it the character of a navigable stream, it must be generally useful for some purpose of trade or agriculture.' See also the collection of authorities in the able circuit decree in 22 S. C. Appendix, by Judge John J. Maher. In the case of *State v. Pacific Guano Co.*, 22 S. C. 50, Judge Wallace, in a circuit decree, affirmed on appeal, says: 'It will be at once perceived that Big creek and Chisolm's creek are not navigable streams. Although the tide ebbs and flows through them, yet the conditions necessary to sustain trade or commerce of any kind do not exist. Flowing out of Coosaw, with the tide, into Chisolm's island, they lose themselves in the marshes with which they are surrounded. They are entirely in the private estate of the owners of this island, and make no connections with thoroughfares of trade or travel, and are none of themselves.' It is true that at this point Shingle creek is seven feet at low tide. The depth of water in the two creeks referred to by Judge Wallace is not given, and seems to have been regarded as not very important, and is not given. It must have been sufficient for gathering phosphate rocks in the same manner as has been done in this case. In other respects, Shingle creek is, in my view, just what Big creek and Chisolm's creek were. The only boat for any useful purpose ever employed in these waters was the boat and barge employed by the defendant in this case,—one of which, it is said, carried seventy-five tons of phosphate rock. In Cooley on Constitutional Limitations (at page 590) we find these words: 'The capacity of a stream which generally appears by the nature, amount, importance, and the necessity of the business done upon it must be the criterion.' In the same section, we find that a stream may be navigable if it has the capacity of transporting logs to market, and has the character of a public stream for that purpose. It seems to me, also, that, in addition to what I have above said, to be navigable, a stream should not only have sufficient depth and width of water to float useful

commerce, but that the surroundings should be such that it may be useful for that purpose. Now, Shingle creek flows up with the tide into the private estate of the plaintiff, which is a mere marsh, and loses itself in that marsh; it has never been used as a highway for commerce of any sort, and there seems to be no prospect of its ever being so used; it makes no connections with any other highways. The only thing which looks commerce is the capacity to float away the phosphate rock about which this litigation is carried on; it has been used for no other. I therefore find, and it is adjudged, that Shingle creek is not navigable, and that the defendant, the Farmers' Mining Company, is a trespasser, and that plaintiff is entitled to damages. By agreement of counsel, no one having been named by consent, it is ordered that it be referred to Thomas Talbird, as referee, to ascertain and report what damages have been sustained by the plaintiff in consequence of the trespasses complained of in this case. Plaintiff may apply for other proper orders."

To this decree defendants took the following exceptions: "The defendants appeal to the supreme court from the judgment or decree of his honor, Judge Fraser, and now ask for a reversal of said judgment, and a new trial, upon the following grounds and exceptions: It is respectfully submitted: (1) That his honor erred in holding that this action is sufficient to test the title, as contemplated by the order of Judge Wallace directing plaintiff to institute an action on the law side of this court for the purpose of determining the question of title to the land described in the complaint, whereas this action presents no issues not involved in the first action, in which said order was made. (2) That his honor erred in not dismissing this action, there being another action, at the time of the commencement of this action, pending in this court between the same parties and involving the same issues. (3) That his honor erred in holding that the plaintiff had sufficiently connected himself with the grant to Christopher Williman, dated 4th September, 1786. (4) That his honor erred in holding that land below high-water mark was conveyed by said grant to Christopher Williman. (5) That his honor erred in holding that any of the papers or deeds introduced in evidence afforded 'color of title' to the marsh lands below high-water mark. (6) That, his honor having found as matter of fact that, at the place where the alleged trespasses were committed, the tide ebbs and flows in and out from Coosaw river, and that the water there was seven feet deep at low water, and wide enough to float a dredge and barge carrying seventy-five tons of rock, he erred in not holding as matter of law that said place was the property of the state, no grant from the state conveying lands below high-water mark on Coosaw river having been produced. (7) That his honor erred in holding that plaintiff's mere possession of land covered by tide water was sufficient, in an action against the state and its licensee, to make it incumbent upon the defendants to prove title in order to justify their alleged trespasses on 28 L. R. A.

this possession. (8) That his honor erred in holding that the possession of the plaintiff, and those under whom he claims, was sufficient to presume a grant to land under high-water mark on a tidal stream, as against the state and its licensee. (9) That his honor erred in holding the business done upon a stream is the test of navigability. (10) That his honor erred in holding that connection with another stream or highway is necessary to the navigability of a stream. (11) That his honor erred in holding that the surroundings of a stream are a test of navigability. (12) That his honor erred in concluding and holding that a stream flowing up into a private estate cannot be a navigable stream. (13) That his honor erred in concluding and holding that Shingle creek is not a navigable stream, from his findings of fact that 'Shingle creek flows up with the tide into the private estate of the plaintiff, which is a mere marsh, and loses itself in that marsh; it has never been used as a highway for commerce of any sort, and there seems to be no prospect of its ever being so used; it makes no connection with any other highways.' (14) That his honor erred in finding that Shingle creek is a stream arising in a private estate, when the great preponderance of the evidence showed it was a navigable, tidal salt-water stream connecting two navigable streams, and is actually navigable. (15) That his honor erred in not holding that, even if said stream did not exist there at the time of the original Williman plat and grant from Governor Moultrie, its subsequent existing, becoming navigable, and covering the land now its bed, made it a navigable stream, and below high-water mark the property of the state."

Mr. William H. Townsend, for appellant, Farmers' Mining Co.:

It has never been heretofore permitted, when the plaintiff has failed to prove the location of the land described in the declaration, that he should take a verdict for the lands described in the deeds produced in evidence of his title.

Broughton v. Broughton, 4 Rich. L. 504; *Felder v. Bonnett*, 2 McMull. L. 47, 37 Am. Dec. 545.

Being below high-water mark, the land did not pass under the grant.

State v. Pinckney, 23 S. C. 484, 507; *State v. Pacific Guano Co.* 22 S. C. 50.

All streams below tide water are prima facie public, and the title is prima facie in the state.

See *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 489; *State v. Pacific Guano Co. supra*; *United States v. Pacheco*, 69 U. S. 2 Wall. 587, 17 L. ed. 865; Gould, Waters, p. 60.

Nor would mere possession be sufficient to raise the presumption of title against the state.

State v. Arledge, 1 Ball. L. 551; *State v. Pinckney*, 23 S. C. 503.

His honor erred in concluding that Shingle creek is not a navigable stream from his finding of fact: That "Shingle creek flows up with the tide into the private estate of the plaintiff, which is a mere marsh, and loses itself in that marsh. It has never been used as a highway for commerce of any sort, and there seems to be no prospect of its ever being so used. It

makes no connection with any other highways."

State v. Pacific Guano Co. 22 S. C. 75; *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997; *McCullough v. Wall*, 4 Rich. L. 68; *Shands v. Triplett*, 5 Rich. Eq. 78.

The common law as to what is navigable has been extended in this state so as to include as navigable waters, watercourses above the tide water which are navigable in fact, but not restricted so as to include any tide waters which were navigable at common law.

Jones v. Souldard, 65 U. S. 24 How. 60, 16 L. ed. 604.

By the term "navigable river" the law does not mean such as are navigable in common parlance. The term has in law a technical meaning, and applies to all streams, rivers, or arms of the sea where the tide ebbs and flows.

People v. Canal Appraisers, 38 N. Y. 478.

If this court should determine that the rule of the common law was changed by the decision in *State v. Pacific Guano Co.*, 22 S. C. 75, the tests applied by his honor the circuit judge to determine the navigability were improper, even had Shingle creek not been a tidal stream.

The Montello, 87 U. S. 20 Wall. 441, 22 L. ed. 394, 78 U. S. 11 Wall. 411, 20 L. ed. 191; *Atty-Gen. v. Woods*, 106 Mass. 439, 11 Am. Rep. 320; *Roue v. Granite Bridge Corp.* 21 Pick. 344; *Charlestown v. Middlesex County Comrs.* 8 Met. 202; *Murdock v. Stickney*, 8 Cush. 118; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 213.

Mr. Osmond W. Buchanan, Atty-Gen., for the State:

That the state cannot convey and dispose of to a private person the beds of its navigable streams.

See *Arnold v. Mundy*, 6 N. J. L. 1, 10 Am. Dec. 356; *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 458, 36 L. ed. 1044; *State v. Pinckney*, 22 S. C. 484; *State v. Pacific Guano Co.* 22 S. C. 50.

Plaintiffs must prove title, and in doing so the law presuming the phosphate commission had done their proper duty pursuant to the maxim, "Omnia rite presumuntur" puts upon the plaintiff the burden of showing that the stream was actually unnavigable.

State v. Pacific Guano Co. 22 S. C. 75; *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997; 8 Kent, Com. 377; *State v. Pinckney*, 22 S. C. 484; *State v. Evans*, 33 S. C. 184.

The flowing of the tide, says Gibbs, *Ch. J.*, in *Miles v. Rose*, 5 Taunt. 706 (cited in *State v. Pacific Guano Co.* 22 S. C. 56), is strong prima facie evidence of its being a public navigable river.

See also *State v. Pacific Guano Co.* 22 S. C. 56; *The Montello*, 87 U. S. 20 Wall. 441, 22 L. ed. 394; *The Daniel Ball*, 77 U. S. 10 Wall. 563, 19 L. ed. 1001; *The Montello*, 78 U. S. 11 Wall. 411, 20 L. ed. 191; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Brown v. Chadbourne*, 31 Me. 1, 50 Am. Dec. 641; *Oak Point Mines Case*, 22 S. C. 595.

In navigable waters on the sea coast where the tide ebbs and flows title extends only to high-water mark.

State v. Pacific Guano Co. 22 S. C. 51.

Lands generally encroached upon by such
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salt water cease to belong to the former owner. *Gould, Waters*, § 155; *Re Hull & Selby Railway* 5 Mees. & W. 327; 2 Bl. Com. 262; *St. Clair County v. Livingston*, 90 U. S. 23 Wall. 68, 23 L. ed. 59; *New Orleans v. United States*, 35 U. S. 10 Pet. 717, 9 L. ed. 594; *Foster v. Wright*, L. R. 4 C. P. Div. 438.

Messrs. W. H. Heyward and Mordcaid & Gadsden, for respondents:

This is essentially a law case, and was submitted to be heard by his honor Judge Fraser, without a jury, and the findings of fact by a circuit judge in a law case are not subject to review on appeal, and must stand as the established facts of the case.

Chapman v. Lipscomb, 18 S. C. 231; *Miller v. South Carolina R. Co.* 9 L. R. A. 838, 33 S. C. 365; *Draffin v. Charleston, C. & C. R. Co.* 34 S. C. 466; *Stepp v. National Life & Maternity Ass.* 37 S. C. 434; *Rhodes v. Russell*, 38 S. C. 424.

Even though this court should become satisfied from the consideration of the testimony that his honor Judge Fraser was in error as to this finding of fact, it is absolutely out of the power of this court to reverse such finding as this court has no power under the constitution to review findings of fact in a law case.

State v. Pacific Guano Co. 22 S. C. 77; *Gary v. Burnett*, 16 S. C. 632.

There cannot be a doubt that the intention was to execute a formal deed to Christopher Williman, Jr. and the parties as well as the witnesses, together with the recording officer, manifestly supposed that the paper was what it was intended to be, a valid deed. This being the case, a court of equity will regard the paper as a deed, and will supply this accidental omission of the seal.

1 Pom. Eq. Jur. § 383; *Wadsworth v. Wendell*, 5 Johns. Ch. 224, 1 L. ed. 1064; *Bernard Twp. v. Stebbins*, 109 U. S. 341, 27 L. ed. 956; *Pope v. Montgomery*, 24 S. C. 595; *Wadsworthville Poor School Trustees v. Bryson*, 34 S. C. 416; *Sullivan v. Latimer*, 38 S. C. 420; *McCoy v. Cassidy*, 96 Mo. 429; *Carrington v. Potter*, 37 Fed. Rep. 767.

This is an action known under the old practice as an action "*quare clausum fregit*" which was an action for damages to possession, and in such an action the defendant may come in and defend by setting up title in himself, and the proof of such title would be a bar to a recovery in this action; but in such action the burden of proof as to the title is on the defendant.

Geiger v. Kaigler, 15 S. C. 273; 2 Greenl. Ev. § 311; *Hutchinson v. Perley*, 4 Cal. 33, 60 Am. Dec. 578; *Nagle v. Macy*, 9 Cal. 426; *Burt v. Panjuud*, 99 U. S. 182, 25 L. ed. 453.

The burden of proof of paramount title was thrown upon the defendant, and the plaintiff could rely upon the proof of possession.

Watson v. Hill, 1 Strobb. L. 79.

In the old action of *quare clausum fregit*, the question of title can be decided.

Shettleworth v. Hughey, 9 Rich. L. 387; *Muldrow v. Jones*, 1 Rice, L. 64, 72; *Dodd v. Kuffin*, 7 T. R. 354; *Duren v. Strait*, 16 S. C. 466; *Santee River Cypress Lumber Co. v. James*, 50 Fed. Rep. 362; *Watson v. Hill* and *Geiger v. Kaigler*, *supra*.

In all cases of this sort, if the right be doubt-

ful, the court will direct it to be tried at law, and will in the meantime restrain all the injurious proceedings, and when the right is fully established a perpetual injunction will be decreed.

2 Story, Eq. Jur. § 927; *Santee River Cypress Lumber Co. v. James*, 50 Fed. Rep. 360; *Erhardt v. Boaro*, 118 U. S. 536, 23 L. ed. 1116; *Irwin v. Dixon*, 50 U. S. 9 How. 10, 18 L. ed. 25; *Muldrow v. Jones*, *supra*; *Jerome v. Ross*, 11 Am. Dec. 506, and *note*; *Crowder v. Tinkler*, 19 Ves. Jr. 618.

When the state comes into her own courts to assert a right of property she is, of course, bound by all the rules established for the administration of justice between individuals.

State v. Pacific Guano Co. 22 S. C. 74.

Estoppel is available against the state.

Com. v. Andre, 3 Pick. 224; *Bigelow, Estoppel*, p. 246; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162; *Lunt v. Holland*, 14 Mass. 151; *People v. Hagadorn*, 104 N. Y. 516.

A party who has admitted a fact in his deed is estopped not only from disputing the deed, but every fact which it recites, and so are all persons claiming under and through him.

Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; *Hailey v. Curry*, 3 Strobb. L. 100.

Gary, J., delivered the opinion of the court:

The issues involved in this case will be understood by referring to the two complaints, the second answer of the Farmers' Mining Company, which was also adopted by the state as its answer when, upon petition, it was made a party defendant, the judgment of the court below, appellants' exceptions, plaintiff's notice as to estoppel.

First exception: "That his honor erred in holding that this action is sufficient to test the title as contemplated by the order of Judge Wallace, directing plaintiff to institute an action on the law side of this court for the purpose of determining the question of title to the land described in the complaint, whereas this action presents no issues not involved in the first action, in which said order was made." The complaint alleges that the plaintiff is seised in fee, and, at the time therein alleged, was in possession, of the premises described in the complaint. These allegations are denied by the defendants. This raises the question of title to the land, and is a compliance with the order of his honor, Judge Wallace, bearing upon this question, viz.: "That, within ten days from the signing of this order, the plaintiff do institute, on the law side of the court, such action as he may be advised by his counsel, for the purpose of determining the question as to the title to the land described in the complaint." Mr. Justice McGowan in *Anderson v. Lynch*, 37 S. C. 575, says: The code of procedure has made no material changes in the primary rights of parties, or in the different causes of action, nor undertaken to give any new redress, but has only changed the mode by which redress is reached and applied. It has provided what it calls 'an action for the recovery of real property,' in the place of the old action of trespass to try titles, which, as it is understood, embraces

three elements, viz., the writ of right to try the title, ejectment to recover the possession, and also for meane profits. See *Geiger v. Kaigler*, 15 S. C. 262. As we think, the action cannot be maintained unless there has been an actual trespass by the defendant. It is not absolutely necessary that the trespass should have been committed by the defendant himself in person, but it may be committed through and by another as an agent or tenant." So much of this exception as complains that "this action presents no issues not involved in the first action, in which said order was made," will be considered in connection with the second exception. This exception is overruled.

Second exception: That his honor erred in not dismissing this action, there being another action at the time of the commencement of this action pending in this court, between the same parties and involving the same issues." The first complaint embraced two causes of action. One was an action for the recovery of real property, and the other was an equitable action for injunction. *McMahan v. Dawkins*, 22 S. C. 814; *DeWalt v. Kinard*, 19 S. C. 292. The action set forth in the first complaint for the recovery of the land should have been placed on calendar 1, and tried by a jury, unless a jury trial was waived. The equitable action should have been placed on calendar 2, and tried by the judge, sitting as a chancellor. There was no necessity for the order requiring the plaintiff to institute another action on the law side of the court for the purpose of determining the question as to the title to the land. It has been urged as an objection to this exception that no appeal was taken from the order of Judge Wallace. The appeal from that order, however, could only be taken in the case in which it was made, and that case is not before this court. When the second action was instituted, the defendants had the right to set up as a defense that there was another action pending between the same parties for the same cause. It appears, however, that, "at the hearing, the first defense set up in the answer was not brought up for the consideration of the court;" nor does it appear that the defendants introduced any testimony to sustain this defense. It was not considered by the circuit judge in rendering his judgment, and may have been considered by him as waived; but, even if he had desired to consider it, we do not see any testimony upon which it could have been sustained. It is also questionable whether this exception can be considered by this court, as it does not complain of error on the part of the circuit judge in failing to consider a defense set up in the answer, as was done in the case of *Aultman v. Utsey*, 41 S. C. 304. This exception is overruled.

Third exception: "That his honor erred in holding that the plaintiff had sufficiently connected himself with the grant to Christopher Williman, dated 4th September, 1786." This involves only a question of fact, which cannot be reviewed by this court, as this is a law case. "So far as questions of fact, however, are concerned, this could do nothing, even if such conclusions of fact should

appear erroneous to us, for this court is without authority, as it has been repeatedly held in our decisions, to canvass such findings," etc. *Stapp v. National Life & Maturity Assn.*, 87 S. C. 434. See also *Rhodes v. Russell*, 88 S. C. 424. The circuit judge says: "The place on the creek at which the alleged trespass was committed is covered by the plat accompanying the grant from the state to Christopher Williman of 2,400 acres of marsh land. . . . I think the plaintiff has sufficiently connected himself with this grant. The only exception brought to my attention is that a deed from Christopher Williman, Sr., to Christopher Williman, Jr., wants a seal. It seems to me that under the ruling of the supreme court in *Wadsworthville Poor School Trustees v. Bryson*, 84 S. C. 401, this deed is sufficient. The seal seems to have been, as in that case, accidentally omitted," etc. See also *Sullivan v. Latimer*, 88 S. C. 417. This exception is overruled.

Fourth exception: "That his honor erred in holding that land below high-water mark was conveyed by said grant to Christopher Williman." The circuit judge found as a fact that the stream in which the land lies is not navigable, and the rule prevailing as to navigable streams cannot be applied. Furthermore, this exception only involves a question of fact, which the court, in this case, cannot review.

Fifth exception: "That his honor erred in holding that any of the papers or deeds introduced in evidence afforded 'color of title' to the marsh lands below high-water mark." The circuit judge shows that the plaintiff relied upon deeds and possession of the land as color of title. The court in *Duren v. Strait*, 16 S. C. 465, says: "In *Simmons v. Parsons*, 2 Hill, L. 492, color of title is defined to be 'anything which shows the extent of the occupant's claim.'" This exception is overruled.

Sixth exception: "That, his honor having found as matter of fact that, at the places where the alleged trespasses were committed, the tide ebbs and flows in and out from Coosaw river, and that the water there was seven feet deep at low water, and wide enough to float a dredge and barge carrying seventy-five tons of rock, he erred in not holding as matter of law that said place was the property of the state, no grant from the state conveying lands below high-water mark on Coosaw river having been produced." The circuit judge could not have decided as contended in this exception, unless he had found, as matter of fact, that, where the alleged trespasses were committed, the stream was navigable. This exception questions a finding of fact by the circuit judge, which cannot be reviewed by this court. This exception is overruled.

Seventh exception: "That his honor erred in holding that plaintiff's mere possession of land covered by tide water was sufficient, in an action against the state and its licensee, to make it incumbent upon the defendants to prove title in order to justify their alleged trespasses on this possession." So much of the judgment of the court below as bears upon this exception is as follows: "When the

alleged trespass was committed, the plaintiff was in possession, and I am not sure that it was necessary for the plaintiff to prove title at all. I am inclined to the opinion that, when the plaintiff proved possession, it was incumbent on the defendants to prove title in order to justify the trespasses on the possession. I think, therefore, that plaintiff has a right to recover, unless that right is defeated by the better title of the defendants, as lessees of the state, under the claim that these phosphate deposits are the property of the state, in the bed of a navigable stream or a navigable water." The views expressed by the circuit judge are in conflict with the principle laid down in *Geiger v. Kaigler*, 15 S. C. 262, in which *Mr. Justice McGowan* says: "The action was brought, as stated, expressly to recover the land in dispute, on the ground that the plaintiff had title to the same; and, even if the old rule as to the necessity of proving title should now be held to be modified so as to allow a person deprived of the possession of land, under proper allegations, to recover that possession without proof of title, it can have no application to this case. Here prior possession cannot stand for the title, although it is an action in the form prescribed by the code, and not technically trespass to try title, under the statute. The plaintiffs staked themselves upon their title, and they must recover, if at all, upon the strength of this title." The order of *Judge Wallace* was that the second action should be instituted for the purpose of determining the title to the land. The plaintiff having alleged that he was seised in fee, it was incumbent on him to prove the allegation. It must also be remembered that the state was one of the defendants, and had the right to stand upon its prima facie ownership of the soil. This exception is sustained.

Eighth exception: "That his honor erred in holding that the possession of the plaintiff, and those under whom he claims, was sufficient to presume a grant to land under high-water mark on a tidal stream, as against the state and its licensee." That part of the judgment of the court below bearing upon this exception is as follows: "Besides, the plaintiff, and those under whom he claims, have for many years been in possession under this deed or paper title,—a time of itself sufficient to presume a grant, if none had appeared in the case, to all the land covered by this paper as color of title,—and their possession has been such as this marsh land was capable of, and therefore sufficient." In the case of *State v. Pacific Guano Co.*, 22 S. C. 50, quoted with approval in *State v. Pinckney*, Id. 484, the court says: "Until 1870, the doctrine of *nullum tempus* prevailed in this state, and since that time twenty years have not elapsed; so that it is not necessary to consider the scope and effect of the new provision in the code, as to when and under what circumstances the state will not sue." The possession could not have begun to run against the state before 1870, when the code was adopted. *State v. Arledge*, 1 Bail. L. 551. The period of time necessary to bar the right of the state, when the possession began

to run against it, in 1870, was forty years. In 1873 the period was changed to twenty years. The possession having begun to run against the state in 1870, when forty years was the period of time necessary to bar the right of the state, it was necessary for the possession to continue for forty years in order to bar the right of the state, although the code was amended in 1873, changing such time to twenty years. This view is sustained by the case of *Rehkopf v. Kukland*, 30 S. C. 238, in which Chief Justice Melver, in delivering the opinion of the court, says: "The right of action against Apeler accrued when he took possession, in 1871, at which time the statutory period was twenty years; and, as he held possession for only fourteen years, it is quite clear that he had not acquired a title by possession when he conveyed to the intestate, unless it be by virtue of the Amendment of 1873, reducing the statutory period to ten years. But the amendatory act contains no words giving it a retroactive effect, and, on the contrary, it is inserted as part of chapter 1 of title 2 of the Code of Procedure, and must therefore be read in connection with the first section of that title, which expressly declares that 'the provision of this title shall not extend to actions already commenced, or to causes where the right of action has already accrued, but the statutes then in force shall be applicable to such cases.' Now, as, in this case, the right of action had already accrued when the amendment was adopted, such amendment could not extend to this case, but the statute in force at the time the right of action accrued, which was twenty years, was applicable. *Nichols v. Briggs*, 18 S. C. 473." See also *Lyles v. Reach*, 30 S. C. 291. The period of forty years not having elapsed, the state is not barred of its right, and the circuit judge was in error in applying the statute in this case. In the language of Mr. Justice McGowan in *State v. Puckney*: "It surely cannot be that a requirement as to proof, originating in a statute of limitations, and having exclusive reference to that, can be obligatory in a case to which the statute of limitations has no application as an act, somewhat in the nature of a declaratory law." The section of the code under which the plaintiff contends that the state is barred of its right to the land is contained in chapter 1, title 2, referred to by Chief Justice Melver in the case of *Rehkopf v. Kukland*, *supra*; and the language of Mr. Justice McGowan was used in a case where the attempt was made to interpose this section to defeat the right of the state to the beds of her navigable streams. This exception is sustained.

Ninth exception: "That his honor erred in holding the business done upon a stream is the test of navigability." Tenth exception: "That his honor erred in holding that connection with another stream or highway is necessary to the navigability of a stream." Eleventh exception: "That his honor erred in holding that the surroundings of a stream are a test of navigability. Twelfth exception: "That his honor erred in concluding and holding that a stream flowing up into a private estate cannot be a navigable stream." These exceptions will be considered together.

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The circuit judge says: "I propose to state my conclusions on this subject, and my reasons for them, as briefly as possible." After quoting from certain authorities, he proceeds to lay down the rule by which to test the navigability of a stream, saying: "It seems to me, also, that in addition to what I have above said, that to be navigable, a stream should not only have sufficient depth and width of water to float useful commerce, but that the surroundings should be such that it may be useful for that purpose." He then proceeds to illustrate what he means by "surroundings." "Now, Shingle creek flows up with the tide into the private estate of the plaintiff, which is a mere marsh, and loses itself in that marsh. It has never been used as a highway for commerce of any sort, and there seems to be no prospect of its ever being so used. It makes no connections with any other highways. The only thing which looks like commerce is the capacity to float away the phosphate rock about which this litigation is carried on. It has been used for no other." The doctrine of the common law that the navigability of a stream is to be determined by the ebb and flow of the tide was repudiated in this state in the case of *State v. Pacific Guano Co.*, 23 S. C. 50. If his honor had simply said "that, to be navigable, a stream should have sufficient depth and width of water to float useful commerce," without attaching other conditions, he would have stated correctly the doctrine prevailing in this state. Judge Wallace, in his circuit decree, which was affirmed on appeal in the case of *State v. Pacific Guano Co.*, says: "If a channel, therefore, in which the tide ebbs and flows, and, in the language of the civil law, is 'floatable,' can be used for the purpose of trade and commerce, it is a navigable stream. Neither the character of the craft nor the relative ease or difficulty of navigation are tests of navigability." The circuit judge seems to have considered the surroundings of more importance in determining the navigability of a stream than its depth, as shown by the following, from the judgment rendered by him (*italics ours*), to wit: "It is true that at this point Shingle creek is *acres feet at low tide*. The depth of water in the two creeks referred to by Judge Wallace is not given, and seems to have been regarded as not very important, and is not given. It must have been sufficient for gathering phosphate rocks in the same manner as has been done in this case. In other respects Shingle creek is, in my view, just [as] Big creek and Chisolm's creek were. The only boat for any *useful* purpose ever employed in these waters was the boat and barge employed by the defendant in this case, one of which it is said, carried *seventy-five tons* of phosphate rock." The test is navigable capacity, and not that the surroundings should be such that it may be useful for the purpose of commerce.

In discussing the surroundings enumerated by the circuit judge to determine the navigability of a stream, we will take them up separately. The first is: "Now, Shingle creek flows up with the tide into the private estate of the plaintiff, which is a mere marsh, and loses itself in that marsh." This condi-

tion, relied upon by the circuit judge, was mentioned by Lord Mansfield in *Lynn v. Turner*, 1 Cowp. 86, simply as a circumstance tending to show that the stream did not have navigable capacity, but not as a condition without which, though possessing navigable capacity, it could not be declared a navigable stream, as will be seen by the following language from that case: "How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so, for there are many places into which the tide flows which are not navigable rivers, and the place in question may be a creek in their own private estate." The second condition enumerated by the circuit judge is: "It has never been used as a highway for commerce of any sort, and there seems to be no prospect of its ever being so used." This makes actual use, and not navigable capacity, the test. The decisions hereinafter mentioned show that such a test would exclude many large rivers in undeveloped sections of the country. A stream may not be useful for commerce at one time, and yet circumstances may make it so. There are certain navigable streams in our state which are very valuable on account of their phosphatic deposits. If the question of their navigability had come before the courts for adjudication before the phosphate rock in them was discovered, and the test laid down by the circuit judge had been applied, it would have resulted in the state being deprived of this valuable source of revenue, because they were not actually used at that time. The third condition enumerated by the circuit judge is: "It makes no connections with other highways." This test has only been applied in cases where the question was whether a stream was a navigable water of the United States. There are certain conditions to be considered in determining the navigability of waters of the United States, so as to subject them to the laws of interstate commerce, that do not apply to navigable streams under the control of the state. Among these conditions is that mentioned by the circuit judge.

In the case of *The Daniel Ball*, 77 U. S. 18, 5 Wall. 557, 19 L. ed. 999, the court, after speaking of the necessity of a rule on the subject of navigable streams in this country different from that prevailing at common law, says: "A different test must therefore be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law, which are navigable in fact; and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted, in the customary modes of trade and travel on water; and they constitute navigable waters of the United States, within the meaning of the acts of congress, in contradistinction from the navigable waters of the states, when they form, in their ordinary condition, by themselves or by uniting with other waters, a continued highway, over which commerce is or may be carried on with

other states or foreign countries, in the customary modes in which such commerce is conducted by water." In discussing the rule laid down in the case just mentioned, the court, in *The Montello*, 78 U. S. 11 Wall. 411, 20 L. ed. 191, says: "It can only be deemed a navigable water of the United States when it forms, by itself or by its connection with other waters, such highway.

. . . If, however, the river is not of itself a highway for commerce with other states or foreign countries, or does not form such highway by its own connection with other waters, and is only navigable between different places within the state, then it is not navigable water of the United States, but only a navigable water of the state." *The Montello*, 87 U. S. 20 Wall. 480, 22 L. ed. 391, says: "If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

. . . The learned judge of the court below rested his decision against the navigability of the Fox river below the De Pere rapids chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation. . . . Apart from this, however, the rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to a uninterrupted navigation. In some cases, like the Fox river, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so, the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sandbars."

In *Moore v. Sanborn*, 2 Mich. 519, 59 Am. Dec. 209, the court says: "In this country the public right cannot depend upon custom or general use; and we accordingly find in nearly all the states this rule has been extended so as to be adapted to the necessities of our trade and commerce, and to embrace all streams upon which in their natural state there is capacity for valuable floatage, irrespective of the fact of actual use or the extent of such use. Nor can the fact that a floatable stream has not been used by the public, or has only been used by persons following a particular occupation, deprive such stream of its public character. This principle is one of vast importance to the interest of this and all new states." *Brown v. Chadbourne*, 81 Me. 9, 50 Am. Dec. 646, says: "If a stream could be subject to public servitude by long use only, many large rivers in newly settled states, and some in the interior of this state, would be altogether under the control and dominion of the owners of their beds, and the community would be de-

prived of the use of those rivers which nature has plainly declared to be public highways. The true test, therefore, to be applied in such cases, is whether a stream is inherently and in its nature capable of being used for the purposes of commerce for the floating of vessels, boats, rafts, or logs." *Hickok v. Hine*, 23 Ohio St. 523, 18 Am. Rep. 255, says: "A river is regarded as navigable which is capable of floating to market the products of the country through which it passes, or upon which commerce may be conducted; and, from the fact of its being so navigable, it becomes, in law, a public river or highway. The character of a river as such highway is not so much determined by the frequency of its use for that purpose, as it is by its capacity of being used by the public for purposes of transportation and commerce." *Diedrich v. Northwestern U. B. Co.*, 43 Wis. 248, 24 Am. Rep. 899, says: "Waters are here held navigable when capable of navigation in fact, without other condition; and, when we use the terms 'navigable,' or 'unnavigable,' we mean capable or incapable of actual navigation." *Atty. Gen. v. Woods*, 108 Mass. 436, 11 Am. Rep. 880, says: "It is also denied that the stream is navigable, although it is about two feet deep at low water, because it is not proved to be used for the purposes of navigation, except with pleasure boats." The case of *Roue v. Granite Bridge Corp.*, 21 Pick. 844-847, is cited to sustain this position. Chief Justice Shaw there says: "It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable; but, in order to have this character, it must be navigable for some purpose useful to trade or agriculture. But this language is applied to the capacity of the stream and is not intended to be a strict enumeration of the uses to which it must be actually applied in order to give it that character. Navigable streams are highways; and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or water, as a traveler for business. If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purpose of trade or agriculture. The purpose of the navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation." The case of *Roue v. Granite Bridge Corp.*, explained in the foregoing case, is one of those upon which the circuit judge based the test of navigability laid down by him, and does not sustain said test. The foregoing authorities show that the views expressed by the circuit judge are erroneous, and the test of navigability laid down by him cannot be sustained.

Thirteenth exception: "That his honor erred in concluding and holding that Shingle creek is not a navigable stream from his findings of fact, that 'Shingle creek flows up with the tide into the private estate of the plaintiff, which is a mere marsh, and loses itself in that marsh. It has never been used as a highway for commerce of any sort, and there seems to be no prospect of its ever being so used. It makes no connection with

any other highways.'" Fourteenth exception: "That his honor erred in finding that Shingle creek is a stream arising in a private estate, when the great preponderance of the evidence showed it was a navigable tidal salt-water stream, connecting two navigable streams, and is actually navigable." These exceptions only involve questions of fact, and, this being a law case, will not be considered by this court, and are overruled.

Fifteenth exception: "That his honor erred in not holding that, even if said stream did not exist there at the time of the original Williman plat and grant from Governor Moultrie, its subsequent existing, becoming navigable, and covering the land now its bed, made it a navigable stream, and, below high-water mark, the property of the state." This exception seems to have been taken under a misapprehension of what his honor, Judge Fraser, decided. He says: "Whatever changes may have occurred in these creeks and marshes in past geological epochs,—and the very existence of these phosphate deposits shows that they have been great,—in the absence of any evidence of changes in them in modern times, or in the absence of the actual present operation of any forces of nature which would have worked changes near the date of this grant, in 1786, I am bound to assume that Shingle creek exists to-day in the same condition in which it was at the date of the grant and the failure of the surveyor to note the creek on the plat is not sufficient evidence to the contrary." His honor did not hold that the stream had become navigable. On the contrary, he decided, as matter of fact, that it is not navigable. There is therefore no necessity for the application of the principle enunciated in *McCullough v. Wall*, 4 Rich. L. 83. This exception is overruled.

We now come to a consideration of the question of estoppel, relied upon by the plaintiff. This question does not seem to have been made in the court below, nor passed upon by the circuit judge. As the case must, however, be remanded for a new trial, and this question may be raised in the court below, we will not decline to consider it. The following is plaintiff's notice as to estoppel: "Please take notice that, if an appeal to the supreme court is perfected in this cause, the plaintiff will insist that the decree herein be sustained, upon the ground that, upon the evidence produced in this case, the state of South Carolina and her licensees are estopped from setting up any claim to the lands described in the complaint if the supreme court should find itself unable to sustain the said decree on the grounds upon which it is rested by the circuit judge." If the plaintiff can trace title back to a grant from the state to land covered by tidal, though not navigable, waters, the state would be estopped by its grant. The principle, however, is different when the land granted is covered by navigable waters, as shown by *Mr. Justice McGowan in State v. Pacific Guano Co.*, to wit: "The absolute rule heretofore referred to limiting land owners bounded by such streams to the high-water mark, unless altered by law or modified by

custom, accords with the view that the beds of such channels below low-water mark are not held by the state simply as vacant lands, subject to grant to settlers in the usual way through the land office. There seems to be no doubt, however, that the state, as such trustee, has the power to dispose of these beds as she may think best for citizens; but, not being, as it seems to us, subject to grant in the usual form, under the provisions of the statute regulating vacant lands, it would seem to follow that, in order to give effect to an alienation which the state might undertake to make, it would be necessary to have a special act of the legislature, expressing in terms and formally such intention." See also *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 458, 36 L. ed. 1044, in which it is said: "A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administra-

tion of government and the preservation of the peace. In the administration of government, the use of such power may, for a limited period, be delegated to a municipality or other body; but there always remains with the state the right to revoke those powers, and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state."

It is the judgment of this court that the judgment of the court below be reversed, and that the case be remanded to that court for a new trial.

McIver, Ch. J., and McGowan, J., concur.

A petition for rehearing was subsequently filed in response to which on September 13, 1894, the following opinion was handed down:

Per Curiam:

After a careful consideration of this petition, we are unable to perceive that any material fact or principle of law has either been overlooked or disregarded, and hence there is no ground for a rehearing. It is therefore ordered that this petition be dismissed, and that the stay of the remittitur heretofore granted be revoked.

KANSAS SUPREME COURT.

DIEBOLD SAFE & LOCK CO., *Plff. in Err.*,
v.

A. H. HUSTON *et al.*

(.....Kan.....)

•**Plaintiffs ordered from the defendant a No. 4 fireproof safe.** The order was in writing. It contained no reference to a warranty. A safe was delivered in compliance with the order, and received and used by the plaintiffs to store valuable papers. The building in which it was kept was afterwards destroyed by fire, and some of the contents of the safe were consumed. **Held:** (1) That parol evidence was inadmissible to prove a warranty made at the time the order was given; (2) that the words "fireproof safe" do not imply a warranty of the quality of the safe, or that it will protect its contents from fire for any definite period or under any given circumstances.

(April 6, 1895.)

ERROR to the District Court for Nemaha County to review a judgment in favor of plaintiff in an action brought to recover damages for loss by fire of papers in a safe which

•**Headnote by ALLEN, J.**

NOTE.—In connection with the valuable briefs of counsel in the above, see other authorities on the same subject as to excluding oral proof of warranty on a written contract of sale in *note to Hobart v. Young* (Vt.) 12 L. R. A. 603.
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plaintiffs claimed to have purchased of defendant under a warranty that it was fire proof. **Reversed.**

Statement by ALLEN, J.:

This case was commenced before a justice of the peace of the city of Seneca, and the plaintiffs obtained judgment for \$172 and costs. The defendant appealed to the district court, where an amended petition was filed, alleging, in substance, that the plaintiffs, on or about the 25th of July, 1889, purchased of the Diebold Safe & Lock Company a No. 4 Diebold safe, which was represented and guaranteed to be fire-proof, for which the plaintiffs agreed to pay \$72, one fourth cash, and the balance in three equal payments; that on the 18th day of January, 1890, the building in which the safe was situated was burned, and the contents of the safe, consisting of notes and accounts, and contracts, and other valuable papers, contained in said safe, were burned; and asking judgment for \$247. J. L. Breeding, one of the plaintiffs, testified that "the agent warranted it to be fire-proof. He stated that the company always did that; that they guaranteed all their safes." He also testified that at the same time a duplicate contract was entered into for the purchase of the safe. The one of these duplicates signed by the plaintiffs was introduced in evidence, and reads as follows: "Seneca, July 23, 1889. Brintnall & Harri-

son, General Agents, Diebold Safe and Lock Company: Please send me as soon as convenient one No. 4 fire-proof safe, approximate size inside 19 inches high, 15 inches wide, 12 inches deep, as per page 8 of illustrated catalogue, and plan of interior as specified on back of this order. Marked to Huston & Breeding, town of Seneca, county of Nemaha, state of Kansas. Ship via town of St. Joseph, and rent same to undersigned on following terms: F. O. B. cars in Seneca, Kas. \$72.00, as follows: \$18.00 upon arrival; balance in 3 notes, of \$18.00 each, due, respectively, in 3, 6, & 9 months from shipment. Said safe to be one of your latest styles, with all your latest improvements, and to be as per illustrated catalogue. Front of safe to be a dark wine color, and finished in gold, and to be nicely finished and ornamented in your latest style. This order subject to the approval of Brintnall & Harrison. All notes given are to bear interest at the rate of eight per cent per annum. It is agreed above sums are to be paid as rent for said safe. When the full amount of \$72.00 is paid, you are to give me a bill of sale of safe. If note is not forwarded to you at the expiration of twenty days from date of invoice, all rent shall become due at the expiration of thirty days from date of bill, and agree to accept and pay draft of amount mentioned below, and are not to countermand or attempt to annul this contract. It is agreed that the title of said safe shall not pass until notes are paid or safe paid for in cash, but shall remain your property until that time. In default of payment of said rent, you or your agent may take possession of and remove said safe without legal process. Nothing but shipment or delivery constitute an acceptance of this contract. It is also hereby expressly agreed and understood that the foregoing embodies all the agreements made between us in any way, hereby waiving all claims of verbal or other agreements of any nature not embodied in this contract. I hold a duplicate copy of above contract. Agents not authorized to make collections. Amount, \$72.00. Truly yours, Huston & Breeding. Witness: _____

The jury rendered a verdict in favor of the plaintiffs for \$247, for which amount the judgment was entered. The defendant brings the case to this court.

Mr. Samuel K. Woodworth, for plaintiff in error:

Parol evidence of the warranty was inadmissible because the contract provided that "it is also hereby expressly agreed and understood that the foregoing embodies all the agreements made between us in any way, hereby waiving all claims of verbal or other agreements of any nature not embodied in this contract."

Furneaux v. Esterly, 36 Kan. 539; *National Cash Register Co. v. Blumenthal*, 85 Mich. 464.

The court will take judicial notice that literally speaking there is no such thing as a "fire-proof safe;" it is elementary that all substances and all combinations of substances known to the genius of man may be totally destroyed by fire.

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Wasson v. First Nat. Bank of Indianapolis, 107 Ind. 206.

The description or name by which goods are sold is a warranty that the goods are such as are known or pass by that description or name. It is not a warranty as to their qualities, nor of their fitness for a specific use or purpose.

2 *Sutherland, Damages*, 410, 411, and cases cited; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Olivant v. Bayley*, 5 Q. B. 288; *Camac v. Warriner*, 1 C. B. 356; *Mason v. Chappell*, 15 Gratt. 572.

No engagement of this sort can be implied against the vendor, save where the contract is partially or wholly executory, and in such event, it is not in the nature of a warranty, but an implied stipulation, forming part of the essence of the contract.

Rodgers v. Niles, 11 Ohio St. 48, 78 Am. Dec. 296; *Mason v. Chappell*, *supra*; *Prentice v. Dike*, 6 Duer; 220; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Howard v. Hoey*, 23 Wend. 350, 35 Am. Dec. 572; *Richardson v. Grandy*, 49 Vt. 22; *Barr v. Gibson*, 3 Mees. & W. 390; *Burnby v. Bollett*, 16 Mees. & W. 644; *Keates v. Earl of Cadogan*, 10 C. B. 591; *Misner v. Granger*, 9 Ill. 60.

It may be doubted whether there is any instance in which a knowledge of the object for which a specific chattel is bought will raise an implied warranty that it is fit for that purpose, although a failure to acquaint the vendee with its unfitness may be evidence of fraud, and thus render the vendor liable in an action of tort.

Kingsbury v. Taylor, 29 Me. 508, 50 Am. Dec. 607; *Humphreys v. Comline*, 8 Blackf. 516; *Emerson v. Origham*, 10 Mass. 197, 6 Am. Dec. 109; *Howell v. Coules*, 6 Gratt. 393; *Dickson v. Jordan*, 33 N. C. 166, 53 Am. Dec. 403; *Maynard v. Maynard*, 49 Vt. 297.

Or it may serve as a defense in an action for the price.

Perry v. Johnston, 59 Ala. 648; *Owens v. Dunbar*, 12 Ir. L. Rep. 304; *Dickson v. Zizinia*, 10 C. B. 602; *Burnby v. Bollett*, *supra*.

The contract made by defendants in error with Brintnall & Harrison was for a "fireproof safe," and they were bound to furnish a safe known or which passed by that description or name, and none other.

2 *Sutherland, Damages*, 410, 411, and cases cited.

The written contract is presumed to contain the entire contract.

Warner v. Thompson, 35 Kan. 27; *McMullen v. Carson*, 48 Kan. 263; *Rich v. Northwestern Cattle Co.* 48 Kan. 197; 2 *Rice*, Ev. p. 1316, and authorities cited; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4, 73 Ala. 448; *Chicago, K. & W. R. Co. v. Fisher*, 49 Kan. 460; *White v. Miller*, 71 N. Y. 133, 27 Am. Rep. 18.

Where the seller knows nothing of the reasons of the purchase or the circumstances or condition of the purchaser, the measure of damages is the difference between the value of the article delivered in the condition it then was, and that of the article which in its perfect and complete condition the party intended to purchase; and good faith on the part of the seller is presumed.

Weybrich v. Harris, 31 Kan. 93; *Wheeler & Wilson Mfg. Co. v. Thompson*, 33 Kan. 491;

Great Western Printing Co. v. Tucker, 78 Iowa, 755; *Hoe v. Sanborn*, 36 N. Y. 93; *Muller v. Eno*, 14 N. Y. 606; *Voorhees v. Earl*, 2 Hill, 288, 38 Am. Dec. 588; *Cary v. Gruman*, 4 Hill, 625, 40 Am. Dec. 299; *Sanborn v. Herring* (N. Y.) 6 Am. L. Reg. N. S. 457; *Herring v. Skaggs*, *supra*; *Walrath v. Whittlekind*, 26 Kan. 482; *Missouri Pac. R. Co. v. Pierce*, 88 Kan. 61; *Dowell v. Williams*, 33 Kan. 319.

Mr. E. G. Wilson, for defendants in error: The evidence of the agent's representation neither contradicts nor varies the terms of the written contract (order of sale), even if such an instrument comes within the inhibition contended for by the plaintiff in error.

Irwin v. Thompson, 27 Kan. 643.

A sale of an article for the vendor's manufacture for a particular purpose imports a warranty that the machine is reasonably fit for that purpose, and to be free from latent defects arising in the process of manufacture and not disclosed to the vendor.

Hoult v. Baldwin, 67 Cal. 610; *Allen v. Truesdell*, 135 Mass. 75; *Hadley v. Bazendale*, 9 Exch. 341; *Hammer v. Schanfelder*, 47 Wis. 455.

The loss of the contents of the safe "may fairly and reasonably be considered as naturally arising from the breach of the contract, according to the usual course of things and the increased expense caused the injured party by the breach, as well as all other substantial inconveniences from that cause are legitimate elements of damage."

5 Am. & Eng. Encyclop. Law, p. 18.

Allen, J., delivered the opinion of the court:

The plaintiff testified to an oral warranty that the safe was fire-proof, by the agent of the defendant. It will be observed that the written order for the safe, made at the time, expressly provides that the title should remain in the defendant until the full purchase price should be paid. The evidence shows that \$18 was paid at the time of the delivery of the safe, and that the first note was afterwards paid. At the time of the fire, two notes still remained unpaid, and the title to the property, therefore, was still in the defendant. There could not, then, be a technical warranty of the article sold. It is not necessary, however, to nicely inquire into the difference in the mode of recovering damages for a breach of warranty and those resulting from the use of an article furnished for a particular purpose under a bailment. The only question we deem it necessary to decide is whether, under the testimony, any such warranty was made as would entitle the plaintiffs to recover irrespective of the technical question. It appears from the plaintiff's own evidence that the agreement which he entered into with the agent of the safe and lock company was reduced to writing. Oral evidence, therefore, is inadmissible to vary or enlarge its terms. *Drake v. Dods-worth*, 4 Kan. 160; *Brenner v. Luth*, 28 Kan. 581; *Hopkins v. St. Louis & S. F. R. Co.* 29 Kan. 544; *Furneaux v. Eberly*, 86 Kan. 589; *Phelps & Bigelow Windmill Co. v. Piercy*, 41 Kan. 763; *Willard v. Ostrander*, 46 Kan. 591.

It is clear that the safe was delivered to 28 L. R. A.

the plaintiffs in compliance with the terms of the written order. Does this order contain what in law amounts to a warranty? There are no words in it of express warranty. Does an order, however, for a fire-proof safe, imply a warranty? It is contended that this is a case of a sale of an article of the vendor's manufacture for a particular purpose, and imports a warranty that it is reasonably fit for that purpose, and free from latent defects arising in the process of manufacture, and not disclosed to the vendor. In the case of *Lukens v. Freind*, 27 Kan. 664, 51 Am. Rep. 429, it appeared that the defendant was a miller; that two copper clasps accidentally fell into some bran which was sold to the plaintiff. The clasps were swallowed by one of the plaintiff's cows, and killed her. It was held that, in the absence of express warranty, the plaintiff could not recover for his cow. The second clause of the syllabus reads as follows: "While, when an article is ordered from a manufacturer, to be by him manufactured for a specific and understood purpose, there is in some cases an implied warranty that the article, when manufactured, will be reasonably fit for the purpose intended, yet, when a purchase is made from him of a specific and completed article, he is to be regarded as a dealer, and his liability determined accordingly." There is nothing in this case indicating that the safe purchased by the plaintiffs was manufactured specially for them, but the fair inference is that it was one of a kind of safes which the defendants manufactured for sale to whomsoever would buy. It is designated in the order as a "No. 4 fire-proof safe," and the order provides that it shall be one of the defendant's latest styles and improvements; thus clearly indicating that it is one of a kind of safes manufactured by the safe and lock company. "There is in America an implied warranty of identity; namely, that the article shall be of the kind or species it purports to be or is described to be,—that is, that the article delivered shall be the same thing contracted for." Benjamin, Sales, 6th ed. 636. This proposition is illustrated in the following cases: In *Henshaw v. Robins*, 9 Met. 83, 43 Am. Dec. 367, a sale and bill of parcels of two cases of indigo was made. It was shown that the article paid for and delivered was not indigo at all, but composed of Prussian blue, chromate of iron, and potash, and worthless for any purpose. It was held that the description of the article inserted in the bill of parcels amounted to a warranty that the article was such as represented. In *Hawkins v. Pemberton*, 61 N. Y. 198, 10 Am. Rep. 595, it was held that the sale of an article as blue vitriol amounted to a warranty that it was such. In *Walcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 498, it was held that a sale of seed which the seller said was early strap-leaf, red-top turnip seed was equivalent to a warranty that it was such, and that the purchaser might recover the difference between the market value of the crop raised and the same crop from such seed as was ordered. In *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 18, it was held that, on a sale of "large Bristol cabbage

seed" to a market gardener, there was an implied warranty that the seed was not only raised from such stock, but free from any latent defect arising from the mode of cultivation, and would produce that kind of cabbage. In *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280, it was held that a sale by a druggist to a planter of an article as Paris green implied a warranty that it was that substance.

There is no doubt, under the authorities, that the article sold must answer in kind to the description under which it is sold, and that there is an implied warranty that the article delivered is such an article as the name under which it is sold indicates. When, however, the question arises whether an article is of a particular quality or degree of excellence, unless it is designated by some term which is descriptive of the article and calls for a particular quality, the general rule is that no warranty of quality will be implied. In *Wolcott v. Mount*, *supra*, it was said: "In general, the only contract which arises on the sale of an article by a description, by its known designation in the market, is that it is of the kind specified." In *Winsor v. Lombard*, 18 Pick. 57, it was held that, where a large number of barrels of mackerel branded under the inspection laws as No. 1 and No. 2 mackerel were sold in the spring with that description of them in the bill of parcels, it was not a warranty that the mackerel were free from rust, although it appeared that mackerel affected by rust are not considered as No. 1 and No. 2. In *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331, it was held that "one who agreed to sell 'Manilla sugar' to refiners, and delivered to them what is usually called in commerce by that name, can, in the absence of fraud, misrepresentation, or warranty, recover the agreed price, though the article delivered contained more impurities than sugar known under that name usually does." The case of *Shisler v. Baxter*, 109 Pa. 443, 58 Am. Rep. 738, seems to be opposed to *White v. Miller*, *supra*, holding that the sale of seed as Wakefield cabbage seed did not amount to a warranty that it was such, but was a representation as to quality. In *Towell v. Gatewood*, 3 Ill. 22, 38 Am. Rep. 497, a bill of sale of good first and second rate tobacco was made. The court refused to treat this as a warranty, but rather as an expression of opinion as to the quality of the article sold, concerning which the buyer should have relied on his own judgment or obtained an express warranty. "The mere description of iron sold as mill iron in a bill rendered to the purchaser will not amount to a warranty that the same is of the quality or grade described, but will be regarded as a mere statement or expression of opinion as to the quality." *Carondelet Iron Works v. Moore*, 78 Ill. 65. See also, *Ryan v. Ulmer*, 108 Pa. 332, 56 Am. Rep. 210; *Dounce v. Dow*, 64 N. Y. 411. In *Fraley v. Bispham*, 10 Pa. 320, 51 Am. Dec. 486, it was held that a sale bill of superior sweet-scented Kentucky leaf tobacco affords no evidence from which the jury may infer a warranty that it is either superior or sweet scented. The case of *Shaw* 28 L. R. A.

v. Smith, 45 Kan. 334, 11 L. R. A. 681, was on a contract for the sale of flax-seed, which the buyer agreed to sow, and sell the crop to the seller on certain terms stated in the contract. The seed proved worthless, and did not grow. It was held that under the contract, and in view of the purposes for which it was purchased, the buyer might recover as upon a warranty. In that case the purposes of the contract did not end with the delivery of the seed to the buyer, for he was obligated to sow the seed, and to sell the crop which it might produce to the vendor. Under such a contract, it was held that a warranty of the fitness of the seed for the purposes specified in the contract would be implied.

In the case under consideration the plaintiffs ordered a fire-proof safe. There is no proof, nor was it in fact claimed at the trial, that the article delivered did not answer the description; that is, that it was not such an article as is generally known and designated as a "fire-proof safe." The evidence shows that it was manufactured and placed on the market in the same way that other fire-proof safes were made. "Fire-proof" is defined by Webster: "Proof against fire; incombustible." The case of *Hickey v. Morrell*, 102 N. Y. 454, 55 Am. Rep. 824, was an action against a warehouseman to recover for goods destroyed by fire in a warehouse represented to have a fire-proof exterior. It appeared that the window frames and sash were wooden, and that there were no outside shutters, and it was held that the building could not be deemed fire-proof. In the course of the opinion it is said: "Here the allegation is that the exterior of the building is fire-proof. It necessarily refers to the quality of the material out of which it is constructed, or which forms its exposed surface. To say of any article it is fire-proof conveys no other idea than that the material out of which it is formed is incombustible." In the case of *Knoxville F. Ins. Co. v. Hird*, 4 Tex. Civ. App. 82, in an action on a fire insurance policy which stipulated "that the assured would keep his books in a fire-proof safe, and that in case of loss he would produce the books, and on failure to so produce them the policy would become void. The books were in good faith kept in a safe of the kind generally known and reputed as fire-proof, but which failed to preserve them from destruction by fire. Held, that the insured had not warranted the safe to preserve the books, and that he complied with the condition."

It is not claimed in this case that the safe itself was constructed of combustible materials, nor that it was burned, or even greatly damaged by fire. The plaintiffs seek to recover solely for damages resulting from the burning of articles deposited in the safe. There was no contract or representation with reference to the degree of heat, or the length of time when exposed to a fire, against which the safe would afford protection. Safes denominated as "fire-proof" are made of various sizes, capacities, and styles. If the outside be made of iron, while that metal is commonly regarded as incombustible, be-

cause it will not burn, yet it is not indestructible by fire. It is a matter of common knowledge that iron will melt when subjected to a sufficient degree of heat. To imply a warranty that the safe would protect its contents against any given exposure to fire, we think, would be to imply a warranty of quality, and that altogether indefinite in its terms, and imposing a liability which might be immensely disproportionate to the sum received. The recovery in this case was

for more than three times the price of the safe. We are of the opinion that it was incumbent on the plaintiffs to inspect the safe, when they received it, for the purpose of ascertaining whether it was of the kind specified in the order; that, if it was so, no warranty of quality was implied, and no recovery can be had for the destruction of its contents.

The judgment is reversed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Fanny E. EMERY

v.

Horace H. BURBANK, Exr., etc., of Eliza A. Rumery.

(.....Mass.....)

An oral contract to make a will although valid in the state where it is made cannot be enforced in Massachusetts against inhabitants of that state since an action must be controlled by the policy of Stat. 1888, chap. 872, which requires such agreements to be in writing.

(March 9, 1895.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Middlesex County made during the trial of an action brought to enforce an agreement alleged to have been made by defendant's testatrix to leave certain property to plaintiff at her death which resulted in a dismissal of the action. *Overruled.*

The facts are stated in the opinion.

Mr. Elisha Greenhood for plaintiff.

Messrs. John D. Long, Henry C. Mulhgan, and A. E. Burr, for defendant:

Where a contract is made in one place but is to be executed in another, it is to be governed by the laws of the place of performance.

Prentiss v. Savage, 13 Mass. 20; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244, 71 Am. Dec. 753; *Carnegie v. Morrison*, 2 Met. 881; *Powers v. Lynch*, 8 Mass. 77; *Dolan v. Green*, 110 Mass. 822; *Fanning v. Consequa*, 17 Johns. 518, 8 Am. Dec. 442; *Cox v. United States*, 31 U. S. 6 Pet. 203, 8 L. ed. 370; *Robinson v. Bland*, 2 Burr. 1077; *Andrews v. Pond*, 88 U. S. 13 Pet. 65, 10 L. ed. 61; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 867, 38 Am. Rep. 518; *Hyde v. Goodnow*, 8 N. Y. 267; *Waverly Nat. Bank v. Hall*, 150 Pa. 466; *Thayer v. Elliott*, 16 N. H. 104; *Story, Conf. L. § 280*; *Bishop, Cont. § 1871*; *Parsons, Cont. 8th ed. 697*; *Clark, Cont. (1894) 507*.

The contract was invalid under the laws of Massachusetts.

Acts 1888, chap. 872.

Even assuming that this was a Maine contract, and also assuming that it was valid under the Maine laws, yet it would be unenforceable in this state.

NOTE.—For validity of contracts to pay money or give property after the death of the promisor, including agreements to make bequests or devises, see *note to Krell v. Codman (Mass.)* 14 L. R. A. 860.

As to conflict of laws in respect to devolution of property, see *note to Harvey v. Great Northern R. Co. (Minn.)* 17 L. R. A. 84.

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Whart. Conf. L. § 690; *Leroux v. Brown*, 13 C. B. 801; *Pritchard v. Norton*, 106 U. S. 134, 27 L. ed. 107; *Hoadley v. Northern Transp. Co.* 115 Mass. 804, 15 Am. Rep. 106.

Under the statute of frauds such a promise to leave all one's property by will is not binding unless in writing.

Gould v. Mansfield, 108 Mass. 409, 4 Am. Rep. 578; *Wellington v. Apthorp*, 145 Mass. 78.

The contract with regard to the personal property is not divisible from the one with regard to the real estate.

Gould v. Mansfield, 108 Mass. 408, 4 Am. Rep. 576; *Sugden, Vendors*, 8th Am. ed. p. 189.

An oral contract to execute and deliver a deed of real property is within the statute of frauds.

Brackett v. Brewer, 71 Me. 478; *Lawrence v. Chase*, 54 Me. 196.

No permanent interest in real estate can be acquired by a parol agreement.

Pitman v. Poor, 38 Me. 287; *Jellison v. Jordan*, 68 Me. 873; *Plummer v. Bucknam*, 55 Me. 105; *Patterson v. Cunningham*, 12 Me. 506.

Holmes, J., delivered the opinion of the court:

This is an action on an oral agreement, alleged to have been made in Maine in 1890 by the defendant's testatrix, Mrs. Rumery, to the effect that if the plaintiff would leave Maine, and take care of Mrs. Rumery, the latter would leave the plaintiff all her property at her death, and also would put \$4,000 into a house, which the plaintiff should have.

At the trial evidence was introduced tending to prove the agreement as alleged. The presiding justice ruled that the action could not be maintained, and the case is here on exceptions. As we are of opinion that the ruling must be sustained, under Stat. 1888, chap. 872, requiring agreements to make wills to be in writing, a fuller statement of the facts is not needful.

There is no doubt of the general principles to be applied. A contract valid where it is made is valid everywhere, but it is not necessarily enforceable everywhere. It may be contrary to the policy of the law of the forum. *Van Reimsdyk v. Kane*, 1 Gall. 371, 375, Fed. Cas. No. 16,871; *Greenwood v. Curtis*, 6 Mass. 858, 4 Am. Dec. 145; *Fant v. Miller*, 17 Gratt. 47, 62. Or again, if the law of the forum requires a certain mode of proof, the contract, although valid, cannot be enforced in that jurisdiction without the proof re-

quired there. This is as true between the states of this Union as it is between Massachusetts and England. *Hoadley v. Northern Transp. Co* 115 Mass. 804, 806, 15 Am. Rep. 106; *Pritchard v. Norton*, 106 U. S. 124, 134, 27 L. ed. 104, 107; *Downer v. Chesbrough*, 36 Conn. 39, 4 Am. Rep. 29; *Kleeman v. Collins*, 9 Bush, 460; *Fant v. Miller*, 17 Gratt. 47; *Hunt v. Jones*, 12 R. I. 265, 266, 34 Am. Rep. 635; *Yates v. Thomson*, 8 Clark & F. 544, 586, 587; *Bain v. Whitehaven & F. Junction R. Co.* 3 H. L. Cas. 1, 19; *Leroux v. Brown*, 12 C. B. 801.

When the law involved is a statute, it is a question of construction whether the law is addressed to the necessary constituent elements or legality of the contract on the one hand, or to the evidence by which it shall be proved on the other. In the former case, the law affects contracts made within the jurisdiction wherever sued, and may affect only them (*Drew v. Smith*, 59 Me. 393); in the latter, it applies to all suits within the jurisdiction, wherever the contracts sued upon were made, and again may have no other effect. It is possible, however, that a statute should affect both validity and remedy by express words, and, this being so, it is possible that words which in terms speak only of one should carry with them an implication also as to the other. For instance, in a well-known English case *Maule, J.*, said: "The fourth section of the statute of frauds entirely applies to procedure;" and on this ground it was held that an action could not be maintained upon an oral contract made in France. But he went on: "It may be that the words used, operating on contracts made in England, render them void." *Leroux v. Brown*, 12 C. B. 801, 805, 827. We cite the language, not for its particular application, but as a recognition of the possibility which we assert.

The words of the statute before us seem in the first place, and most plainly, to deal with the validity and form of the contract. "No agreement . . . shall be binding, unless such agreement is in writing." If taken literally, they are not satisfied by a written memorandum of the contract; the contract itself must be made in writing. They are limited, too, to agreements made after the passage of the act,—a limitation which perhaps would be more likely to be inserted in a law concerning the form of a contract than in one which only changed a rule of evidence. But we are of opinion that the statute ought not to be limited to its operation on the form of contracts made in this state. The generality of the words alone, "no agreement," is not conclusive. But the statute evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practiced without this safeguard. The nature of the contract is such that it naturally would be performed or sued upon at the domicile of the promisor. If the policy of Massachusetts makes void an oral contract of this sort made within the state, the same policy forbids that Massachusetts testators should be sued here upon such contract without written evidence, wherever it is made.

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If we are right in our understanding of the policy established by the legislature, it is our duty to carry it out so far as we can do so without coming into conflict with paramount principles. "If oral evidence were offered which the *lex fori* excluded, such exclusion, being founded on the desire of preventing perjury, might claim to override any contrary rule of the *lex loci contractus*, not only on the ground of its being a question of procedure, but also because of that reservation in favor of any stringent domestic policy, which controls all maxims of private international law." Westlake, *Private International Law*, 3d ed. § 298; Whart. *Conf. L.* 2d ed. § 766.

In our view, the statute, whatever it expresses, implies a rule of procedure broad enough to cover this case. It is not necessary to decide exactly how broad the rule may be,—whether, for instance, if, by some unusual chance, a suit should happen to be brought here against an ancillary administrator upon a contract made in another state by one of its inhabitants, the contract would have to be in writing. The rule extends, at least, to contracts by Massachusetts testators. It might be possible to treat the words, "signed by the party whose executor or administrator is sought to be charged," as meaning, "signed by the party whose executor or administrator is sought to be charged in Massachusetts," and to construe the whole statute as directed only to procedure. Compare *Fant v. Miller*, 17 Gratt. 47, 72, *et seq.*; *Denny v. Williams*, 5 Allen, 1, 3, 9. Upon this question, also, we express no opinion. All that we decide is that the statute does apply to a case like the present.

The law of the testator's domicile is the law of the will. A contract to make a will means an effectual will, and therefore a will good by the law of the domicile. In a sense the place of performance, as well as the forum for a suit in case of breach, is the domicile. We do not draw the conclusion that, therefore, the validity of all such contracts, wherever sued on, must depend on the law of the domicile. That would leave many such contracts in a state of indeterminate validity until the testator's death, as he may change his domicile so long as he can travel. But the consideration shows that the final domicile is more concerned in the policy to be insisted on than any other jurisdiction, and justifies it in framing its rules accordingly. There would be no question to be argued if the law were in terms a rule of evidence. It is equally open for a state to declare, upon the same considerations which dictate a rule of evidence, that a contract must have certain form, if it is to be enforced against its inhabitants in its courts. Legislation of this kind, for contracts which thus necessarily reach into the jurisdiction in their operation, hardly goes as far as statutes dealing with substantive liability, which have been upheld. *Com. v. Macdon*, 101 Mass. 1, 100 Am. Dec. 89.

If the statute applies, the fact that the plaintiff has furnished the stipulated consideration will not prevent its application.

Exceptions overruled.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina

William HALL *et al.*, Appts.

(114 N. C. 909.)

There is no jurisdiction in North Carolina of the crime committed by persons who, while standing in that state, shoot across the state boundary and kill a person in Tennessee.

(April 24, 1894.)

APPEAL by defendants from a judgment of the Superior Court for Cherokee County convicting them of murder. *Reversed.*

The facts are stated in the opinion.

Mr. G. S. Ferguson for appellants.

Mr. Frank I. Osborne, *Atty. Gen.*, for the State.

Shepherd, *Ch. J.*, delivered the opinion of the court:

There was testimony tending to show that the deceased was wounded and died in the state of Tennessee, and that the fatal wounds were inflicted by the prisoners by shooting at the deceased while they were standing within the boundaries of the state of North Carolina. The prisoners have been convicted of murder, and the question presented is whether they committed that offense within the jurisdiction of this state.

It is a general principle of universal acceptance that one state or sovereignty cannot enforce the penal or criminal laws of another, or punish crimes or offenses committed in and against another state or sovereignty. Rorer, *Interstate Law*, 308; Story, *Conf. L.* 620-623; *The Antelope*, 23 U. S. 10 Wheat. 66-123, 6 L. ed. 268-282; *State v. Knight*, Taylor & C. (N. C.) 65; *State v. Brown*, 2 N. C. 100, 1 Am. Dec. 548; *State v. Cutshall*, 110 N. C. 538, 16 L. R. A. 180. There may, by reason of a "statute or the nature of a particular case," be apparent exceptions to the rule; as, if "one personally out of the country puts in motion a force which takes effect in it, he is answerable where the evil is done, though his presence was elsewhere. So, where a man, standing beyond the outer line of a territory, by discharging a ball over the line kills another within it; or himself, being abroad, circulates libel here, or in like manner obtains here goods by false pretenses; or does any other crime in our own locality against our laws,—he is punishable, though absent, the same as if he were present." 1 Bishop, *Crim. L.* 109, 110; *State v. Cutshall*, *supra*. These cases, however, are but instances of crimes which are considered by the law to have been committed within our territory, and in no wise conflict with the general principle to which we have referred.

NOTE.—*Locality of crime committed by shooting or striking across state boundary.*

I. *What constitutes the offense.*

II. *The question of locality.*

III. *Statutory provisions regarding.*

IV. *Constitutionality of such statutes.*

The subject of the note is confined to the consideration of this question in the abstract; what state has jurisdiction over a person who, while located within the limits of one state, commits an offense by shooting or striking one standing within the boundary of another state; in other words, is the crime triable in the courts of the state where the prisoner stands at the time he fires the shot or strikes the blow, or have the courts of the state wherein his victim is located at the time the act is committed jurisdiction over the criminal? Where is the crime complete: is it so in the jurisdiction where he fires the shot or uplifts his hand to strike the blow, or where the shot or blow takes effect upon the body of his victim?

There is a clear distinction between cases where a wound is inflicted in one jurisdiction and death ensues in another, and cases where the accused in one state puts in operation a force which takes effect in another.

The cases that are strictly in point are not very numerous and are in keeping with the holding in the principal case, such decisions giving jurisdiction where the shot takes effect, and not where the guilty party stands at the time he puts the force in motion that leads to the perpetration of and ends in the crime.

In *STATE v. HALL* the prisoner discharged the shot in North Carolina and it took effect in Tennessee, and therefore according to the earlier cases the Tennessee courts had jurisdiction.

The statutory provisions in some of the states will be found to cover the question, providing for the trial of the offender where the act is consummated.

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See also 47 L. R. A. 731.

I. *What constitutes the offense.*

At common law murder consists of the stroke and the consequent death. *State v. McCoy* (1844) 8 Rob. (La.) 545, 41 Am. Dec. 301.

Until death ensues there is no felony. *State v. Ayers* (1874) 8 Baxt. 96; 3 Hale, P. C. 427.

The concurrence of both the stroke and the consequent death are necessary for the consummation of the crime, and under the common-law doctrine when they occur in different parts the offense is incomplete in either. *State v. McCoy*, *supra*.

The crime of murder consists in the inflicting of a fatal wound coupled with requisite contemporaneous intent or design, which legally renders it felonious, the subsequent death of the injured party being a result or sequence, rather than a constituent elemental part of the crime. *Green v. State* (1890) 66 Ala. 40, 41 Am. Rep. 744,—adopting the suggestion of the court in *Rex v. Hargrave* (1831) 5 Car. & P. 170, that the giving of the blows which caused the death constituted the felony.

And is said to be committed when the fatal blow is given. *People v. Gill* (1856) 6 Cal. 637.

If the act charged in the indictment be criminal in the state, it must be either by force of some statute or upon general principles. *State v. Carter* (1859) 27 N. J. L. 490.

It has been held under Ohio Rev. Stat., § 37, that it is not the place of the death, but the place where the criminal act is perpetrated or consummated to which the jurisdiction to try the case is given. *Robbins v. State* (1857) 8 Ohio St. 131.

Yet a man may be guilty of homicide by shooting even if he stand afar off, out of sight, or in another jurisdiction. *Com. v. Macloon* (1869) 101 Mass. 1, 100 Am. Dec. 89; *People v. Adams* (1845) 3 Denio, 207, 45 Am. Dec. 468; *Adams v. People* (1848) 1 N. Y. 176.

II. *The question of locality.*

The general doctrine is that penal laws are strict-

Starting, then, with this fundamental principle, and avoiding a general discussion of the subject of extraterritorial crime, we will at once proceed to an examination of the interesting question which has been submitted for our determination. It seems to have been a matter of doubt, in ancient times, whether, if a blow were struck in one county, and death ensued in another, the offender could be prosecuted in either, though, according to *Lord Hale* (P. C. 426), "the more common opinion was that he might be indicted where the stroke was given." This difficulty, as stated by Mr. Starkie, was sought to be avoided by the legal device "of carrying the dead body back into the county where the blow was struck; and the jury might there," he adds, "inquire both of the stroke and death." 1 Starkie, Crim. Pl. 2d ed. 304; 1 Hawk. P. C. 18; 1 East, P. C. 361. But to remove all doubts in respect to a matter of such grave importance, it was enacted by the Statute 2 & 3 Edw. VI. that the murderer might be tried in the county where the death occurred. This statute, either as a part of the common law or by re-enactment, is in force in many of the states of the Union, and, as applicable to counties within the same state, its validity has never been questioned. See Acts 1891, chap. 68, and also Code Tenn. § 5801. But, where its provisions have been extended so as to affect the jurisdiction of the different states, its constitutionality has been vigorously assailed. Such legislation, however, has been very generally, if not, indeed, uniformly,

sustained. *Simpson v. State*, 4 Humph. 461; *Green v. State*, 66 Ala. 40, 41 Am. Rep. 744; *Com. v. Macdon*, 101 Mass. 1, 100 Am. Dec. 89; *Tyler v. People*, 8 Mich. 326; *Hemmaker v. State*, 12 Mo. 453, 51 Am. Dec. 172; *People v. Burke*, 11 Wend. 129; *Hunter v. State*, 40 N. J. L. 495. Statutes of this character "are founded upon the general power of the legislature, except so far as restrained by the constitution of the commonwealth and the United States, to declare any willful or negligent act which causes an injury to person or property within its territory to be a crime." Kerr, Homicide, 47. See also, remarks of *Justices Bradley* in the habeas corpus proceedings of *Guiteau*, reported in the notes to the case of *United States v. Guiteau*, 47 Am. Rep. 247, 1 Mackey, 498.

In many of the states there are also statutes substantially providing that where the death occurs outside of one state, by reason of a stroke given in another, the latter state may have jurisdiction. See our Act, Code, § 1197. The validity of these statutes seems to be undisputed; and indeed it has been held in many jurisdictions that such legislation is but in affirmance of the common law. This view is taken by the supreme court of the District of Columbia in *Guiteau's Case*, *supra*, in which the authorities are collected, and their principle stated, with much force, by *Justice James*. It is manifest that statutes of this nature are only applicable to cases where the stroke and the death occur in different jurisdictions; and it is equally clear that, where the stroke and the death

ly local and affect nothing more than they can reach. *Scoville v. Canfield* (1817) 14 Johns. 338, 7 Am. Dec. 467; *Folliott v. Ogden* (1789) 1 H. Bl. 135. *Cowp.* 343; *Dickson v. Dickson* (1826) 1 Yerg. 110, 24 Am. Dec. 444; *Suffolk Bank v. Kidder* (1840) 12 Vt. 464, 36 Am. Dec. 354; *Stewart v. Jessup* (1875) 51 Ind. 413, 19 Am. Rep. 739.

But among the exceptions to this general rule are the cases where one being at the time in another state or country does a criminal act which takes effect in another state as, *inter alia*, where one, contrary to the laws of the state, or from a standpoint beyond the line of the state, fires a gun or sets in motion any force that inflicts an injury within the state for which a criminal indictment will lie. *State v. Cutshall* (1892) 17 L. R. A. 130, 110 N. C. 588, 541.

Each state may protect her own citizens in the enjoyment of life, liberty, and property, by determining what acts within her own limits shall be deemed criminal, and by punishing the commission of those acts, the right of punishment extending not only to persons who commit infractions of the criminal law actually within the state, but also to all persons who cause such infractions as are, in contemplation of law, within the state. *Johns v. State* (1892) 19 Ind. 421, 81 Am. Dec. 408.

The general proposition that no man is to suffer criminally for what he does out of the territorial limits of the country, if applied to a case where the act is completed out of the country, is correct, but it is the highest injustice that a man should be protected in doing a criminal act here because he is personally out of the state, his act being here although he is not. A man standing without the outer line of one state and discharging a ball over the line and killing another has been held punishable for the crime even though a felony. *State v. Grady* (1867) 34 Conn. 118.

For in such cases if the jurisdiction of the courts

over his person depend upon his voluntary appearance before the tribunal, or within their territorial limits, the criminal in most instances would doubtless go unpunished. *State v. Chapin* (1856) 17 Ark. 561, 65 Am. Dec. 452.

So the principle that a crime committed in a foreign country and in violation of the laws thereof, cannot, by mere legislative fiction or construction, be constituted an offense in another country, does not apply to a case where a crime is perpetrated partly in one state or country, and partly in another, where the act done in the country taking jurisdiction amounts to a substantial wrong and not merely to an incident thereof which of itself might be innocent. *Green v. State* (1880) 66 Ala. 41, 41 Am. Rep. 744.

The principle of the common law *qui facit per alium facit per se* is of universal application both in criminal and civil cases, and he who does an act by his agent is considered as if he had done it in his own proper person. *Barkhamsted v. Parsons* (1819) 3 Conn. 1.

Therefore, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. *Simpson v. State* (1893) 22 L. R. A. 243, 62 Ga. 41.

Persons guilty of such acts are liable to indictments and punishment when they venture voluntarily within the territorial bounds of the offended sovereignty, or when under the provisions of extradition laws, or the terms of treaties, they are allowed to be brought into its limits to answer such charges. *State v. Cutshall* (1892) 16 L. R. A. 130, 110 N. C. 538, 541.

In *State v. Chapin* (1856) 17 Ark. 561, 65 Am. Dec. 452, it is said if a man standing without our boundary line in Texas, were, by firing a gun or propelling any other implement of death, to kill a per-

occur in the same state, the offense of murder at common law is there complete, and the courts of that state can alone try the offender for that specific common-law crime."

The turning point, therefore, in this case, is whether the stroke was, in legal contemplation, given in Tennessee, the alleged place of the death; and upon this question the authorities all seem to point in one direction. In the early case of *King v. Coombes*, 1 Leach, C. C. 4th ed. 888, it was held that "if a loaded pistol be fired from the land at a distance of 100 yards from the sea, and a man is maliciously killed in the water 100 yards from the shore, the offender shall be tried by the admiralty jurisdiction, for the offense is committed where the death happened, and not at the place whence the cause of the death proceeds." See also, 1 East, P. C. 367, and 1 Chitty, Crim. L. 154. In the case of *United States v. Davis*, 2 Sumn. 482, Fed. Cas. No. 14,932, a gun was fired from an American ship lying in the harbor of Raiatea, one of the Society isles, and a foreign government, by which a person on board a schooner belonging to the natives, and lying in the same harbor, was killed. *Mr. Justice Story*, in the course of his opinion, said: "What we found ourselves upon in this case is that the offense, if any, was committed on board of a foreign schooner belonging to inhabitants of the Society Islands, and of course under the territorial government of the Society islands, with which kingdom we have trade and friendly intercourse, and which our government may be

presumed (since we have a consul there) to recognize as entitled to the rights and sovereignty of an independent nation, and of course entitled to try offenses committed within its territorial jurisdiction. I say the offense was committed on board of the schooner; for, although the gun was fired from the ship *Rose*, the shot took effect, and the death happened, on board of the schooner, and the act was, in contemplation of law, done where the shot took effect.

We lay no stress on the fact that the deceased was a foreigner. Our judgment would be the same if he had been an American citizen." In *Simpson v. State*, 92 Ga. 41, 22 L. R. A. 248, it was held by the supreme court of Georgia that one who, in the state of South Carolina, aims and fires a pistol at another who, at the time, is in the state of Georgia, is guilty of the offense of "shooting at another," although the ball did not take effect, but struck the water in the latter state. The court said: "Of course, the presence of the accused within this state is essential to make his act one which is done in this state. But the presence need not be actual; it may be constructive. The well-established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual.

... So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes. If

son in Arkansas, he would be guilty of murder here, and answerable to our laws, because the crime is regarded as being committed where the shot, or other implement propelled, takes effect.

For a shot fired in one state taking operation in another, the prisoner is properly tried and convicted in the latter state. *People v. Adams* (1846) 8 Denio, 190, 45 Am. Dec. 468.

Where a person being within one jurisdiction maliciously fires a shot which kills a man in another jurisdiction, it is murder in the latter jurisdiction, the illegal act being there consummated. *State v. Wyckoff* (1864) 31 N. J. L. 65.

The question whether the sword, the ball, or any other missile passes over the boundary in the act of striking, being a matter of no consequence, the act is where it strikes, as much where the party who strikes stands out of the state, as where he stands in it. *State v. Carter* (1859) 27 N. J. L. 499.

The criminal act being the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. *Ibid.*

All the cases turned upon the question where the act was done. The person who does it may, when he does it, be within or without the jurisdiction, as by shooting or sending a letter across a border; but the act is not the less done within the jurisdiction because the person who does it stands without. *Ibid.*

Personal presence at the place where the crime is perpetrated is not indispensable to make one a principal offender in its commission; thus where a gun is fired from the land and kills a man at sea, the offense must be tried by the admiralty, and not by the common-law courts; the crime being committed where death occurs and not at the place from whence the cause of death proceeds. *People v. Adams, supra.*

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Where the crime is committed by an absent person, through the means of a merely material agency or by an innocent sentient agent, the offender is punishable where the act is done, the law implying a constructive presence from the necessity of the case; otherwise the anomaly would exist of a crime but no responsible criminal. *State v. Wyckoff, supra.*

The doctrine of constructive presence amounts to this that the crime shall be regarded as committed where the injurious act is done, the wounding must be done where there is a person wounded, and the criminal act is the force against his person, that is the immediate act of the assailant, whether he strikes with a sword or shoots a gun; and he may very reasonably be held present where his forcible act becomes operative. *Simpson v. State* (1893) 22 L. R. A. 248, 92 Ga. 193.

The presence of the accused within the state is essential to make his act one which is done in the state, but such presence need not be actual, it may be constructive. *Ibid.*

An actual or constructive presence is sufficient to render a prisoner liable as a principal in felony. *Bex v. Gordon* (1789) 2 Leach, C. C. 551, 553.

He may be considered as present where his acts become operative. *Tyler v. People* (1860) 8 Mich. 321.

His unlawful act being the efficient cause his personal presence at the time of its beginning, its continuing or its result, is not essential. *Com. v. Macloon* (1890) 101 Mass. 1, 100 Am. Dec. 89; *Simpson v. State, supra.*

Such a person being regarded by the law as accompanying the bullet, and as being represented by it, up to the point where it strikes. *Simpson v. State, supra.*

As he is the immediate actor in the perpetration of the crime. *Johns v. State* (1862) 19 Ind. 431, 81 Am. Dec. 408.

an unlawful shooting occurred while both the parties were in this state, the mere fact of missing would not render the person who shot any the less guilty. Consequently, if one shooting from another state goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle." The court approved of the language of Campbell, J., in *Tyler v. People*, 8 Mich. 320, that "a wounding must of course be done where there is a person wounded, and the criminal act is the force against his person. That is the immediate act of the assailant, whether he strikes with a sword or shoots with a gun, and he may very reasonably be held present where his forcible act becomes directly operative." In speaking of crime committed, by one out of the state, through an innocent agent, Judge Rorer says: "In such case the innocent person in the state is the means used to perpetrate the crime therein, just as if a person who shoots out of a state across the line into another state, and therein intentionally kills another person, is in such case guilty of committing the criminal act within the state without himself being at the time therein." Interstate Law, 326. In *Com. v. Macloon*, *supra*, Justice Gray says that, if one's "unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result is not essential. He may be held guilty of homicide by shooting, even if he stands afar off, out of sight, or in another jurisdiction." In *State v. Carter*, 27 N. J.

L. 499, the supreme court of New Jersey, in discussing a kindred question, said: "This is not the case where a man stands on the New York side of the line, and, shooting across the border, kills one in New Jersey. When that is so, the blow is in fact struck in New Jersey. It is the defendant's act in this state. The passage of the ball after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile passes over a boundary in the act of striking is a matter of no consequence. The act is where it strikes, as much where the party who strikes stands out of the state as where he stands in it." In *State v. Chapin*, 17 Ark. 561, 65 Am. Dec. 452, the court said: "For example, if a man standing beyond our boundary line, in Texas, where, by firing a gun or propelling any other implement of death, to kill a person in Arkansas, he would be guilty of murder here, and answerable to our laws, because the crime is regarded as being committed where the shot or other implement propelled takes effect." See also *People v. Adams*, 3 Denio, 207, 45 Am. Dec. 468. In *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. 538, Fed. Cas. No. 13,446, Woodbury, J., said: "I can conceive of crimes, likewise, like civil injuries, which may be prosecuted in two states, though sometimes in different forms

Being there by the instrument used to effect his purpose, and which the law holds sufficient to make him responsible at that place for the act done there. *Ibid.*

So if one shooting from another state goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle. *Simpson v. State*, *supra*.

In the above case it was contended on the part of the defendant, that inasmuch as the party was not struck by the bullet, fired from the South Carolina side, no effect whatever was produced in Georgia by the act in question, but the court found against such contention the evidence showing conclusively that, although the prosecutor was not injured, the bullet did strike the water in the river in close proximity to him, and within the state of Georgia, and therefore the act took effect in Georgia, although not the precise effect intended, the accused being guilty of a criminal act.

So in *Hatfield v. Com.* (1889) 11 Ky. L. Rep. 468, the defendants were indicted, tried, and convicted for murder on or near the Virginia line one of the defendants not being actually present when the murder was committed, but remained with his gun on the opposite side of the river two or three hundred yards distant, ready and near enough to give aid and assistance should an attempt be made to rescue, and to administer an oath to each on their return from the murder that they would never reveal the action of any one connected with the act, the indictment also charging a conspiracy, the contention being that the defendant being on the Virginia side of the boundary line could not in contemplation of law have aided or abetted the murder in Kentucky, so as to bring himself within the jurisdiction of the Kentucky courts and that he was not near enough at the time of the commission of the offense to have aided or abetted in its commission,

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and therefore could not be convicted as principal, the court held that he was rightly convicted in the Kentucky courts, stating that while it was not pretended that the courts of one state could enforce its laws beyond the state boundary, yet that where one puts in operation the force or power that causes the injury he is responsible where the wrong is perpetrated, although he may not be actually present.

Where a loaded pistol is fired from the land at a distance of one hundred yards from the sea, and a man is maliciously killed in the water one hundred yards from the shore, the offender is to be tried by admiralty jurisdiction, the offense being committed where the death happens and not at the place from whence the cause of death proceeded. *King v. Coombes* (1785) 1 Leach, C. C. 4th ed. 388, 1 East, 367.

In *United States v. Davis* (1837) 2 Sumn. 482, the offense was committed by shooting from an American ship in the Raiatea harbor, one of the Society islands and a foreign government, the shot taking effect in the body of the person on board a foreign schooner belonging to inhabitants of the islands, and causing his death, and the court held that the offense was committed on board of the schooner, for although the gun was fired from the ship, yet the shot took effect and the death happened on board of the schooner, and the act was therefore in contemplation of law done where the shot took effect.

In *Grosvenor v. Inhabitants of the Lath of St. Augustine* (1810) 12 East, 244, action was brought under the English Statute, 19 Geo. II., chap. 24, § 6, against the inhabitants by the executor of a revenue officer, who was shot while on a boat between high and low water mark in pursuit of a smuggling boat, by a person on the shore within the Lath, the officer subsequently dying of the wound on the high sea beyond low-water mark and out of the

as here So, if one fires a gun in one state, which kills an individual in another state, there may be the offense of using a deadly weapon in the first state (that is, we suppose, by statute) and committing murder by killing in the second state." In speaking of the validity of acts similar to that of Edw. VI., *supra*, Mr. Black, in an article in the Central Law Journal (vol. 32, p. 819), remarks: "There is less difficulty in cases where the means of death employed, though set in motion in one jurisdiction, reach and operate upon their object in another territory, for of course the act can amount to nothing more than an attempt until the fatal agency comes in contact with the body of the victim." See also, upon this subject, 20 Am. L. Rev. p. 918.

In view of the foregoing authorities, it cannot be doubted that the place of the assault or stroke in the present case was in Tennessee; and it is also clear that the offense of murder at common law was committed within the jurisdiction of that state. If this be so, it must follow that unless we have some statute expressly conferring jurisdiction upon the courts of this state, or making the act of shooting under the circumstances a substantive murder, the offense with which the prisoners are charged can only be tried by the tribunals of Tennessee. It is true that in Wharton's Criminal Law (sec. 288) it is said in a general way that "a concurrent jurisdiction exists in the place of starting the offense;" but by a reference to the cases cited in support of the proposition it will be read-

ily seen that they have no application to the question under consideration. These and like authorities are where libels are uttered in one state to take effect in another (*United States v. Worrall*, 24 U. S. 2 Dall. 388, 1 L. ed. 427); or where, either by common law or by statute, the place of the stroke has concurrent jurisdiction (*Green v. State*, *supra*); or where an accessory before the fact in one state to a felony committed in another was held to be indictable in the state where he became accessory (*State v. Chapin*, *supra*); or in certain cases of false pretenses, or in conspiracies, where an overt act is committed at the place of the trial; or where, by statute, a particular "section" of an offense committed in one jurisdiction is there made indictable, as, for instance, the act of shooting or unlawfully using a deadly weapon within the state, as in the present case. In some instances there may be concurrent jurisdiction of the whole offense, and in others there may exist the jurisdiction of an attempt in one state and of the consummated offense in another. In a note to the preceding section the author thus explains: "The place of such residence [that is, where the offense is started] has jurisdiction over the attempt or conspiracy, as the case may be. The place of the consummation has jurisdiction of the offense consummated on its soil." In respect to this very matter the learned author has made his meaning entirely clear in his article on the conflict of laws. 1 Crim. L. Mag. 695. In putting the case of A., in New York, shooting B. in Connecticut, he says that the place

Lath, it was held that the act gave the remedy against the inhabitants where the act was committed; that is, where the officer endeavoring to apprehend the offenders was killed, the shot which produced the death having been fired from the shore within the Lath bringing the case within the fair meaning of the act, the object of which was to make the inhabitants of the place where the act was done which caused the death, answerable for it.

Where the indictment charged the defendant with inflicting the mortal blows in New York and the death ensued in New Jersey, the court held that no act was done in that state by the defendant, inasmuch as he sent no missile or letter, or message that operated as an act within the state, but the coming of the party injured into the state afterwards was his own voluntary act, and in no way the act of the defendant, and that therefore the prisoner was not triable in the courts of that state, section 3 of Nixon's Digest, 184, not applying to such cases, the court distinguishing the case from that of a man standing on the New York side of the line and shooting across the border killing a person in New Jersey, the killing in such case being the defendant's act within the latter state, the passing of the ball after it crosses the boundary and its actual striking being the continuous act of the defendant. *State v. Carter* (1886) 27 N. J. L. 499.

The Mississippi Code, section 314, makes an express statutory provision requiring the indictment to be found where the death occurs, and thus removed the doubt which existed at the common law. *Stoughton v. State* (1850) 13 Smedes & M. 255; *Riggs v. State* (1858) 28 Miss. 51; *Turner v. State* (1855) 28 Miss. 684.

III. Statutory provisions regarding.

The question has been dealt with in some of the states by the legislature having given the courts of 28 L. R. A.

the state wherein the offense is consummated jurisdiction of the prisoner even though he is out of the state at the time of the commission of the offense provided it be consummated through the intervention of an innocent or guilty agent, or by any other means proceeding directly from him. Thus, by section 3717 of Brickell's Criminal Code of Alabama, ed. 1886, page 4, it is provided when the commission of an offense commenced elsewhere is consummated within the boundaries of this state, the offender is liable to punishment here although out of the state at the commission of the offense charged, if he consummated it in this state through the intervention of an innocent or guilty agent, or by any other means proceeding directly from himself, and the jurisdiction in such case, unless otherwise provided by law, is in the county in which the offense was consummated.

Similar provisions in almost the same identical language are to be found in,—the Penal Code of Arizona, § 1216, p. 764, ed. 1887; California, Deering's Annotated Codes & Statutes, vol. 4, § 778, p. 173; Dakota, Code, ed. 1885, title 4, chap. 1, § 72, p. 1284; Florida, Rev. Stat. ed. 1892, § 2369, p. 769; Idaho, Rev. Stat. ed. 1887, title 3, chap. 1, § 7481, p. 787; Illinois, Starr & C. Anno. Stat. vol. 1, par. 461, § 10, p. 866; Indiana, Rev. Stat. annotated ed. 1888, chap. 4, art. 1, Crim. Proc. § 1574; Iowa, McClain's Annotated Code, ed. 1888, vol. 2, § 5541, p. 1586; Kansas, Gen. Stat. annotated ed. 1889, vol. 2, par. 5084, § 21, p. 1664; Mississippi, Code of Crim. Proc. ed. 1892, § 1322, p. 890; Montana, Comp. Stat. ed. 1887, chap. 3, § 81, p. 409; Oregon, Hill's Annotated Laws, vol. 1, chap. 3, § 1212, p. 753; Tennessee, Rev. Stat. ed. 1871, vol. 2, § 4973.

It has been held that the above section of the Indiana Act does not apply to offenses committed and consummated without the state, although the means by which such offense was committed and

of the consummation of the crime should be regarded as its locality. "Until such consummation, a crime, so far as jurisdiction is concerned, is simply an attempt, and only punishable as such. It may be indictable for A. merely to discharge a gun. It may be said: 'This is a dangerous act, punishable as such;' or it may be said: 'From all the circumstances of the case, we infer that you are attempting B's life, and you are to be indicted for this attempt.' But it is not until we see before us a man wounded by such a shot that the crime, in its completeness, exhibits itself."

There being, then, no concurrent jurisdiction at common law, we will now consider whether it has been conferred by statute; for it is well settled that "whenever a homicide is committed partly in, and partly out of, the jurisdiction where the charge is made, the power to punish it depends upon the question whether so much of the act as operates in the county or state in which the offender is indicted and tried has been declared to be punishable by the law of that jurisdiction." *Kerr, Homicide, 226; Com. v. Macloon, supra.* It is not very seriously insisted on the part of the state that our statute (Code, § 1197) applies to this case; but, inasmuch as it was referred to on the argument, it is proper that we should briefly examine into its provisions. It provides: "In all cases of felonious homicide, when the assault shall have been made within this state and the person assaulted shall die without the limits thereof, the offender shall be indicted and punished for the crime in the county where

the assault was made, in the manner, to all intents and purposes, as if the person assaulted had died within the limits of this state." This statute has received a judicial construction by this court in *State v. Dunkley, 25 N. C. 116*, and it was held that it did not create any new offense, but merely removed a difficulty which existed as to the place of the trial. In view of the authorities cited, it can hardly be contended that the assault in the present case was committed in this state; and especially is this so when the assault mentioned in the statute evidently means, not a mere attempt, but such an injury inflicted in this state which results in death in another state. This would seem manifest from the history of the legislation as well as the language of the act, which plainly contemplates that every part of the offense, except the death, must have occurred in this state. It was a subject of doubt, as we have seen, whether the accused could be tried in the place of the stroke, the death having occurred without the jurisdiction; and it was to remove this doubt alone that this and similar legislation was resorted to. It was, of course, never questioned that the place where both the stroke and the death occurred was the place where the crime was committed. We are relieved, however, from all doubt (if any existed) upon this point, by the opinion of Chief Justice Ruffin in *Dunkley's Case, supra.* He says that the act "does not profess to define 'felonious homicide,' or to constitute the crime by any particular acts, but merely says that in certain cases of felonious homicide the offender may

consummated may be within the state. *Stewart v. Jessup (1875) 51 Ind. 413, 19 Am. Rep. 739.*

By section 678 of the New York Code of Criminal Procedure and Penal Code, ed. 1894, page 186, of the Penal Code, a person who commits an act without this state which affects persons or property within this state, or the public health, morals, or decency of this state, and which if committed within this state would be a crime, is punishable as if the act was committed within this state.

And by section 16 of the same (page 4) a person who commits within the state any crime in whole or in part, or a person who being out of the state and with intent to cause within it a result contrary to the laws of this state, does any act which in its nature and usual course results in an act or effect contrary to its laws, is punishable within the state.

By section 1700, article 211, of Wilson's Texas Criminal Statutes, it is provided if a person being at the time within this state shall inflict upon another out of this state an injury by reason of which the injured person dies without the limits of the state, he may be prosecuted in the county where he was when the injury was inflicted.

And by section 1701, article 212, of the same, if a person being at the time without the limits of this state shall inflict upon another who is at the time within this state an injury causing death, he may be prosecuted in the county where the person injured dies.

By section 1333 of the Mississippi Code of Criminal Procedure, where an offense is commenced in this state and consummated out of it, either directly by the accused, or by any means or agency procured by or proceeding from him, he may be indicted and tried in the county in which such offense was consummated or from which such means or agency proceeded.

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By section 87 of the Georgia Statutes it is provided that this state claims jurisdiction of an offense committed on any of her boundary lines with other states for the act bordering on that part of two counties as set forth in the preceding section for either county, and will proceed to arrest, indict, try, and execute until such other state shall make a demand for the accused as a fugitive from justice, in which event the progress of the case shall be suspended by order of the governor until the question of jurisdiction is settled.

IV. Constitutionality of such statutes.

The sovereign right of states to enact jurisdictional laws of this nature, has been uniformly sustained. *Green v. State (1880) 66 Ala. 40, 41 Am. Rep. 744; Hunter v. State (1878) 40 N. J. L. 496; Tyler v. People (1880) 8 Mich. 321; Steerman v. State (1847) 10 Mo. 503.*

In *Green v. State, supra*, the Alabama statute was held constitutional and valid.

In *State v. Carter (1859) 27 N. J. L. 499*, it was stated that the legislature did not intend by the New Jersey Act (Nixon's Digest, 184, § 3) to embrace cases where the injury was inflicted within a foreign jurisdiction without any act done by the defendant within its jurisdiction. Such an enactment upon general principles would be void, inasmuch as it would give the courts of the state jurisdiction over all subjects of all governments on the earth, with power to try and punish them if they could by force or fraud get possession of their persons, in all cases where personal injuries were followed by death.

For locality of crime committed through the agency of the mails or of carriers, see *note to State v. Hudson (Mont.) 19 L. R. A. 775.* E. W.

be indicted, and of course tried and punished, in the county where the stroke was given,—meaning, though it does not (like the Statute 3 & 8 Edw. VI.) expressly say so, 'in the same manner as if the death had happened in the same county where the stroke was given.' As it is plain that, in contemplation of law, the stroke was given in Tennessee, we are of the opinion that there was error in refusing to give the instructions prayed for by the prisoners.

The fact that the prisoners and the deceased were citizens of the state of North Carolina cannot affect the conclusion we have reached. If, as we have seen, the offense was committed in Tennessee, the personal jurisdiction generally claimed by nations over their subjects who have committed offenses abroad or on the high seas cannot be asserted by this state. Such jurisdiction does not exist, as between the states of the Union, under their peculiar relation to each other (Rorer, Interstate Law, 808); and, even if it could be rightfully claimed, it could not, in a case like the present, be enforced in the absence of a statute providing that the offense should be tried in North Carolina. Even in England, where it seems the broadest claim to such jurisdiction is asserted, a Statute (33 Hen. VIII.) appears to have been necessary in order that the courts of that country could try a murder committed in Lisbon by one British subject upon another. *Rea v. Sawyer*, Russ. & R. C. C. 294, cited and commented upon in *Dunkley's Case*, *supra*. In *People v. Merrill*, 2 Park. Crim. Rep. 600, it is said that, by the common law, offenses were local, and the jurisdiction in such cases depends upon statutory provisions. See also, Wheaton, International Law, 115; 1 Whart.

Crim. L. 271; 1 Bishop, Crim. L. 121. Granting, however, that in some instances the jurisdiction may exist without statute, it is not exercised in all cases. Dr. Wharton says: "It has already been stated that *ex* crimes committed by subjects in foreign civilized states, with the single exception in England of homicides, the Anglo-American practice is to take cognizance only of offenses directed against the sovereignty of the prosecuting state, perjury before consuls and forgery of government documents being included in this head." To the same effect is 3 Am. & Eng. Encyclop. Law, p. 539, in which it is said: "As to offenses committed in foreign civilized lands, the country of arrest has jurisdiction only of offenses distinctively against its sovereignty." See also, Dr. Wharton's article upon the subject in 1 Crim. L. Mag. 715. As between the states, the question is so clear to us that we forbear a general discussion of the subject. We may further remark that, while it is true that the criminal laws of a state can have no extraterritorial force, we are of the opinion that it is competent for the legislature to determine what acts within the limits of the state shall be deemed criminal, and to provide for their punishment. Certainly there can be no complaint where all the parties concerned in the homicide are citizens of North Carolina. It may also be observed that, in addition to its common-law jurisdiction, the state of Tennessee has provided by statute for the trial of an offender under the circumstances of this case.

For the reasons given, we are constrained to say that *the prisoners are entitled to a new trial*.

ILLINOIS SUPREME COURT.

PEOPLE'S LOAN & HOMESTEAD ASSOCIATION of Joliet, Ill., *Appt.*,

v.

Frank KEITH, Tax Collector.

(183 Ill. 609.)

1. A statute providing that stock and notes of a homestead loan association shall not be subject to taxation violates Const., art. 9, § 1, which declares that the general assembly shall provide needful revenue by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property.
2. The last clause of Const., art. 9, § 1, providing for the taxation of corporations and other persons specified "in such manner" as the general assembly shall direct, does not limit the effect of the first clause which requires every person and corporation to be taxed in proportion to the value of his, her, or its property, but only authorizes a difference of method for assessments.
3. Taxing homestead loan associations on their obligations held against borrowers does not constitute double taxation by reason of a tax

on the real estate mortgaged to the association by such borrowers.

(October 22, 1894.)

APPEAL by complainant from an order of the Circuit Court for Will County dissolving an injunction which had been previously granted restraining defendant from collecting certain taxes which had been assessed against the complainant association. *Affirmed*.

The facts are stated in the opinion.

Messrs. Julius Stern, A. O. Marshall, Haley & O'Donnell, R. E. Barber, C. H. Brown, George McNulty, and C. W. Brown for appellant.

Messrs. Hill, Haven & Hill, for appellee:

The law exempting such property of homestead loan associations is unconstitutional. Const. 1870, art. 9, § 1, makes it the duty of the legislature to tax all property so that all may pay their proportional share of the necessary taxes.

People v. Worthington, 21 Ill. 171, 74 Am. Dec. 86; *People v. Chicago*, 124 Ill. 636.

Credits are required to be taxed and the statute is not subject to any constitutional objection even if the property for which the credit is given is also taxable.

NOTE.—For legislative power to exempt property from taxation, see note to *Hogg v. Mackay* (Or.), 19 L. R. A. 77.

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Goldgart v. People, 106 Ill. 25; *People v. Worthington*, *supra*.

Section 11 of the Homestead Loan Association Act is clearly an exemption statute. Its purpose, as stated in the act itself, is to exempt the stock and notes of corporations, organized under that act, from taxation. That being so, it must be strictly construed, and it devolves upon those claiming the property to be exempt to clearly show that it comes within the constitutional exemption.

People v. Wabash Hospital, 188 Ill. 85; *People v. Ryan*, 188 Ill. 287; *Re Swigert*, 123 Ill. 267; *People v. Western Seaman's Friend Soc.*, 87 Ill. 246; *People v. Chicago*, *supra*; *Adams County v. Quincy*, 6 L. R. A. 155, 130 Ill. 578.

The notes and mortgages which were assessed in these cases were and are credits of these corporations and property within the meaning of that word as used in section 1, article 9, of the Constitution of this state.

People v. Soldier's Home & Baptist Theological Union, 95 Ill. 565; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 560; *People v. Chicago*, 124 Ill. 640; *People v. Anderson*, 117 Ill. 50; *Hunsaker v. Wright*, 80 Ill. 146; *O'Kane v. Treat*, 25 Ill. 557; *Jack v. Weennett*, 115 Ill. 105, 56 Am. Rep. 129; *Jacksonville Trustees v. McConnel*, 12 Ill. 188; *Hayward v. People*, 145 Ill. 55; *Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill. 561.

The second clause of section 1, article 9, of the Constitution does not authorize the legislature to exempt from taxation any corporate property.

Ottawa Gas Light & Coke Co. v. People, 138 Ill. 346; *Sterling Gas Co. v. Higby*, 184 Ill. 561; *La Salle & P. Horse & Dummy R. Co. v. Donoghue*, 127 Ill. 29; *Coal Run Coal Co. v. Finlen*, 124 Ill. 666; *Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill. 579.

Mr M. T. Maloney, Atty-Gen., also for appellee.

Craig, J., delivered the opinion of the court:

The main question involved in this case, as presented by the record, is whether section 11 of chapter 32 of the Act relating to homestead loan associations, as amended in 1887 and 1891 (Rev. Stat. 1893, chap. 32, § 88) is valid. That section is as follows: "Corporations organized under this act being of the nature of co-operative associations, therefore no interest premiums, fines, or interest on such premiums that may accrue to said corporation, according to the provisions of this act shall be deemed usurious and the same may be collected as other debts of like amount may be collected by law in this state, and all money paid to such corporations being at once loaned out and placed into taxable property and the shares of stock and notes provided for in this act being simply evidence as to where such money has been placed, therefore such stock and notes shall not be subject to taxation."

It is claimed by counsel who insist on the validity of the assessment made by the assessor on the notes and mortgages of the loan and homestead association that the section of the act is in plain conflict with sections 1, 2,

and 3 of article 9 of the Constitution. These sections are as follows:

"Section 1. The general assembly shall provide such revenue as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph, and express interests or business, vendors of patents and persons or corporations owning or using franchises or privileges, in such manner as it shall from time to time direct by general law uniform as to the class upon which it operates.

"Sec. 2. The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution.

"3. The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation; but such exemption shall only be by general law. In the assessment of real estate, incumbered by public easement, any depreciation occasioned by such easement may be deducted from the valuation of the property."

On the other hand, it is claimed that the statute is not in conflict with the constitution; that it does not exempt any property from taxation; that its effect is not to cause any property to go free from taxation, but only to prevent double taxation. The loan homestead association in question was organized under an act to enable associations of persons to become a body corporate to save funds to be loaned only among the members of such associations. Hurd's Rev. Stat. p. 378. Section 1 of the Act provides as follows: "Be it enacted by the people of the state of Illinois represented in the general assembly, that whenever any number of persons not less than five may desire to become incorporated as a mutual building loan and homestead association for the purpose of building and improving homesteads, and loaning money to the members thereof only, they shall make," etc. Section 4 provides that corporations formed under the act shall be bodies corporate and politic, may sue and be sued, may have a common seal, etc. Section 5 provides that the corporate powers shall be exercised by a board of directors. Section 6 provides that the shares of the stock shall be \$100 each, and shall be deemed personal property, transferable on the books of the company. Section 8, as amended in 1891, is as follows: "The board of directors shall hold such stated meetings not less frequently

than once a month as may be provided by the by-laws at which the money in the treasury, if one hundred dollars or more, shall be offered for loan in open meeting, and the stockholders who shall bid the highest premium for the preference or priority of loan, shall be entitled to receive a loan of one hundred dollars for each share of stock held by said stockholders; the said premium bid may be deducted from the loan in one amount, or may be paid in such proportionate amounts or installments and at such times during the existence of the shares of stock borrowed upon, as may be designated by the by-laws of the respective associations: Provided, that any such association may, by its by-laws, dispense with the offering of its money for bids in open meeting, and in lieu thereof loan its money at a rate of interest and premium fixed by its by-laws and either with or without premium, deciding the preference or priority of loan by the priority of the applications for loans of its stockholders: And, provided, that no loan shall be made by said corporation except to its own members, nor in any sum in excess of the amounts of stock held by such members borrowing. But such stockholders may borrow such fractional part of one hundred dollars as the by-laws may provide. Good and ample real estate security unincumbered except by prior loans of such associations shall be given by the borrower to secure the payment of the loan: Provided, however, that the stock of such association may be received as security to the amount of the withdrawal value of such stock." Section 13 empowers the association to purchase real estate upon which it holds a mortgage, and to hold and sell the same to any person it may desire. Various other powers are conferred by the act, but it will not be necessary to refer to them here. From the provisions of the act, it is manifest that the main object of the corporation is to raise a fund to be loaned to its stockholders, and the only substantial difference between a loan made by a corporation of this character and a loan made by any other corporation or individual is that a loan homestead association can loan to no person who is not a member. The person desiring to obtain a loan must first become a stockholder. He is then in a position to obtain a loan, and can do so, provided he is willing to pay the highest premium which may be offered for the money, and will give a mortgage on unincumbered real estate, to secure the loan, which may prove acceptable to the officers of the corporation. Upon securing the money, the borrower gives the association his note or contract and mortgage to secure the payment of the money received.

It is true that the time of payment is not fixed at a day certain, but it is fixed at such a time as the stock held by the borrower in the corporation shall mature. If the borrower fails to comply with the terms of the contract upon which he received the money, the association may foreclose the mortgage in the same manner as any other person holding a debt and mortgage. So far as the nature of the transaction is concerned, it is simply a loan of money made by the association, and the note and mortgage executed by the bor-

rower represent a debt due from the borrower to the association for the money loaned. Expressions may be found in *Holmes v. Smythe*, 100 Ill. 418, which might seem to indicate that the transaction was not a loan, but a sale of stock. What was, however, said in that case on that subject, was corrected in the later case of *Freeman v. Ottawa Bldg., Homestead & Sav. Assn.* 114 Ill. 182. It is there, among other things, said: "It is an advancement of money in anticipation of the par value of his stock, or, if it be more agreeable to so call it, a loan to be paid by stock at its par value, with covenants to make such payments of interest and installments of dues on stock, etc., as shall eventually bring such shares to their par value." Indeed, under the language of section 8, the transaction cannot be regarded otherwise than as a loan. It is there declared that the money in the treasury shall be offered for loan; that no loan shall be made by the corporation except to its own members; that good real estate security, unincumbered, shall be given by the borrower to secure the payment of the loan. Why these expressions in the act under which the association derives all its powers, if the transaction is not a loan? And if the transaction is a loan, and the note or contract and mortgage are to be treated as a credit, upon what principle can it be claimed that a credit of that character should be exempt from taxation, when an ordinary loan evidenced by the same security is not? If a stockholder in an ordinary corporation becomes indebted to the corporation, and, in order to secure the indebtedness, he executes his note and mortgage, payable to the corporation, and at the same time assigns his stock as collateral security, the proposition is a plain one that the credit is liable to be assessed in the hands of the corporation for taxes, and the legislature would have no power to exempt such credit from taxation. If we are correct in regard to the case supposed, upon what principle can it be claimed that the note or contract and mortgage given to the homestead association for a loan can be exempted from taxation? The credits in the two cases stand upon an equality, and any rule established which will subject one credit to taxation, and relieve the other, will violate that rule of uniformity in taxation required by section 1 of article 9 of the Constitution. The Constitution of 1848 contained a provision that the general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in the proportion to the value of his or her property. This provision is substantially like the first part of section 1 of article 9 of our present Constitution; and in *Hunsaker v. Wright*, 30 Ill. 146, in considering this clause of the Constitution, it is said: "These provisions were manifestly inserted in the fundamental law, for the purpose of insuring equality in the levy and collection of the taxes to support the government, whether levied for state, county, or municipal purposes. The design was to impose an equal proportion of these burthens upon all persons within the limits of the district or body imposing them. Under these provisions, the legislature has no

power to exempt or release a person or community of persons from their proportionate share of these burthens." In *Jacksonville Trustees v. McConnell*, 12 Ill. 188, it was held that, under the constitution, the legislature had no power to exempt one species of personal property from taxation while it collects a tax from another within the same jurisdiction. In the discussion of the question, it is there said: "The constitution of the state expressly declares that the mode of levying a tax shall be by valuation 'so that every person and corporation shall pay a tax in proportion to the value of his or her property.' Under this provision the legislature would have no power to exempt from taxation one species of personal property while it collected a tax from another within the same jurisdiction, and it is never to be presumed that the legislature intended to pass a law which should be contrary to the constitution either in its letter or spirit." See also *Jack v. Wiennett*, 115 Ill. 105, 56 Am. Rep. 129; and *Hayward v. People*, 145 Ill. 55.

Under section 1 of article 9 of the Constitution, we think it is plain that the burdens of taxation were intended to be cast equally upon all the property of the state, of every description. Where revenue is needed, a tax is required to be levied on a valuation so that every person and corporation shall be required to pay a tax in proportion to the value of his, her, or its property. Uniformity of taxation on all property was the cardinal principle of that section of the constitution, and had it not been for the adoption of section 8 of article 9 the legislature would have had no power in any case to enact a law exempting any property from taxation. But, under section 8, property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for schools, religious, cemetery, and charitable purposes, may be exempted from taxation, but such exemption shall only be by general law. Here power is conferred on the legislature, in certain specified cases, to exempt certain property from taxation. The section enumerates certain specified property which the legislature may, by general law, exempt. In the construction of statutes, it is a well-understood rule that the enumeration of certain specified things which may be exempted excludes all others not therein mentioned. Section 8 is therefore a limitation in the power of the legislature. The enumeration in that section of certain specified property which may be exempted is a clear limitation upon the power of the legislature to exempt any other property. Shares of stock of homestead loan associations and notes taken by such associations do not fall within the property which the legislature was authorized to exempt from taxation, and it seems plain that the section of the act of the legislature is in conflict with the constitution. Moreover, section 6 of article 9, in plain and unambiguous language, prohibits the legislature from releasing property from its proportionate share of taxes, and any law which provided that any property other than that contained in

section 8 of article 9 should be relieved from its share of taxation would be in conflict with the constitution. That section of the constitution is as follows:

"Sec. 6. The general assembly shall have no power to release or discharge any county, city, township, town or district, or the inhabitants thereof, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, nor shall commutation for such taxes be authorized in any form whatsoever."

If the legislature has no power to release any county, city, township, town, or district, or the inhabitants thereof, or the property therein, from their or its proportionate share of taxes, as declared by this section of the constitution, upon what ground can the legislature pass an act providing that the stock and notes of a loan and homestead association located in Joliet or in any other city or town shall not be subject to taxation? But it is insisted that it is not the duty of the legislature, under the constitution, to require all property to be assessed for taxation, and, under the policy adopted under the constitution, certain property has been exempted. In the argument three instances are given: First. That the shares of stock of corporations organized under the laws of the state, which are property, are exempt from taxation. Second. While credits are property, taxpayers are permitted, in making their assessment, to deduct debts from such credits, and thus a portion of the credits are exempted. Third. Bills receivable and other credits due to a bank, banker, broker, or stockjobber are property which might be taxed, yet they are not taxed under the general revenue laws of the state. The argument of counsel is quite plausible, but we do not regard the position assumed as sound. There is a well-defined and broad distinction between the real subject-matter of taxation and the mode or manner in which such taxation is to be levied. Section 1 of article 9 of the Constitution provides that the general assembly shall provide such revenue as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property. Here is a plain provision requiring the revenue to be raised by levying a tax on all property in proportion to value. But this is followed by a further provision, which allows the legislature to decide the manner in which property may be valued, and the manner in which the tax may be levied. These are matters within the discretion of the legislature, but the subject-matter of taxation has been determined and established by the constitution, and what may be exempted is therein specified, and the legislature has no power to go beyond the exemptions named in the constitution. While it may be conceded that the interest of a corporation in the corporate property and the interest of the stockholder in the corporation are separate interests, yet in reality they both represent one thing,—the money invested in the corporation by those who organized and created it. It would therefore be manifestly unjust to impose a tax on the corporation itself, and

at the same time impose a tax on the shares of stock. Such a course would, in effect, require money invested in a corporation to pay double taxation. It would be repugnant to the principle of equality and uniformity in taxation enjoined by the constitution; and had the legislature attempted to require a corporation organized and doing business under the laws of this state to pay a tax on its corporate property, and at the same time require the shares of stock issued by the corporation to be taxed, the validity of a law of that character might well be doubted. In view of these facts, the legislature, under the power conferred by the constitution to regulate the manner of ascertaining the fair valuation of property subject to taxation, and the mode to be adopted in the assessment, has provided by general law that the whole assessment shall be made against the corporation. In doing this the legislature did not intend to exempt any property from taxation, and no property was exempted from taxation. The legislature, in order to avoid confusion and complication in the assessment, determined, as it had the right to do, that the whole tax should be collected from the corporation itself. In adopting this mode of assessment, no property was exempted from taxation, but the whole burden was cast on the corporation, leaving it to adjust the matter between itself and its stockholders as it might think best.

In considering this mode of assessment, in *Ottawa Glass Co. v. McCaleb*, 81 Ill. 559, it is said: "The general assembly . . . has provided that, where the tangible property or capital stock of a corporation is assessed for taxation, the shares shall not be assessed against the holders thereof. Thus, it is seen that the shareholders, under this provision, escape taxation on their individual shares, when the company list their tangible property as capital stock. We perceive no excess in the exercise of power by the general assembly in making this provision. The company, through their directors, in exercising the franchise and managing the business for the stockholders, act as quasi trustees; and their relation to each other is so close in the management of the corporation, their business and property thus held and managed, that no reason is perceived why the general assembly, if they believe that such a mode is better calculated to prevent the shares from escaping their just proportion of taxation, may not require the taxes to be paid by the corporation, and collected by them of the shareholder, by deducting the amount from his dividends or otherwise." In the case cited, there is no intimation that the legislature, in adopting the mode of taxation it did in regard to corporations, either directly or indirectly exempted any property from taxation; and we see no reason now to change the conclusion there reached. As respects credits and the deduction authorized by the statute of bona fide debts of the person or corporation assessed from such credits, we do not understand that operation of the statute exempts property from taxation. Section 27 of the Revenue Statute (chap. 120), which authorizes the deduction of debts from credits, is as follows: "In making up the

amount of credits which any person is required to list for himself, or for any other person, company, or corporation, he shall be entitled to deduct from the gross amount of credits the amount of all bona fide debts owing by such person, company, or corporation to any other person, company, or corporation for a consideration received." It may be conceded that credits are property, but if a taxpayer holds a promissory note of \$1,000 against A., and at the same time is indebted to B. in the sum of \$1,000, he has no credits. If A. borrows of B. \$1,000, and loans the same money to C., can it be said that A. has property of the value of \$1,000, or, in other words, is he worth \$1,000? The method adopted by the legislature in requiring credits to be assessed was intended to reach such credits as the taxpayer possessed, and the only just mode that could be adopted was one allowing all bona fide debts to be deducted, leaving the balance in his hands liable to be taxed; and, in our judgment, the adoption of this mode of assessment of credits exempts no property from taxation. As to deductions allowed in the case of bankers, brokers, and stockjobbers, they stand upon the same footing. The statute authorizes the amount of deposits and the amount of accounts payable to be deducted from the bills receivable and other credits and interest due the bank. This is a method under which it may be determined what the just and true amount of credits is, held and owned by the bank, which should be assessed as property. The legislature, in providing this mode, did not intend to exempt any property of any description, but only adopted a plan under which the true and real amount of property held and owned could be ascertained. The deposits held by a bank and its accounts due represent the indebtedness of a bank; and, in order to determine the real credits owned by the bank, these items should be deducted from the bills receivable, and a statute authorizing this to be done does not, in our opinion, exempt any property from taxation. It is only a method adopted by which the true credits held and owned may be ascertained and determined.

It is also claimed that the power of the legislature over the subject of taxation of corporations and their property does not fall within the limitation prescribed by the first clause of section 1 of article 9 of the Constitution, but under the last clause of that section,—that the legislature has authority to tax or not to tax the property of corporations, as it may in its discretion deem proper. In arriving at a construction of section 1, the two clauses of the section must be considered together, and the entire section must be considered in connection with sections 2 and 3 of the same article. When this is done, we think it is plain that the framers of the constitution intended that all property should be taxed, except such as the legislature was authorized to exempt by section 8; that it was not intended by the second clause to permit any property belonging to the corporations to be exempted from taxation by the legislature, but the legislature was only authorized to adopt a different method for the assessment

of such property if it was thought proper to do so. By adopting the construction contended for, the first clause of section 1, which requires equality and uniformity, would not only be abrogated, but the legislature would have unlimited power to exempt large amounts of property of corporations, while the same property in the hands of individuals would be liable to taxation. Much reliance in the argument is placed on *Sterling Gas Co. v. Higby*, 184 Ill. 557. But in that case it was not claimed that the property assessed was exempt from taxation. Whether the legislature had the power to exempt the property of a corporation under the second clause of section 1 did not arise in that case, nor was that question decided. It was held in that case that the power to impose a tax upon the capital stock and franchise of a corporation formed for pecuniary profit was not confined to the first clause of section 1 of article 9 of the Constitution, and the second clause was not confined to occupations, but also applied to property rights. But the question here involved was not considered nor decided; and the same is true of the other cases cited.

It is also claimed in the argument, if the corporation is taxed on the obligations it holds against borrowers, the borrowing stockholder will be taxed twice on the same prop-

erty,—once on the real estate mortgaged, and again on the credit arising from the loan; and the result is double taxation. We do not concur in this view. Where a person owning a farm procures a loan, and mortgages the land, it is subject to taxation as the property of the owner, and the note and mortgage are subject to taxation as a credit in the hands of the person loaning the money; and, where a loan is procured from a homestead loan association, the borrower and the association occupy a similar position; and, if the note and mortgage and the land upon which the mortgage is given are both taxable in the one case, we see no good reason why they should not be in the other. The note (or contract) and mortgage held by a loan association are in no sense a credit of the borrower, but it is a credit belonging to the corporation. If the credit is taxed, the tax falls on the corporation, and not upon the borrower. It is true that a portion of the tax may ultimately fall on the borrower, as a stockholder of the corporation; but that amount, whatever it may be, falls upon him as a stockholder, having an investment for profit in a corporation.

In conclusion, we think that the association was liable to be assessed by the assessor and the *decree of the Circuit Court will be affirmed.*

IOWA SUPREME COURT.

D. LAKINGS, *Appt.*,
v.
PHENIX INSURANCE CO.

(.....Iowa.....)

Insurance on farming utensils and live-stock on described premises occupied by the assured, and on hay in stacks, does not cover such property when taken temporarily for the purpose of plowing to a place twenty miles distant, especially where the application which is made part of the policy asks for insurance on live-stock "while on the premises only."

(Apr. 3, 1896.)

APPEAL by plaintiff from a judgment of the District Court for Plymouth County in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Zink & Roseberry, for appellant:

This application and policy were each designed to include three kinds of property: (1) buildings on real estate; (2) personal property from the nature and use of which it would be in contemplation of the parties confined to one location, as household goods, a stock of groceries, dry goods, hardware, etc.; (3) personal property, from the nature and use

of which it would be taken into different places, as harness, wagons, horses, wearing apparel, buggies, etc.

Words descriptive of location might, as to one class of property, or as to one kind of insurance, be treated as a statement of a fact relating to the risk, and as amounting to a stipulation or condition that the property should remain there; while as to the other class of property or as to the kind of insurance, it might be construed as mere description for the purpose of identification.

DeGraff v. Queen Ins. Co. 38 Minn. 501; *Holbrook v. St. Paul Fire & Marine Ins. Co.* 25 Minn. 283; *Merrill v. Agricultural Ins. Co.* 78 N. Y. 458, 29 Am. Rep. 184; *Koontz v. Hannibal Sav. & Ins. Co.* 42 Mo. 126, 97 Am. Dec. 326.

The words which are used must be construed with reference to the property to which they are applied.

McCluer v. Girard Fire & Marine Ins. Co. 48 Iowa, 351, 22 Am. Rep. 249.

Where a person procures a policy upon his horse, harness, buggy, and phaeton, as contained in a certain barn, the presumption must be that they are in use, and that the policy is issued with reference to such use.

Ibid.

If there is no express provision in the policy limiting the appellant's use of the property destroyed to the premises described therein, and limiting the liability of the appellant in case of loss to the same, the law will not imply one.

Peterson v. Mississippi Valley Ins. Co. 24

NOTE.—For location of movable property as affecting insurance, see *note to Benton v. Farmers Mut. F. Ins. Co.* (Mich.) 26 L. R. A. 237.
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Iowa, 497, 95 Am. Dec. 748; *Mills v. Farmers Ins. Co.* 37 Iowa, 401; *Longueville v. Western Assur. Co.* 51 Iowa, 553, 33 Am. Rep. 146; *McCluer v. Girard Fire & Marine Ins. Co.* *supra*.

The character of the property insured must be considered in determining the true construction of the policy.

Longueville v. Western Assur. Co. 51 Iowa, 554, 33 Am. Rep. 146.

Policies of insurance, unless the language excludes the presumption, must be presumed to be made with reference to the character of the property insured, and to the owner's use of it in the ordinary manner, and for the purposes for which such property is ordinarily held and used.

Holbrook v. St. Paul Fire & Marine Ins. Co. 35 Minn. 233; *McCluer v. Girard Fire & Marine Ins. Co.* *supra*.

The parties to this policy must be presumed to have had all the facts incident to the use of the property in view when they made the contract.

DeGraff v. Queen Ins. Co. 38 Minn. 501; *Noyes v. Northwestern Nat. Ins. Co.* 64 Wis. 415, 54 Am. Rep. 631.

The assured had the right to use his property in the usual manner and for the usual purposes for which he kept the same, and if the loss occurred while so using the property, though in a place other than that mentioned in the policy, and the risk be increased thereby, the assured can recover, unless there is something in the policy which clearly changes this rule.

McCluer v. Girard Fire & Marine Ins. Co. 48 Iowa, 350, 22 Am. Rep. 249; *Peterson v. Mississippi Valley Ins. Co.* 24 Iowa, 495, 95 Am. Dec. 748; *Mills v. Farmers Ins. Co.* and *Longueville v. Western Assur. Co.* *supra*; *Eberett v. Continental Ins. Co.* 21 Minn. 76; *Holbrook v. St. Paul Fire & Marine Ins. Co.*, *Noyes v. Northwestern Nat. Ins. Co.* and *DeGraff v. Queen Ins. Co.* *supra*.

When a policy of insurance contains contradictory or ambiguous terms, or leaves room for construction, rendering its meaning doubtful, the courts always resolve the doubt in favor of the assured, and against a construction which makes the statements of the insured a warranty.

Indiana Farmers Live Stock Ins. Co. v. Rundell, 7 Ind. App. 426; *Phenix Ins. Co. of Brooklyn v. Pickel*, 119 Ind. 155; *Fitch v. American Popular L. Ins. Co.* 59 N. Y. 565, 17 Am. Rep. 372; *Rogers v. Phenix Ins. Co. of Brooklyn*, 121 Ind. 570; *First Nat. Bank of Kansas City v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 583; *Moulton v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447; *No. thwestern Mut. L. Ins. Co. v. Hazlett*, 105 Ind. 212, 55 Am. Rep. 192; *Carson v. Jersey City Ins. Co.* 43 N. J. L. 300, 39 Am. Rep. 586.

Meurs Sammis & Scott for appellees.

Robinson, J., delivered the opinion of the court:

The material facts shown by the petition and admitted by the demurrer are substantially as follows: The defendant issued to the plaintiff a policy insuring him against loss or damage by fire on household furniture

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and other property for the term of five years. During the life of the policy a portion of the property which it was designed to cover, consisting of three horses, one colt, harness, a plow, plow tongue, neck yoke, and whiffletree twenty bushels of corn, and half a ton of hay, was destroyed by fire. The policy was issued on an application which asked for insurance on "reapers, mowers, harvesters, and farming utensils (excepting threshing machines), wagons, buggies, and harness in buildings on premises; on grain in granaries, or in barns, in cribs, or in dwelling; . . . on horses, mules, and colts . . . while on premises only, and against loss by lightning while at large. Situated on Sec. 4, Twp. 93, Range 46, county of Plymouth, Iowa." The application also contained the following: "I warrant the foregoing application . . . to contain a full and true description and statement of the circumstances, conditions, situation, value, incumbrance, occupation, and title to the property hereby proposed to be insured in the Phenix Insurance Company; and I warrant the answers to each of the foregoing questions to be true." The property was described in the policy as it was in the application, excepting that the policy insured "horses, mules, and colts on premises, and against loss by lightning while at large." The policy also contained a provision, following the specifications of the property insured and referring to it, which is as follows: "Situated (except as otherwise provided) on and confined to premises actually occupied by the assured, to wit, leased acres, Sec. 4, Twp. 93, Range 46, Plymouth county, Iowa." The policy was based on the application, every statement of which was made a warranty, and a part of the policy. When the policy was issued, and when the loss occurred, the plaintiff was a farmer, and kept and used the property destroyed, excepting the hay and corn, in his business, and was so using it at the time it was destroyed. At that time all of the property in question was on section 26, in township 93 north, of range 48, in Plymouth county, nearly twenty miles from the place described in the policy. All of it, excepting the hay and corn, had been taken there temporarily for the purpose of plowing. The colt was with its dam, and the hay and corn were for use in feeding the horses. The ground upon which the demurrer was sustained was that the policy covered the property destroyed only while it was on the premises described in the policy, and not at the place where the loss occurred. The appellant contends that the character of the property insured must be considered in determining the true construction of the policy; that, unless the language used prevents, the presumption is that the policy was issued with reference to the character and probable use of the property; and that, while it was used in the manner and for the purposes contemplated by the parties, the policy continued in force. He further contends that the policy does not limit the use of the property to the premises described in the policy. In *Peterson v. Mississippi Valley Ins. Co.*, 24 Iowa, 494, 95 Am. Dec. 748, the property insured was

described as "situated Sec. 23, Twp. 99, R. 7 west," and the only claim of the limitation was based on that description. It was held not to limit liability under the policy to loss which occurred on the section specified. It was held in *Mills v. Farmers' Ins. Co.*, 87 Iowa, 400, that a policy on "live-stock on premises, §235, situated Secs. 7, 76, 27," was not limited to the property while on the premises. In *McCluer v. Girard Fire & Marine Ins. Co.*, 43 Iowa, 349, 22 Am. Rep. 249, it appeared that the policy in dispute was on property "contained in a frame barn situated on the northwest corner of Alley and Eleventh streets, Dubuque, Iowa." It was held that this description did not limit the liability of the insurance company to loss which occurred in the barn, but merely indicated the place where it was to be deposited when not in use. That rule was followed in *Longueville v. Western Assur. Co.*, 51 Iowa, 558, 33 Am. Rep. 146, which was a case where the property insured was described as "all contained in two-story frame dwelling on lot 6, Newberry's subdivision, Dubuque, Iowa." In these cases stress was laid upon the use of the property which must have been contemplated by the parties to the contract of insurance. This case would be covered by the same rule if the property insured was merely described as in or on certain premises. But the language used in the policy under consideration is more significant and restrictive. It is true, there is not express provision in the policy making it void or inoperative as to property insured when away from the premises described. It is also true that the description of the horses, mules, and colts contained in the policy omits words set out in the application. But the policy and the application together contain the contract of insurance. The application asks for insurance on the horses and colts "while on the premises only." Insurance on other property is asked in terms less restrictive, and the situation of all the property to be insured is given. The policy insures the hay "in stacks," the farming utensils and harness "in buildings on premises," and the horses and colts "on premises." This is not all, however. The property insured is further specified as "situated (except as otherwise provided) on and confined to premises actually occupied by the assured," which are described. This, we think, was intended to limit liability under the policy to loss which should occur to the property while on the premises. The application shows that this was what was desired by the plaintiff as to the horses and colts, and the policy adopted the general provision applicable alike to all the property insured. We know of no reason why such a limitation as that is not valid. Even if it be true that the policy should be held to continue in force while the property is not on the premises described, if it is used for ordinary purposes which must have been contemplated by the parties when the policy was issued it must be held that the policy did not cover the loss in question, for it occurred while the property was being used at an unusual distance from the place where it should have been kept. That was not an

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ordinary use, and could not have been contemplated by the parties when the insurance was effected. We conclude that the demurrer was properly sustained.

Affirmed.

J. B. MENTZER

o.

WESTERN UNION TELEGRAPH CO.,
Appl.

(.....Iowa.....)

1. The person to whom a message was addressed may maintain an action for damages sustained by him on account of negligence in its delivery.
2. Damages for mental suffering independent of any physical injury may be recovered for negligence in delivery of a telegram the character of which is known to the telegraph company.

(*Kinna, J., dissent.*)

(February 2, 1895.)

APPEAL by defendant from a judgment of the District Court for Linn County for \$100 in favor of plaintiff in an action brought to recover damages for defendant's negligent failure to deliver to plaintiff a telegram informing him of the death of his mother.

Affirmed.

The facts are stated in the opinion.

Messrs. Mills & Keeler for appellant.

Messrs. Heins & Heins for appellee.

Deemer, J., delivered the opinion of the court:

There was testimony tending to show, and the jury may well have found: That on the 11th day of April, 1892, one H. Dorn delivered to the defendant, at Creston, Ohio, to be transmitted to plaintiff, at Cedar Rapids, Iowa, the following telegraphic message: "Creston, Ohio, 11, 1892. To J. D. Mentzer, Cedar Rapids, Iowa. Mother dead. Funeral Wednesday. Answer if coming or not. H. Dorn." That Dorn paid the regular charges for transmitting the same, and, at the time of the delivery of the message, informed defendant's employé in charge of the office at Creston that it was plaintiff's mother who was dead. That the message reached defendant's office at Cedar Rapids at 9:16 A. M., April 11, 1892, but, through the negligence and carelessness of defendant's employé, was not delivered until 9 P. M., April 18th. The plaintiff inquired at defendant's office at Cedar Rapids at about 7 o'clock in the evening of April 11th, and was informed there was nothing there for him. It is shown beyond dispute that plaintiff's mother died at Creston, Ohio, on April 11,

NOTE.—The above is a notable and powerful reinforcement of the authorities in favor of allowing damages for mental anguish in telegraph cases. Most of the recent cases in states where the question was new have been on the other side. See *Francis v. Western U. Tele. Co. (Minn.)*, 25 L. R. A. 406, and cases and *note* there referred.

1892, and was buried on the 18th, and that, by reason of the failure of defendant to deliver the message informing plaintiff of her death, he was prevented from attending her funeral. There was also testimony tending to show that plaintiff lost some time from his work in trying to discover whether a message had been sent him or not. The court gave the jury the following instruction with reference to the measure of damages, in the event they found plaintiff entitled to recover: "(7) If you find for plaintiff, then you will allow him for the amounts he paid for messages sent by him, if any; for loss of time caused by the failure to deliver said message, and rendered useless thereby, if any; and, in addition thereto, such an amount as you may find from the evidence to be just and reasonable to compensate plaintiff for the damages sustained by reason of mental anguish suffered by him by reason of failure to deliver said message, if any. But you should not allow plaintiff anything for loss of time or expense in going to Creston, Ohio, nor should you allow plaintiff for the money paid by Dorn for the message in question."

It is first insisted by appellant's counsel that the plaintiff cannot recover because he made no contract with the defendant, and is not in privity with it; that the action is founded on contract, and therefore he cannot maintain the suit. Such, no doubt, is the rule in England. But the courts of this country almost universally hold to the contrary. In the recent case of *Herron v. Western U. Telegr. Co.* (Iowa) 57 N. W. Rep. 696, we had occasion to consider this question; and the holding there, which is in accord with the current of judicial opinion in this country, was that the person to whom the message was addressed might maintain an action for the damages sustained by him.

2. It is conceded by appellant's counsel that plaintiff suffered damages under the first two heads covered by the instruction, to the amount of one dollar, and no complaint is made of the charge, so far as it relates to these two items. The objection to the instruction is that it allows the jury to assess damages for "mental anguish," and it is contended that such damages are not allowable in actions of this kind. Counsel also insists that, if such damages are recoverable in any case, they should not be allowed here, for the reason that the testimony negatives any such suffering on the part of plaintiff as would entitle him to recover. Disposing of this last proposition first, we have to say that there is sufficient testimony in the record to justify the conclusion that the plaintiff did suffer as claimed. The evidence discloses such conduct on the part of plaintiff in inquiring for a message at the office of the defendant company, and in the efforts put forth by him to ascertain if a death message had come, as to evince mental anxiety. Plaintiff says he was desirous of attending his mother's funeral, and that he felt "hard" because of the delay in the delivery of the message. He immediately telegraphed to ascertain if he could be present at the funeral, and took up his journey to Ohio, to be in attendance upon the burial. When he called

at defendant's office, after the receipt of the message, he was excited and anxious. He complained of the delay, and wanted to know why the message was not delivered at his house. We think these declarations, and this course of conduct, clearly indicate that plaintiff did suffer as charged. We have, then, the question as to whether damages for mental suffering can be recovered in actions of this kind, independent of any physical injury, where the company is advised of the character of the message and negligently fails to deliver it. This question has been variously decided by the different courts of the country, but, up to this time, is an open one in this state. The following cases answer the proposition in the affirmative: *So Relle v. Western U. Telegr. Co.* 55 Tex. 308, 40 Am. Rep. 805; *Stuart v. Western U. Telegr. Co.* 66 Tex. 580, 59 Am. Rep. 628; *Gulf, C. & S. P. R. Co. v. Wilson*, 69 Tex. 739; *Western U. Telegr. Co. v. Brosche*, 72 Tex. 654; *Western U. Telegr. Co. v. Simpson*, 78 Tex. 428; *Western U. Telegr. Co. v. Adams*, 75 Tex. 581, 6 L. R. A. 844; *Womack v. Western U. Telegr. Co.* (Tex.) 23 S. W. Rep. 417; *Western U. Telegr. Co. v. Carter*, 2 Tex. Civ. App. 624; *Wadsworth v. Western U. Telegr. Co.* 88 Tenn. 695; *Newport News & M. V. R. Co. v. Griffin*, 93 Tenn. 694; *Reese v. Western U. Telegr. Co.* 123 Ind. 294, 7 L. R. A. 583; *Western U. Telegr. Co. v. Stratemeyer*, 6 Ind. App. 125; *Western U. Telegr. Co. v. Newhouse*, Id. 422; *Western U. Telegr. Co. v. Henderson*, 89 Ala. 519; *Thompson v. Western U. Telegr. Co.* 106 N. C. 549; *Young v. Western U. Telegr. Co.* 107 N. C. 370, 9 L. R. A. 669; *Thompson v. Western U. Telegr. Co.* 107 N. C. 449; *Chapman v. Western U. Telegr. Co.* 90 Ky. 265; *Western U. Telegr. Co. v. Stephens*, 2 Tex. Civ. App. 129; *Logan v. Western U. Telegr. Co.* 84 Ill. 468,—and perhaps others. While perhaps equally as large a number answer it in the negative. See the following: *Western U. Telegr. Co. v. Wood*, 6 C. C. A. 432, 57 Fed. Rep. 471, 21 L. R. A. 706; *Russell v. Western U. Telegr. Co.* 3 Dak. 315; *West v. Western U. Telegr. Co.* 89 Kan. 93; *Western U. Telegr. Co. v. Rogers*, 68 Miss. 748, 13 L. R. A. 859; *Chapman v. Western U. Telegr. Co.* 88 Ga. 763, 17 L. R. A. 430; *Connell v. Western U. Telegr. Co.* 116 Mo. 34, 20 L. R. A. 172; *International Ocean Telegr. Co. v. Saunders*, 82 Fla. 434, 21 L. R. A. 810; *Summerfield v. Western U. Telegr. Co.* 87 Wis. 1; *Francis v. Western U. Telegr. Co.* (Minn.) 25 L. R. A. 406. Perhaps other cases announcing the same rule may be found. Of the text-writers: *Shearn & Redf. Neg. p. 692, § 605; Thompson, Electricity, § 879; 3 Sutherland, Damages, §§ 975-980, inclusive; 2 Sedgw. Damages, § 894.* And others hold that such damages may be recovered, while *Wood's Mayne, Damages, p. 74; Cooley, Torts, 271,—*and others, seem to deny it. The general rule which has come down to us from England, no doubt, is that mental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis of an action for damages. See *Lynch v. Knight*, 9 H. L. Cas. 577; *Hobbs v. London & S. W. R. Co.* L. R. 10 Q. B. 122. And doubtless

this is the rule of law to-day in all ordinary actions, either *ex contractu* or *ex delicto*. But it must be remembered that there are exceptions to the rule, and that the telegraph, as a means of conveying intelligence, is comparatively a new invention. The general rule above referred to was adopted long before the electric current was harnessed and made subservient to the will of man. One of the crowning glories of the common law has been its elasticity, and its adaptability to new conditions and new states of fact. It has grown with civilization, and kept pace with the march of events, so that it is as virile to-day, in our advanced state of civilization, as it was when the race was emerging from the dark ages of the past. Should it ever fail to be adjustable to the new conditions which age and experience bring, then its usefulness is over, and a new social compact must be entered into.

Let us look at this query, then, upon principle and see if such damages are recoverable. And first we must determine the nature, objects, and purposes of telegraph companies; their legal status and duties to the public, and to those with whom they do business; then the nature of the action; and finally the elements of damage which may be recovered, either by reason of their breach of contract or because of their failure to perform their duties,—and see if there is any reason known to and recognized by the law, why such damages should not be allowed. Far be it from our purpose to make law. We cannot legislate, but will discover, if we can, whether there are any precedents for recovery lying in the ashes of the past.

What, then, are the nature, purpose, and object of the telegraph, and what is its legal status? It is a system of appliances conducting the electric current or fluid, used for the purpose of transmitting intelligence, thought, or news from one place to another. Somewhat akin is it to a common carrier, in this: that they are both carriers, and must serve all alike; but the carrier transports persons or goods, while the telegraph conveys intelligence. The very object of the invention is to quickly convey information from one to another, upon which that other may act. It is a public use, and for that reason eminent domain may be exercised in its behalf, and is engaged in a business affecting public interests to such an extent that the state may regulate the charges of companies engaged in the business. It is not an insurer of the accuracy or of the delivery of messages intrusted to it, but it is so far a common carrier as to be bound to serve all people alike, and to exercise due care in the discharge of its public duties. Nor can it provide by contract for exemption from liability from the consequences of its own negligence. Enough has been stated to show that it owes a duty to all whom it attempts to serve, independent of the contractual one entered into when it receives its messages. Telegraph companies are held, then, to the exercise of due care, and for negligence, either in sending or delivering messages, are liable to any person injured thereby for all the damages he may sustain.

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We have stated these rules in order to show that one who is injured by their neglect of duty may maintain an action, either *ex contractu* or *ex delicto*, for the injuries sustained. The rule, no doubt, is as announced by Judge Cooley in his work on Torts, at pages 104 *et seq.*: "In many cases an action, as for tort, or an action for a breach of contract, may be brought by the same party on the same state of facts. This, at first, may seem in contradiction to the definition of a tort as a wrong unconnected with contract, but the principles which sustain such actions will enable us to solve the seeming difficulty.

There are also, in certain relations, duties imposed by law, a failure to perform which is regarded as a tort, though the relations themselves may be formed by contract covering the same ground. Thus, for breach of the general duty imposed by law, because of the relation one form of action may be brought, and for the breach of contract another form of action may be brought." See also, *Rich v. New York Cent. & H. R. R. Co.* 87 N. Y. 393; *Nevin v. Pullman Palace Car Co.* 106 Ill. 223, 46 Am Rep. 688; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 134; Cooley, Torts, p. 8. In this state all forms of action are abolished. The pleader simply makes a plain statement of the facts, avoiding legal conclusions, and may recover as damages, on the facts stated, whatever the law will allow, either for breach of the contract or for the tort pleaded. We desire to make this plain, for if, in the further progress of the opinion, it should appear that damages for mental suffering are allowed in cases of this kind, either for breach of contract or for tort, then plaintiff may recover. With this thought in mind, the reader may also be able to explain and reconcile some of the cases before cited.

Having determined the nature and objects, the status and relation, of the defendant company, we turn to the verdict of the jury in this case, and find that not only did the defendant break its contract, but that it was guilty of negligence as well, and that, under all known rules of law, plaintiff is entitled to some damages. Defendant insists they are simply nominal, and plaintiff contends he has suffered acute and actual damages, for which he should be compensated. The general rule of damages for breach of contract comes down to us from the opinion of *Hadley v. Baxendale*, 9 Exch. 341, and is as follows: "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fully and reasonably be considered either as arising naturally—i. e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." In actions for tort the rule is much broader. The universal and cardinal principle in such cases is that the person injured shall receive compensation commensurate with his loss or injury, and

no more. This includes damages not only for such injurious consequences as proceed immediately from the cause which is the basis of the action, but consequential damages as well. These damages are not limited or affected, so far as they are compensatory, by what was in fact contemplated by the party in fault. He who is responsible for a negligent act must answer "for all the injurious results which flow therefrom, by ordinary, natural sequence, without the interposition of any other negligent act or overpowering force." Whether the injurious consequences may have been "reasonably expected" to follow from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. As said in *Stevens v. Dudley*, 56 Vt. 158, "it is the unexpected, rather than the expected, that happens in the great majority of cases of negligence." Under all the authorities, it was the duty of the defendant to transmit and deliver messages intrusted to it without unreasonable delay; and, in failing to do so, it becomes liable for all damages resulting therefrom. Cooley, Torts, 646, 647; Gray, Communications by Telegraph, §§ 81, 82, *et seq.*; Whart. Neg. § 767. That a person is entitled to at least nominal damages for an infraction of the duty imposed upon a telegraph company is conceded. And it must also be conceded that every person desires to attend upon the obsequies of his near relations. And when, able and anxious to attend, he is, through the negligence of a telegraph company, not notified of their death in time to attend the funeral, he naturally and almost inevitably suffers mental pain and anguish. No man is so depraved but that he yet remembers his mother, and, when able, will pay her the last respect that is her due. In the case at bar it is established that defendant knew the nature of the intelligence it was to transmit, and also knew that, if it was not delivered within a reasonable time, plaintiff was likely to be greatly pained on account not only of not knowing of the death of his mother until she was placed under the ground, but also because of his inability to attend the funeral on account of the delay. That the defendant should reasonably have contemplated such results, under the rule laid down in *Hadley v. Baxendale*, is clear.

But it is insisted that damages for mental suffering, although contemplated by the parties cannot be recovered for mere breach of contract. That such is the general rule announced by the courts, and that it is the rule now with reference to all ordinary contracts, must be conceded. But it must be remembered that this rule grew up at a time when there was no thought of the transmission of intelligence by electricity. Breaches of contract, such as the one in question, were unknown to the common law. The business of telegraphy has grown up within comparatively recent years. But must we say that the law furnishes no remedy because no case of the kind was known to the common law? If so, such law is no longer applicable to our present conditions. Regard must be had, too,

to the subject-matter of the contract. The message does not relate to property. In such cases for breach of contract the law affords adequate compensation. But it does relate to the feelings, the sensibilities, aye, sometimes even to the life, of the individual. It does not affect his pocketbook seriously, but it does relate to his feelings, his emotions, his sensibilities,—those finer qualities which go to make the man. Shall we say that in one case the law affords compensation, and in the other it does not? Instead of goods which are conveyed by the defendant, it is intelligence,—thought. If defendant were a common carrier of goods, it would be liable for all damages sustained by reason of its breach of contract to deliver them within a reasonable time. But it is said no damages can be recovered for failure to deliver intelligence, beyond the amount actually paid for the message, or nominal damages, although the addressee may endure the greatest of mental pangs, notwithstanding the fact that such suffering was in the contemplation of the parties at the time the contract was made. Of course, every breach of contract is likely to cause some pain, but most of these contracts relate to property and pecuniary matters, and in such case the law furnishes what has always been held to be an adequate remedy for the pecuniary loss sustained. Mental suffering has never been considered as within the contemplation of the parties at the time the contract is entered into, and recovery cannot be had therefor. But few contracts have direct relation to the feelings and sensibilities of the parties entering into them, and the pain growing out of the ordinary breach of contracts relating to property is entirely different from that suffered from a death message. Sutherland, Damages, § 980. We find a well-recognized exception to the general rule that damages cannot be had for mental anguish in cases of breach of contract, in the action for breach of promise of marriage, and the reason for this exception is quite applicable here. In such cases the defendant, in making his contract, is dealing with the feelings and emotions. The contract relates almost wholly to the affections, and one is not allowed to so trifle with another's feelings. He knows at the time he makes the contract that if he breaks it the other will suffer great mental pain, and the courts, without exception, have allowed recovery in such a case. See *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *Royal v. Smith*, 40 Iowa, 615. The distinction we have pointed out is well stated in 1 Sutherland, Damages, § 92. Other exceptions have sometimes been made, which we need not further refer to. As said in the case of *Wadsworth v. Western U. Teleg. Co.*, *supra*: "These illustrations serve the purpose of showing that in the ordinary contract only pecuniary benefits are contemplated by the contracting parties, and that, therefore, the damages resulting from such breach of contract must be measured by pecuniary standards, and that, where other than pecuniary benefits are contracted for, other than pecuniary standards should be applied in the ascertainment of damages flowing from the

breach." "The case before us, so far as it is an action for breach of contract, is subject to the same general rule; and the defendant is answerable in damages for the breach, according to the nature of the contract, and the character and extent of the injury suffered by reason of its nonperformance. The message was sent for a particular purpose, of which the defendant had knowledge. That purpose was not of a pecuniary nature. There was no offer or instruction to buy or sell anything,—no proposition or promise with respect to any business transaction. The message was of far greater importance to the receiver than any of these. It was information which defendant undertook to convey for a stipulated sum, and which, if promptly conveyed, would have enabled plaintiff to have been with him at the last moments, and would have saved her the injury of which she complains. The messages were in proper language, and lawful in purpose. She was entitled to the information they contained, and to whatever benefits that information would have conferred upon her, even though such benefits be mainly or altogether to the feelings and affections. The defendant contracted that she should have those benefits, and that she should be spared whatever pain and anguish such information, properly conveyed, would prevent."

Reverting now to the damages which may be allowed if the action is treated as *ex delicto*, and to the broader rule of damages in cases of tort, we find that, in very many of these actions, damages are recoverable for mental anguish, some of which we will refer to hereafter. It is conceded by appellant's counsel that such damages may in certain cases be recovered, but they insist that they are never recoverable unless accompanied by some physical injury. It seems to us that, when it is conceded that mental suffering may be compensated for in actions of tort, the right of plaintiff to recover in this case is established. Let us look to some of the cases authorizing recovery in such cases, and see if there are no analogies. Damages for injuries to the feelings are given, though there are no physical injuries, where a person is wrongfully ejected from a train. *Shepard v. Chicago, R. I. & P. R. Co.* 77 Iowa, 54. In actions for slander and libel. *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420. For malicious prosecution. *Fisher v. Hamilton*, 49 Ind. 241. For false imprisonment. *Stewart v. Maddox*, 63 Ind. 51. For crim. con. and seduction, and for assault. So damages for injured feelings were allowed where a conductor kissed a female passenger against her will. *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504. So, likewise, it has been held that the removal of the body of a child from the lot in which it was rightfully buried, to a charity lot, gives the parent a right to recover for injury to his feelings. *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 751. And a widow may recover for such suffering and nervous shock, against the person who unlawfully mutilates the dead body of her husband, although no actual pecuniary damages are alleged or proven. *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 29 L. R. A.

85. See also, *Sutherland, Damages*, § 979, and authorities cited for kindred cases. The wrongs complained of in these cases all directly affected the feelings, and injury there-to proximately resulted. But not more so than in the case at bar, where the injury to the feelings is apparent, and suffering necessarily followed. This rule of necessity applies where the feelings are directly affected by the nature of the wrong complained of. It has no application to such mental suffering as indirectly results from the commission of every tort.

Let us now look to our own cases for a moment, and see what has been held. In the case of *Stevenson v. Belknap*, 6 Iowa, 103, 71 Am. Dec. 892, which was an action brought by a father for the seduction of his daughter, this court approved an instruction that damage may be given, not only for his loss of service and actual expenses, but also on account of the wounded feelings of the plaintiff, and of his anxiety, as a parent of other children, whose morals may be corrupted by the example. In the case of *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 318, 24 Am. Rep. 748, which was an action for an assault by one of defendant's employes upon the plaintiff, the lower court instructed the jury that plaintiff might recover, as compensatory damages, not only for bodily pain and suffering, but for the outrage and indignity put upon him. This instruction was approved, and it was held that mental suffering not arising from bodily pain, but from the nature of the assault, might be recovered, the court using this language: "The question is fairly presented whether mental anguish, arising from the nature and character of the assault, constitutes an element of compensatory damages. . . . We, on principle, are unable to see why mental pain arising from or caused by the nature of the assault whereby the wound was inflicted . . . should not be an element of such damages." "A careful examination of the authorities will disclose the fact that the weight of adjudicated cases is in favor of the proposition that mental anguish arising from the nature and character of the assault is an element of compensatory damages. . . . The mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter." It may also be said in this connection that the court in this case declined to follow the case of *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245, and kindred cases which are relied upon by appellant's counsel, remarking that "the decided weight of authority is opposed to the view taken in that case, and we are unwilling to follow it, and by so doing ignore the other authorities cited." That the question was well considered and deliberately decided is apparent from the fact that *Mr. Justice Day* dissented from the conclusion of the majority. In the quite recent case of *Shepard v. Chicago, R. I. & P. R. Co.*, 77 Iowa, 58, we went still further, and squarely held that damages for mental suffering are recoverable although there was no physical pain or injury. In that case we

said: "If these things [wounded feelings] may be considered in connection with physical suffering, in estimating actual damages, we know no reason which forbids their being considered in the absence of physical suffering. It is said that the 'mental pain' contemplated by the court in the case last cited [44 Iowa, 815] includes something more than mere wounded feelings or wounded pride, and that the latter can be considered only where malice is alleged and proven, and where there has been proof of actual bodily injury. We do not think the claim is well founded. Humiliation, wounded pride, and the like may cause very acute mental anguish. The suffering caused would undoubtedly be different in different persons, and no exact rule for measuring it can be given. In ascertaining it, much must necessarily be left to the discretion of the jury, as enlightened by the charge of the court. The charge given in this case, as a whole, confined the jury to an allowance for compensatory damages." In the case of *Curtis v. Sioux City & H. P. R. Co.*, 87 Iowa, 622, this court squarely held that damages might be recovered for mental pain and suffering, although the damages for physical injury were merely nominal; and further held that such damages were compensatory, and not punitive. In the case of *Parkhurst v. Masteller*, 57 Iowa, 480, which was an action for malicious prosecution, this court followed the *McKinley Case*, and held that in such actions actual damages would include compensation for bodily and mental suffering, and clearly held that damages for mental suffering might be recovered in such cases, although entirely disconnected from bodily suffering or disability. In a case of assault and battery (*Lucas v. Flinn*, 85 Iowa, 9), this court held that damages for mental anguish might be allowed as compensation. In the case of *Paine v. Chicago, R. I. & P. R. Co.*, 45 Iowa, 569, the rule in the *McKinley Case* was recognized; but it was held there was no right of recovery for injury to feelings, on account of the peculiar facts of that case. And the case of *Fitzgerald v. Chicago, R. I. & P. R. Co.*, 50 Iowa, 79, merely follows the *Paine Case*, and holds that, under the facts, plaintiff was not entitled to recover. The rule of the *McKinley Case* has never, to our knowledge, been doubted by any later decision. In the case of *Stone v. Chicago & N. W. R. Co.*, 47 Iowa, 88, 29 Am. Rep. 458, it was held that the action in that case, owing to its peculiar facts, was an action for breach of contract; and that damages for mental suffering were not recoverable, and in this case it is said: "Insult and abuse accompanying a breach of contract cannot affect the amount of recovery in such actions. If the action is based upon a wrong, the jury are permitted to consider injury to feelings, and many other matters which have no place in actions to recover damages for breach of contracts," citing *Walsh v. Chicago, M. & St. P. R. Co.* 42 Wis. 28, 24 Am. Rep. 876. It is enough to say here that the action at bar is *ex delicto*, or that damages may be recovered as if it were, under our system of code pleading.

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The only other case having any bearing upon this question is *Hall v. Manson* (Iowa) 58 N. W. Rep. 881, which was a case wherein plaintiff sought to recover damages for personal injuries sustained by reason of a defective street crossing. The lower court instructed the jury that plaintiff might recover "for the peril, if any, the jury may find she was subjected to, from the evidence in the case." This court disapproved the instruction, not because damages for mental anguish could be recovered, but because, "in our view of the instruction, its wording would warrant the jury in allowing damages for mental pain and suffering, which would include peril, and also for peril, as a distinct, independent, and additional element of damage, thereby allowing double compensation for the peril plaintiff was in, which would be erroneous."

From these cases it is apparent that in actions of tort this court has frequently announced the rule that damages for mental suffering may be recovered, although there is no physical injury. And, if this be so, why is not this a case where they ought to be allowed? It cannot be possible that here is a legal wrong for which the law affords no remedy. The wrong is plain, the injury is apparent, and we think the law affords a remedy for compensatory damages, under the rules above given. It must not be understood to follow that, in all actions *ex delicto*, damages for mental suffering may be allowed. There must be some direct and proximate connection between the wrong done and the injury to the feelings, to justify a recovery for mental anguish. But, when there is this connection so manifest as in the case at bar, we think such damages ought to be allowed. It is very appropriately said, however, in one of the cases which has been cited, that "great caution should be used in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of a parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company, for it is only the latter for which recovery may be had; and the attention of juries might well be directed to this fact." It is not necessary for us to determine on which theory damages for mental anguish are recoverable. If we find they are recoverable, either in an action for breach of contract, or by reason of a breach of public duty, then the instruction given by the lower court was correct, and should be sustained. It will be noticed that, in some of the cases holding to a contrary doctrine from that here announced, recovery was denied because of the form of the action; that is to say, it was held that the action in the particular case was for breach of contract, and that damages for mental suffering were not recoverable in such an action. Whether they would be recoverable in actions *ex delicto* or not was not determined. Let us look for a moment to some of the objections urged to such a rule as we have announced.

First. It is said that such suffering is speculative and remote. We have, as we think, answered this by showing that in ac-

tions of this kind it is direct and proximate to the wrong complained of.

Second. It is urged that such damages are sentimental, are vague and shadowy, and that there is no standard by which an injury can be justly compensated or approximately measured. This objection is answered if we find any case in which such damages are allowed, for if they may be allowed in one kind of case they may in all, so far as this objection is concerned. We have already seen numbers of cases, both from this and other states, wherein it is held that damages for mental suffering, independent of physical injury, may be recovered. It is conceded by counsel that damages can be recovered for mental suffering when accompanied by physical pain or bodily suffering. If this be true, then let us ask how they can be any more accurately measured when so accompanied than when not. When it is once conceded that mental anguish can be considered, and compensation made therefor, then the objection last urged falls to the ground.

Third. It is said there is no principle on which such damages can be recovered. We have endeavored to show, to the best of our ability, that there is abundant authority to justify a recovery in such cases.

Fourth. It is contended that the rule opens up a vast and fruitful field for speculative litigation. We have endeavored to so guard and limit the rule that there may be no mistaking its operation and effect. If recovery is for breach of the contract, then it can only be had because of the subject-matter,—the fact that it is intelligence that is transmitted, and the feelings only affected. And, if the recovery is had because it is a tort, then a somewhat similar limitation is made, which we have tried to make apparent. If, as thus limited, the rule opens up a vast and fruitful field of litigation, it is only because telegraph companies fail to do their duty. We cannot think that a rule which will tend to make telegraph companies more careful in the matter of delivering their messages will be fraught with such fearful results as counsel imagine. The single, plain duty of a telegraph company is to make transmission and delivery of messages intrusted to it with promptitude and accuracy. When that is done its responsibility is ended. When it is omitted, through negligence, the company should answer for all injury resulting, whether to the feelings or the purse, one or both, subject to the proviso that the injury must be the natural and direct consequence of the negligent act. We cannot conceive of any danger in such a rule. It seems to us to be in accord with the enlightened spirit of modern jurisprudence, and that in actual practice no evil can result therefrom.

Juries may be prone, in cases of this kind, to place their estimates high; but the judge is ever present, with a restraining power, ample to prevent unconscionable and unjust verdicts.

Without further extending this opinion, it is sufficient to say that the instruction of the district court was correct, and the judgment is affirmed.

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Kinne, J., dissenting:

I am of the opinion that the general rule that damages are not recoverable for mental pain and suffering not induced by or connected with a physical injury should govern in this class of cases. I admit that, under the rule I contend for, no adequate compensation is possible in this case; but that is not a reason for abrogating a rule of such long standing, and thereby opening up a vast field for litigation, wherein, in my judgment, it will be found impossible to limit the application of the rule adopted by the majority opinion as is therein indicated. The question is properly one for legislative action, wherein the application of the rule may be definitely fixed. Nor do I think that the section of our statute referred to in any way changes the general rule as to damages in this class of cases. I am not content with either the argument of the majority opinion, or the result reached. My views are so fully set forth in the cases cited in the opinion as being opposed to the allowance of damages for mental pain and suffering in such cases that I need not set them forth in detail. For the error in the instruction the case should be reversed.

Rehearing denied.

Mary A. FOLLIS

v.

UNITED STATES MUTUAL ACCIDENT ASSOCIATION, *Appx.*

(.....Iowa.....)

1. An action at law will lie on a mutual insurance policy which promises to pay a definite amount, although payment is conditioned upon the same being realized from assessments, as this is simply a method of securing the fund.
2. Voluntary exposure to unnecessary danger within the meaning of an insurance policy is made by attempting to cross a bridge fifteen feet high upon ties from ten to twelve inches apart with no walk or planking of any kind or any railing, on a dark night, when a platform or walk extended the whole length of the bridge on the opposite side with a fence railing to protect persons from falling off.

(April 6, 1896.)

A PPEAL by defendant from a judgment of the District Court for Woodbury County, in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of accident insurance. *Reversed.*

Statement by Deemer, J.:

On the 19th day of November, 1892, the

NOTE.—On the subject of voluntary exposure to unnecessary danger, see *notes* to *Badenfeld v. Massachusetts Mut. Acc. Asso. (Mass.)* 13 L. R. A. 263; *Sheanon v. Pacific Mut. L. Ins. Co. (Wia.)* 9 L. R. A. 686; *Paul v. Travelers Ins. Co. (N. Y.)* 8 L. R. A. 444, also the later case of *Miller v. American Mut. Acc. Ins. Co. (Tenn.)* 20 L. R. A. 705.

dead body of William Follis was found underneath a railway bridge in Sioux City, Iowa, across Perry creek. The body was lying face down in the water, and had evidently fallen or was thrown from the bridge. Deceased held a policy of accident insurance in the defendant company; his wife, the appellee herein, being the beneficiary named therein. This action was brought to recover \$5,000,—the amount agreed to be paid in case of death. The defense was—First, that no action would lie to recover a money judgment; second, that deceased was intoxicated when he met with the accident which caused his death; and, third, that death resulted because the deceased voluntarily exposed himself to unnecessary danger. The case was tried to a jury, and a verdict and judgment were rendered for plaintiff, and defendant appeals.

Messrs. Kennedy & Kennedy and Peet, Smith & Murray for appellant.

Messrs. T. F. Griffin and Lynn, Sullivan & Foley for appellee.

Deemer, J., delivered the opinion of the court:

The policy in suit provides that "if death shall result from such injuries [external, violent, and accidental] alone, and within ninety days, the association will pay \$5,000.00 to Mary A. Follis [his wife]. . . ." Among other conditions appearing upon it is this: "The payment of the various sums of indemnity herein provided is conditioned, pursuant to chapter 175 of the Laws of 1883 of state of New York, upon the same being realized from assessments (premium calls) upon the members of the association. Payment in case of loss of both hands, feet, or eyes, or for permanent total disability, shall immediately terminate membership and this insurance." We are not advised as to what is contained in chapter 175 of the Laws of 1883 of the state of New York. The by-laws of the defendant company provide for an assessment to be made by the company to pay losses in the event of there being no funds at hand with which to meet them. It is insisted on behalf of appellant that the promise to pay in this case is conditional upon the same being realized from assessments upon the members of the association, and that as there is neither allegation nor proof of any funds in the treasury of the company, nor of any assessment having been levied or moneys realized to pay the claim, plaintiff cannot recover more than nominal damages; her remedy being in equity, to compel the levy of an assessment. Counsel cite, to sustain them *Bailey v. Mutual Ben. Asso.*, 71 Iowa, 690, and kindred cases. These cases are not applicable, for the reason that in each of them the obligation of the company was to pay the net proceeds of an assessment, not to exceed the amount called for by the certificate, to the beneficiary. Here the promise is to pay a definite amount, which is in no manner dependent upon or limited by the assessment. True, an assessment is provided for, but this is simply the method the company which is a mutual one, has of securing the fund. The

case is more nearly like *Harl v. Pottawatamie County Mut. F. Ins. Co.* 74 Iowa, 39. See also *United States Mut. Assn. v. Barry*, 181 U. S. 122, 33 L. ed. 67; *Bacon, Ben. Soc.* § 458; *Niblack, Mut. Ben. Soc.* §§ 384-386. We think the action was properly brought at law.

2. One of the conditions of the policy is that it does not cover or extend to accidental injuries or death happening while the insured is under the influence of intoxicating liquors, or in consequence thereof. It is insisted that the evidence shows that the deceased was under the influence of intoxicating liquor when he received the injuries which caused his death, and that he walked off the railway bridge in consequence of his being intoxicated. There was a sharp conflict in the evidence on this question, and it was submitted to the jury under proper instructions. The jury found that the insured was not intoxicated, and with this finding we cannot interfere.

3. Another condition of the policy is that it shall not extend to or cover death caused directly or indirectly, wholly or in part, by voluntary exposure to unnecessary danger. It is contended that deceased went upon the bridge, which was private property of the railway company, on a dark night, knowing it to be a dangerous place, and that he fell therefrom, struck his head so that he was stunned, and, falling into the water of the creek, was suffocated and drowned before he regained consciousness. The evidence shows that the bridge underneath which the deceased was found is an ordinary pile trestle-work railroad bridge, about 15 feet high and something like 160 feet long and 80 feet in breadth. The creek which it spans is from 15 to 20 feet wide. On the north side of the bridge is a walk built originally as a sort of platform on which passengers from the trains might alight. This platform or walk is about 5 feet wide, and extends the entire length of the bridge. On the north side of the walk is a fence railing to prevent pedestrians from falling off. South of the walk are the two railway tracks, and between them a narrow plank for the railroad employes to walk upon. From the south rail to the end of the ties on the bridge is about 10 or 11 feet. The ties here are about 10 inches apart, and they are uncovered. On the south side, at the extreme west end, there is a little platform, about 12 feet long, for switchmen to stand upon. It has a fence around it, so that employes would not walk off it at night. There was no approach to this platform from the east end, and the ties were open to the east and north of it. The north side of the bridge was extensively used by footmen who desired to cross the creek. Follis was last seen about 9 o'clock in the evening of the day before his body was found in the creek. His condition is a matter of some dispute, but it is evident that about this time he started to his home, which was across the creek from the place where he was last seen, and that while crossing the bridge he in some manner fell therefrom, and received the injuries which resulted in his death. The body was found near the west end of the bridge, and almost directly under

the south end of the ties. The money and other valuables he had on his person were not disturbed. There was quite a large cut or bruise on the forehead, and it is supposed he received this wound in his face from the bridge. The question then is, Does it appear from these facts that the deceased met his death while voluntarily exposing himself to unnecessary danger? It is well to notice that the clause of the policy quoted does not cover voluntary exposure to necessary danger, or involuntary exposure to unnecessary danger, and it evidently means something more than contributory negligence or the want of ordinary care on the part of the assured. The policy was no doubt intended to cover accidents, although the insured may have been guilty of negligence which proximately contributed to his injury. To render one guilty of a voluntary exposure to danger, he must have intentionally done some act which reasonable and ordinary prudence would pronounce dangerous. The burden was upon the defendant to show that the deceased received his injuries while or because of his voluntary exposure to unnecessary danger. *Jones v. United States Mut. Asso. of New York* (Iowa) 61 N. W. Rep. 485; *Freeman v. Travelers Ins. Co. of Hartford*, 144 Mass. 572, 19 Ins. L. J. 285. It is shown by the testimony that the bridge in question was much frequented by foot passengers, and it appears to us that the north side was reasonably safe for use as a bridge over the creek which it spans. Indeed, in the condition it was in, it was as safe as any ordinary bridge, except that it had no guard rail on the south side. We do not think it should be held, as a matter of law, that the deceased exposed himself to danger by taking the bridge in going to his home. Moreover, it is not shown that there was any other bridge by which he might have crossed the creek. There is nothing in the record to show that the exposure, whatever it may have been, was not necessary. The jury was justified in finding that deceased was not unnecessarily exposing himself to danger in attempting to cross the bridge. It is insisted, however, that the insured must have attempted to walk across the bridge on the ties on the south side, where there was no walk or planking, and that in so doing he

brought himself within the condition of the policy relied upon. It seems to us this conclusion is inevitable. That he fell from the south side of the bridge, and at a point at least 25 feet from the nearest end, must be conceded. That it is dangerous to attempt to cross a bridge 15 feet high, upon ties from 10 to 12 inches apart, on a dark night, is a proposition so plain as to be indisputable. And, while it may have been necessary for the deceased to use the bridge to reach his house, it was entirely unnecessary for him to attempt to cross it where there was no walk or planking of any kind. It cannot well be said that he did not know he was upon the ties, and not upon the walk, and that the danger was unknown to him for he had passed onto the bridge at least 25 feet, and must have known he was upon the ties. The jury found that the insured was not intoxicated, and his choice of walk must then have been voluntary. If it can be said that a presumption exists that he did not voluntarily put his life in jeopardy, because of the known instincts which prompt every one to preserve his own life, yet, as against this, we have the presumption, aided to some extent by the finding of the jury, that the deceased was in his right mind and was capable of controlling his actions and directing his course. His act, then, is presumed to have been voluntary; and, from the other circumstances in the case, it is clear that he must have been walking in a dangerous place when he met with the accident. It seems to us that there is no escape from the conclusion that the assured was voluntarily exposing himself to unnecessary danger in attempting to cross the bridge on the south side at the time he did. The danger was plain, the exposure to it unnecessary and voluntary, and death resulted in consequence thereof. *Tuttle v. Travelers Ins. Co.* 184 Mass. 175, 45 Am. Rep. 816; *Travelers Ins. Co. v. Jones*, 80 Ga. 541; *Shaffer v. Travelers Ins. Co.* (Ill.) 19 Ins. L. J. 285; *Williams v. United States Mut. Acc. Asso.* 183 N. Y. 866; *Lovell v. Accident Ins. Co.* 5 Ins. L. J. 559, 8 Ins. L. J. 877.

There should have been a verdict for defendant, on the evidence adduced.

Reversed.

ARKANSAS SUPREME COURT.

MISSOURI PACIFIC R. CO., *Appt.*,

C. E. NEVILS.

(.....Ark.....)

1. Reasonable time to accept and remove goods after their arrival is given before the liability of a carrier is reduced to that of a warehouseman.

2. A mob of rioters is not a public enemy within the exception to the rule that makes a common carrier an insurer of goods carried.

NOTE.—On the question when a carrier's liability ceases as such, see note to *East Tennessee, V. & G. R. Co. v. Kelly* (Tenn.) 17 L. R. A. 691.
28 L. R. A.

(March 30, 1895.)

A PPEAL by defendant from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to recover the value of certain property destroyed while in defendant's possession for transportation. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Dodge & Johnson*, for appellant:

At the time the goods in question were destroyed by a mob they were at the place of destination in appellant's warehouse, awaiting delivery to consignee; consequently the liability of the appellant as a common carrier had

ceased, and its liability as a warehouseman begun.

Butler v. East Tennessee & V. R. Co. 8 Lea, 32; *Southern Exp. Co. v. Kaufman*, 12 Heisk. 165; *East Tennessee, V. & G. R. Co. v. Kelly*, 17 L. R. A. 601, 91 Tenn. 699, 708; *Norway Plains Co. v. Boston & M. Railroad*, 1 Gray, 263, 61 Am. Dec. 423; *Rice v. Boston & W. R. Corp.* 98 Mass. 212; *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *Stowe v. New York, B. & P. R. Co.* 113 Mass. 521; *South & North Ala. R. Co. v. Wood*, 66 Ala. 167, 41 Am. Rep. 749; *Mobile & G. R. Co. v. Frewitt*, 46 Ala. 63, 7 Am. Rep. 586; *Jackson v. Sacramento Valley R. Co.* 23 Cal. 268; *Southwestern R. Co. v. Felder*, 46 Ga. 438; *Rothschild v. Michigan Cent. R. Co.* 69 Ill. 164; *Merchants Dispatch & Transp. Co. v. Hallock*, 64 Ill. 284; *Chicago & A. R. Co. v. Scott*, 42 Ill. 182; *Cincinnati & C. Air Line R. Co. v. McCool*, 26 Ind. 140; *Bansmer v. Toledo & W. R. Co.* 25 Ind. 484, 87 Am. Dec. 367; *Mohr v. Chicago & N. W. R. Co.* 40 Iowa, 579; *François v. Dubuque & S. O. R. Co.* 25 Iowa, 60, 95 Am. Dec. 769; *Gashweiler v. Wabash, St. L. & P. R. Co.* 83 Mo. 112, 53 Am. Rep. 558; *Gramer v. American Merchants Union Exp. Co.* 56 Mo. 528; *Rankin v. Pacific Railroad*, 55 Mo. 168; *Neal v. Wilmington & W. R. Co.* 53 N. C. 482; *Shenk v. Philadelphia Steam Propeller Co.* 60 Pa. 109, 100 Am. Dec. 541; *Union Exp. Co. v. Ohlman*, 92 Pa. 323; *Shepherd v. Bristol & E. R. Co.* 37 L. J. Exch. 113; *Rooth v. North Eastern R. Co.* 36 L. J. Exch. 88; *Chapman v. Great Western R. Co.* 42 L. T. N. S. 252; 2 Redf. Railways, p. 164.

Warehousemen are bound only to take common and reasonable care of the commodity intrusted to their charge, and that common and reasonable care is that diligence which men in general exert in respect to their own concerns.

Murphy v. Lemay, 82 Ark. 225; *Little Rock & Ft. S. R. Co. v. Hunter*, 42 Ark. 204; *Holladay v. Kennard*, 79 U. S. 12 Wall. 254, 20 L. ed. 390.

The defendant's warehouse having been destroyed by fire, with its contents, by reason of the acts of a desperate and uncontrollable mob of rioters, exonerates the railway company from all liability, even though it was liable as a common carrier.

Russell v. Niemann, 17 C. B. N. S. 175; *Grismer v. Lake Shore & M. S. R. Co.* 102 N. Y. 568, 55 Am. Rep. 587; *Little v. Fargo*, 43 Hun, 233; *Hamilton v. Western N. C. R. Co.* 96 N. C. 398; *Pittsburgh, C. & St. L. R. Co. v. Hollowell*, 65 Ind. 183, 82 Am. Rep. 63; *McCrane v. Wood*, 24 La. Ann. 406; *Pittsburgh, Ft. W. & C. R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Rep. 422; *Lake Shore & M. S. R. Co. v. Bennett*, 69 Ind. 457; *Wertheimer v. Pennsylvania R. Co.* 17 Blatchf. 421.

Meers. W. P. Grace and A. B. Grace, for appellee:

A public common carrier for hire is an insurer of the safe delivery of the goods in the absence of an express contract to the contrary.

Hutchinson, Carr. § 4; Cooley, Torts, pp. 640, 641; 2 Am. & Eng. Encyclop. Law, p. 778, notes.

Losses by thieves or robbers and mobs and riots are to be borne by the carrier unless he

has protected himself from such liability by his contract.

Hutchinson, Carr. §§ 204, 205, notes; 2 Kent, Com. §§ 602, 603; *Gulf, C. & S. F. R. Co. v. Levi*, 8 L. R. A. 323, 76 Tex. 337; Story, Bailm. § 838; *Chevallier v. Straham*, 2 Tex. 115, 47 Am. Dec. 639; Cooley, Torts, pp. 640, 641.

The contract to deliver the goods is absolute; in the absence of an express agreement to the contrary, the carrier is an insurer, and nothing but the act of God or the public enemy will excuse him.

Gulf, C. & S. F. R. Co. v. Levi, supra; *Vicksburg & M. R. Co. v. Ragadale*, 46 Miss. 458; *Seligman v. Armijo*, 1 N. M. 459; *Taylor v. Little Rock, M. R. & T. R. Co.* 39 Ark. 148; *Pittsburgh, C. & St. L. R. Co. v. Hollowell*, 65 Ind. 183, 82 Am. Rep. 63; *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294; *Nashville & O. R. Co. v. Estes*, 10 Lea, 749; *Read v. St. Louis, K. O. & N. R. Co.* 60 Mo. 199; *Patton v. Magrath*, Dud. L. 159, 31 Am. Dec. 552; *Hall v. Pennsylvania R. Co.* 1 Fed. Rep. 226.

After the goods arrive at destination a reasonable time must be allowed the owner to receive and remove them.

Moses v. Boston & M. Railroad, 82 N. H. 523, 64 Am. Dec. 881; *McMillan v. Michigan S. & N. I. R. Co.* 16 Mich. 79, 93 Am. Dec. 208; *Tarbell v. Royal Exch. Shipping Co.* 110 N. Y. 170; *Mills v. Michigan Cent. R. Co.* 45 N. Y. 622, 6 Am. Rep. 152; *Pinney v. First Div. of St. Paul & P. R. Co.* 19 Minn. 251; *Morris & E. R. Co. v. Ayres*, 29 N. J. L. 393, 80 Am. Dec. 215; *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333; *Jeffersonville R. Co. v. Cleveland*, 2 Bush, 468; *Maignan v. New Orleans, J. & G. N. R. Co.* 24 La. Ann. 333; *Hirsch v. The Steamboat Quaker City*, 2 Disney (Ohio) 144; *Tanner v. Oil Creek R. Co.* 53 Pa. 411; *Chicago & A. R. Co. v. Scott*, 42 Ill. 183; *Spears v. Spartanburg, U. & C. R. Co.* 11 S. C. 158; *Dean v. Vaccaro*, 2 Hend. 490, 75 Am. Dec. 744; *Quimit v. Henshaw*, 35 Vt. 604, 84 Am. Dec. 648; *Lenke v. Chicago, M. & St. P. R. Co.* 39 Wis. 449; *Missouri Pac. R. Co. v. Haynes*, 72 Tex. 175; *The Mary Washington*, 1 Abb. U. S. 1; *Turner v. Huff*, 46 Ark. 222, 55 Am. Rep. 580; *Burnell v. New York Cent. R. Co.* 45 N. Y. 184, 6 Am. Rep. 61.

Wood, J., delivered the opinion of the court:

The appellant company received some corn and hay at Pine Bluff for transportation to Linwood station, there to be delivered, upon payment of freight, to C. E. Nevila, the appellee. About the hour the freight train was to arrive, appellee appeared at the station to receive his freight. The train did not arrive on time. Appellee waited till after sunset, and returned to his home. Soon after his departure the train came in, and appellee's goods were safely deposited in appellant's warehouse at Linwood. Next morning appellee returned with his teams to receive his goods, but during the night a mob of negroes, which the civil authorities were unable to control, set fire to appellant's station house, and destroyed same, together with the goods of appellee. Appellee sued for and obtained

judgment against the company for the value of his goods, and the company appeals.

The questions for our consideration are presented by the following instruction: (1) "That the receipt of the goods by the company's agent at Linwood, and placing them in the station house, did not, of itself, change the relations existing between the consignee and the company, and change the liability of the latter from that of carrier to warehouseman, because the court adopts what is commonly known as 'the New Hampshire rule,' and holds that, before the liability as carrier ceases and that of warehouseman begins, the consignee must have had a reasonable opportunity to remove the goods after notice to do so, or after reasonable effort by the company to give him notice." (2) "The court further declares, upon the facts stated, the mob of rioters referred to was not a public enemy, in the legal meaning of that term, and therefore its acts in destroying the property did not relieve the defendant of its liability as a common carrier to deliver the same to consignee."

1. Two well-defined but widely divergent rules have been announced by the American courts upon the proposition embodied in the first of the above instructions. In 1854 the supreme court of Massachusetts determined that the liability of railroads as common carriers ceased the moment the goods of the consignee were removed from their cars and placed in a safe place upon their platforms within their depots, and that from that time until the goods were called for and delivered to the consignee the liability of the railroad was only that of warehouseman. *Norway Plains Co. v. Boston & M. Railroad*, 1 Gray, 263, 61 Am. Dec. 423. This rule has been approved in several states,—Illinois, Indiana, Iowa, Georgia, California, Missouri, North Carolina, and Tennessee. In 1856 the supreme court of New Hampshire expressly departed from the doctrine of the Massachusetts court, holding that the liability of the carrier as such continued until the owner should have a reasonable time after the arrival of the goods to accept and remove them. *Moses v. Boston & M. Railroad*, 32 N. H. 523, 64 Am. Dec. 381. The doctrine has been approved by the supreme courts of the following states, to wit: Alabama, Louisiana, Kentucky, New Jersey, Kansas, Ohio, Vermont, Wisconsin, New York, Michigan, Minnesota, Texas, Connecticut, and Pennsylvania. Counsel for appellant cite Alabama and Pennsylvania as supporting the Massachusetts rule, but an examination of the cases of *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395, and *Louisville & N. R. Co. v. Oden*, 80 Ala. 39, and the case of *National Line S. S. Co. v. Smart*, 107 Pa. 492, will discover that Alabama and Pennsylvania are in line with the New Hampshire rule as to the consignee having a reasonable time in which to remove the goods, during which time the liability of the carrier as an insurer continues. Counsel for appellee are likewise mistaken in putting Tennessee in the New Hampshire column. See *Buller v. East Tennessee & V. R. Co* 8 Lea, 32. But, whatever rule we adopt, we will be but going upon

a well-beaten path, and following in the footsteps of eminent jurists. It is difficult to determine where lies the weight of authority amid such respectable conflict. But, considering the "broad principles of public policy and convenience upon which the common-law liability of the carrier is made to rest," the doctrine of the New Hampshire court commends itself to our favor. We think it embodies the better reason. Without entering upon a discussion of these principles (for we could not hope to add anything new), we simply announce our approval of the New Hampshire case as applicable to the undisputed facts of this case. This doctrine is supported, we believe, by a majority of the text-writers, as well as the adjudicated cases. In addition to authorities cited in brief of counsel, see 2 Beach, *Railway Law*, § 916; 3 Wood, *Railway Law*, 1908; 2 Redf. *Railways*, 81; Story, *Bailm.* § 543; and Hutchinson, *Carr.* § 378. The last author, in his excellent work on Carriers, after giving most cogent reasons for the soundness of the New Hampshire rule, concludes as follows: "The same reasons, therefore, upon which is based the severe accountability of the carrier for the safety of his charge, would seem to require that railway companies should be held to be custodians of the goods in the same character in which they received them until they had either tendered them to the consignee, or had, after informing him of their arrival, given him a reasonable time within which to take them away. This is, as we have seen, the well-settled law as to carriers by water, and no substantial reason can be urged why the rule should be further relaxed in favor of railroad companies." Our own court in *Turner v. Huff*, 46 Ark. 225, 55 Am. Rep. 580, speaking of the question of notice, in regard to carriers by water, said: "A carrier by water may deliver goods on the wharf, but as a general proposition the consignee is entitled to actual notice of their arrival, that he may have an opportunity to move or safely store them. The necessity of notice may, however, be waived by the previous course of dealing between the parties." The same rule is applicable to railroads. The supreme court of New York in *Fenner v. Buffalo & S. L. R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709, has covered the whole doctrine of notice and reasonable opportunity to remove the goods after arrival at place of destination, as follows: "If the consignee is present upon the arrival of the goods, he must take them without unreasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them. If he is absent, unknown, or cannot be found, then the carrier can place the goods in its freight house, and after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases." As to what is reasonable time for removal, where the facts are undisputed, as in this case, is a question of law. Where there is a dispute about the facts, the question must be determined by the jury or court sitting as such. It should be said, however:

that the question of reasonable time and opportunity to remove the goods is not in the least affected by any untoward or adventitious surroundings peculiar to any particular consignee. *Hutchinson, Carr. 377.*

2. Upon the second proposition, the authorities are practically one way. Where there is a total failure to deliver goods, occasioned by the "depredations or the violence of mobs, rioters, strikers, thieves, and the like," the carrier is liable; for, says Mr. *Hutchinson*, "by the word 'enemies' in this connection is to be understood the public enemies of the country of the carrier, and not of the owner of the goods." *Hutchinson, Carr. 303*, and authorities there cited.

The charge of the trial court was in harmony with the views we have expressed, and its judgment is therefore affirmed.

ST. LOUIS, ARKANSAS & TEXAS R. CO.,
Appl.,

FIRE ASSOCIATION OF PHILADELPHIA *et al.*

(.....Ark.....)

1. The institution or prosecution of a suit is not a "doing business" within the meaning of laws prescribing conditions of business by foreign corporations.
2. The failure of a foreign corporation to comply with the conditions of the right to do business in a state will not preclude an action by it, or by an insurance company subrogated to its rights, for negligent injuries to its property within the state.
3. The right of a foreign insurance company by subrogation to enforce a claim for negligently destroying property is not affected by the fact that it was not legally bound to pay the loss, or by the invalidity of a formal assignment to it of the right to damages.
4. An action at law is the proper remedy by an insurance company on subrogation to a claim against the party negligently causing the loss.
5. A constitutional provision that no foreign corporation shall do business except while it has a known place of business and an authorized agent in the state is not self executing without any provision how the agent shall be designated or the place of business made known.

(March 16, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Columbia County in favor of plaintiffs in an action brought to recover the value of property alleged to have been destroyed through defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Sam. H. West and Gaughan & Sifford, for appellant:

NOTE.—The question, what constitutes doing business by a foreign corporation, is treated in a note to *Cone Export & Commission Co. v. Poole* (S. C.) 24 L. R. A. 289, while the restriction on business of foreign insurance companies is discussed in a note to *State v. Ackerman* (Ohio) 24 L. R. A. 293.

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The demurrer confesses that this contract is void, because neither of the contracting parties had complied with the act pleaded.

If the appellee's right of action rests upon the contract of the assignment, it must fail, if the contract itself is invalid, and the contract can have no validity unless the Southwestern Commercial Company had complied with the act referred to. If appellee's right of action does not depend upon the contract of assignment, but upon the equitable doctrine of subrogation, then the cause should have been transferred to the chancery docket.

Talbot v. Wilkins, 81 Ark. 411; *Little Rock & Ft. S. R. Co. v. Perry*, 37 Ark. 186.

The right of the commercial company to do this business in Arkansas depended upon the will of our state and any decision which would hold valid its contract would simply be an act of grace.

Com. v. Milton, 12 B. Mon. 212, 54 Am. Dec. 522; *Erie R. Co. v. State*, 81 N. J. L. 531, 86 Am. Dec. 226; *Ducat v. Chicago*, 43 Ill. 172, 95 Am. Dec. 529; *Phamiz Ins. Co. v. Com.* 5 Bush, 68, 96 Am. Dec. 331.

The state having the legal right to declare the contract void without the Act of April 4, 1887, it assuredly had the right to declare the contract void upon a refusal or failure to comply with the condition imposed by it through the legislative branch of government.

The fire association having failed to establish its inability under its contract of insurance cannot maintain a suit against appellant.

Fishback v. Weaver, 34 Ark. 569; *German Ins. Co. v. Gibson*, 53 Ark. 499.

Messrs. B. F. Askew and Scott & Jones, for appellees:

This right (of subrogation) depends, not upon the privity of contract, but is worked out through the right of the creditor or owner and in his name; and exists, although the insurer was not legally bound to indemnify the insured for the loss he sustained.

May, Ins. 2d ed. p. 687.

Battle, J., delivered the opinion of the court:

This action was instituted by the Fire Association of Philadelphia and the Southwestern Commercial Company against the St. Louis, Arkansas & Texas Railway Company for the recovery of damages incurred through the loss of cotton burned by fire on the 1st day of April, 1887, at Magnolia, Ark. The Fire Association of Philadelphia was a corporation organized and existing under the laws of Pennsylvania, and was engaged in insuring property against fire; and the Southwestern Commercial Company was a corporation of the state of Missouri, and was engaged in buying and selling cotton. The cotton burned was purchased in this state by the Southwestern Commercial Company, belonged to it, and was insured by the Fire Association against fire by a policy issued to its owner. After the fire on the 16th of May, 1887, the Fire Association paid to the Commercial Company the sum of \$1,478.86 on account of the loss sustained by the burning of the cotton, and the latter transferred to the former corporation its claim against the defendant for damages. Plaintiffs alleged that

the fire was caused by the negligence of the defendant.

The defendant answered. The issues joined were tried by a jury. The plaintiffs recovered a judgment. The defendant appealed. The judgment was reversed by this court, and the cause was remanded for a new trial. *St. Louis, A. & T. R. Co. v. Fire Assn. of Philadelphia*, 55 Ark. 163.

Upon the return of the case to the circuit court the defendant filed another answer as a substitute for the first, and therein alleged, among other things, as follows:

"First. That the contract of insurance set out in the complaint between the plaintiffs herein was made within the state of Arkansas, and is void, because at the time of the making of said contract of insurance the plaintiff the Southwestern Commercial Company, a corporation, as alleged in the complaint, organized and transacting business under the laws of the state of Missouri, had no legal existence in this state; having never complied with section 11, article 12, of the Constitution, and an Act of April 4, 1887, so as to authorize it to do any business whatever.

"Second. That the assignment and transfer of the right of said Southwestern Commercial Company to said Fire Association were made in this state, and the pretended subrogation of the latter thereto are void, because it says neither of said plaintiffs were authorized to transact corporate business in the state of Arkansas; neither having complied with the Act approved April 4, 1887, whereby alone they could be so authorized, and neither having done so at any time prior to the institution of this suit.

"Tenth. That this court has not jurisdiction to hear and determine this cause, but that on the contrary a court of equity alone is competent to hear and determine this cause,"—and asked that it "may be transferred to the equity docket."

The plaintiffs demurred to the paragraphs of the answer which are numbered "First" and "Second," in so far as they set up the Act of April 4, 1887, as a defense, and the demurrer was sustained by the court. The motion to transfer to the equity docket was disregarded, and the issues were tried by a jury. A verdict was returned in favor of the fire association. Judgment was rendered accordingly, and the defendant again appealed.

In order to decide the question raised by the demurrer to the answer of the appellant, it is necessary to consider the Act of April 4, 1887. That act declares that, "before any foreign corporation shall begin to carry on business in this state, it shall," by a "certificate under the hand of the president and seal of such company, filed in the office of the secretary of state, designate an agent, who shall be a citizen of this state," upon whom process may be served, and state therein its principal place of business in this state, and provides that, if any such corporation shall fail to file such certificate, all its contracts with citizens of this state shall be void as to it, and shall not be enforced in its

favor by the courts. The sole object of the act, as shown by these provisions, is the protection of the citizen. The contracts affected by it are made with him, and, if entered into in violation of the statute, are void as to the corporation, and no one else. Contracts between foreign corporations and persons who are not citizens are under no circumstances declared void as to any one. The act prescribes the conditions upon which foreign corporations can do business, and declares and limits the penalty of noncompliance. Having done so, the penal consequences cannot be extended beyond the boundaries so defined. *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67.

Appellees were foreign corporations. The contract of insurance made by them was prior in time to the enactment of the Act of April 4, 1887, was not made with citizens of this state, and was a valid contract. Being valid, how could the right to maintain this action be affected by the failure, if any, of the commercial company to comply with the condition on which foreign corporations are allowed to do business in this state? The cotton burned was its property, and was in its possession when it was destroyed or injured. No one had a right to forcibly take it from the company, or willfully or carelessly damage or destroy it, with impunity, because it might have been acquired in the transaction of business by a corporation without first conforming to the laws of this state. *Western U. Teleg. Co. v. Union Pac. R. Co.* 1 McCrary, 562, 3 Fed. Rep. 428; *Tenant v. Elliott*, 1 Bos. & P. 8; *Olements v. Yturria*, 81 N. Y. 285; *Pfeuffer v. Malby*, 54 Tex. 454, 38 Am. Rep. 631; 1 Whart. Cont. § 352. Should any one do so, it would have a right of action for the injury done, and could bring suit without complying with the laws prescribing the conditions on which foreign corporations are allowed to do business. The right of action, in such a case, would not grow out of or depend on a violation of the law by it, but would be distinct from, independent of, unconnected with, and proximately unaffected by, any business transaction of the company; and that the institution or prosecution of a suit would not be a "doing business," within the meaning of the laws prescribing such conditions. *St. Louis, A. & T. R. Co. v. Fire Assn. of Philadelphia*, 55 Ark. 163.

If the cotton of the Commercial Company was injured or destroyed by fire caused by the negligence of the railway company, the latter was liable to the former company in damages for the injury done. It was no defense for the latter to say that the former was a foreign corporation, and had not complied with the conditions on which it could do business. Such a failure would be no excuse or justification for the appellant's burning or injuring the property of the Commercial Company.

When the cotton was destroyed or injured by the fire on April 1, 1887, the insurance company had a right to pay the loss incurred, and thereby relieve itself of liability for the same. It was not compelled to wait until a

court of competent jurisdiction adjudged that it was liable. When it paid the loss it succeeded to, and became entitled to, the rights of the commercial company to relief against the appellant, to the extent of the amount paid as indemnity. The commercial company could not defeat this right by showing that it had not performed the conditions on which foreign corporations are permitted to do business. *Hagerman v. Empire State Co.* 97 Pa. 534; *Ehrman v. Teutonia Ins. Co.* 1 McCrary, 123, 1 Fed. Rep. 471. With the defenses the fire association had against the right of the assured to indemnity under the contract of insurance, appellant had no concern, or right to set them up in this action. It was bound to make satisfaction for the damages occasioned by its negligence. It was not relieved of this liability by the acts of the other corporations. When the commercial company accepted the indemnity, the insurance company became subrogated to its rights against appellant, and empowered to work out or enforce them by a suit at law in its name and right, and in the right of no other person; and this authority existed although the fire association was not legally bound to indemnify the assured for the loss sustained. *Commercial Ins. Co. of Cincinnati v. The "O. D., Jr."* 1 Woods, C. C. 72, Fed. Cas. No. 7,051; *The Monticello v. Mollison*, 58 U. S. 17 How. 152, 15 L. ed. 63; 2 May, Ins. 8d ed. § 454.

The fact that the commercial company assigned its rights against the appellant to the fire association, by an instrument of writing, did not affect the remedies of the parties to this action. Assume that it was void because the parties to the same, in executing it, transacted business in violation of the Act of April 4, 1887, and the rights of the fire association remain unaffected, because the rights which the commercial company thereby undertook to assign vested in the insurance company before its execution. *St. Louis, A. & T. R. Co. v. Fire Asso. of Philadelphia* *supra*.

For the reasons given, we think that the demurrer to the answer was properly sustained.

It is contended by appellant that this ac-
35 L. R. A.

tion should have been transferred to the equity docket. In this it is also in error. It is well settled that suits based on causes of action like the one sued on in this case should be brought at law, and in the name of the assured, and can be brought without his consent. *Monmouth County Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107, 117; *Sheldon*, Subr. 2d ed. § 231.

The appellant contends that the evidence failed to show that the commercial company complied with section 11, article 12, of the Constitution. This section declares that no "foreign corporation shall do business in this state, except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served." It is not self-executing. It does not provide how the agent shall be designated, or how the place of business shall be made known. The commercial company had no right to say upon what agent process may be served. The legislature alone had the right. Until it exercised it, there was no penalty for the violation of the constitution in that respect. In this case, however the evidence shows that the company had an agent and a place of business in this state while it was engaged in purchasing cotton. In this way it complied with the constitution, in so far as it could in the absence of legislation. By so doing it assented to the conditions of the constitution, and authorized service of process upon its agent, to the extent of its ability, there being no statute directing it how to designate any particular agent for that purpose. *St. Clair v. Cox*, 106 U. S. 356, 27 L. ed. 225.

But assuming that the commercial company could, but did not, comply with section 11, article 12, of the Constitution, the failure to do so was no defense in this action, as we have attempted to show.

The evidence was sufficient, in this court, to sustain the verdict of the jury.

Judgment affirmed.

Bunn, Ch. J., being disqualified, did not participate.

MINNESOTA SUPREME COURT.

Thomas J. YORKS, *Resp't.*,

v.

David TOZER, *App't.*

(..... Minn.)

"In every important exigency in the partnership affairs, where one partner is about to act, he should consult the other, at least if there are no circumstances which excuse him from so doing. The only business of the partnership between the plaintiff and defendant was the purchase and sale of a single tract of land, the negotiations for the purchase of which were conducted by the plaintiff, and the title taken in the name of the defendant, who sold the land without the knowledge or consent of the plaintiff, and in the negotiations for such sale an incorrect abstract of title was procured, by which it appeared that defendant had no title, whereas he had in fact a good title of record. Thereupon defendant, without plaintiff's knowledge or consent, expended \$526 in procuring a conveyance to himself of the supposed title of the person appearing by such abstract to be the owner, but if, before doing so, he had consulted plaintiff, he would have been informed that the abstract was defective, and the title in defendant good and complete of record. The trial court found that defendant did not act in bad faith. Held, no reason appearing why plaintiff could not be consulted, it was gross negligence in defendant to proceed to purchase such supposed title

*Headnote by CANTY, J.

without consulting him, and that, on an accounting between them, plaintiff cannot be charged with one half or any part of said expense of \$526.

(November 12, 1894.)

APPEAL by defendant from a judgment of the District Court for Washington County in favor of plaintiff in an action brought to obtain an accounting of certain partnership transactions and the payment of the share to which plaintiff was entitled, which judgment disallowed a claim of defendant to an allowance of certain expenses which he had incurred in the partnership transactions. *Affirmed.*

The facts are stated in the opinion.

Messrs. Clapp & Macartney, for appellant.

Though the degree of loyalty required from a partner to his firm is *uberrima fides*, a similar degree of care or of judgment is not required, and the consequences of an honest mistake of judgment or trivial departure from the agreement in exceptional exigencies, or want of extraordinary caution, will not be visited upon him, provided he acted bona fide and with a fair degree of care, and the loss must fall on the firm.

2 Bates, Partn. § 768; *Lyles v. Styles*, 2 Wash. C. C. 224; *Cragg v. Ford*, 1 Younge & C. Ch. Cas. 280; *Caldwell v. Leiber*, 7 Paige, 488, 4 L. ed. 240; *Hall v. Sannoner*, 44 Ark. 34; *Tillotson v. Tillotson*, 84 Conn. 835; *Morrison v.*

NOTE.—Rights of partners inter se in partnership real estate.

I. General rule as to partners' interest.

II. Powers of partners over partnership real estate.

- a. In general.
- b. To contract and purchase.
- c. To transfer or convey firm property.
- d. To convey his interest.
- e. To mortgage.
 1. In general.
 2. For firm's benefit.
 3. To secure private debt.
- f. To create liens, make assignments, etc.
- g. To make and renew lease.
- h. To give note.
- i. To sue.
- j. Of continuing partner.

III. How conveyed by partnership.

IV. Purchase by partner of firm property.

V. Purchase of deceased partner's interest.

VI. Sale by partner of his interest to his co-partners.

VII. Effect of conveyance by partner.

VIII. Liability of the firm for partner's acts.

IX. The question of ratification.

X. Partner's right to reimbursement.

XI. Equitable lien of partners.

XII. Partition of partnership real estate.

XIII. Position of partner advancing purchase money.

XIV. Position of partner purchasing at sheriff's sale.

XV. Position of new partner.

XVI. Fraud by partner.

XVII. Estoppel of partner.

XVIII. Statute of limitations.

XIX. Tender of purchase money by partner.

XX. Dormant partner.

XXI. Deceased partner's share.

XXII. Homestead rights.

XXIII. In partnership formed for the purchase and sale of land.

XXIV. When partnership in lands continues after the death of a partner.

XXV. The question of dissolution.

XXVI. Winding up of firm.

XXVII. Division by partnership prior to dissolution.

XXVIII. In Louisiana.

The question of the rights of surviving partners will form a separate note to the case of *Galbraith v. Tracy* (1894) post, 129, 153 Ill. 54.

As to the position of tenants in dower and by the curtesy and of the heirs and personal representatives of a deceased partner in partnership real estate, see note to *Woodward-Holmes Co. v. Nudd* (1894) (Minn.) 27 L. R. A. 340.

As to when real estate will be considered partnership property, see note to *Robinson Bank v. Miller, Lamport v. Miller* (Ill.) 27 L. R. A. 449, and *National Union Bank of Maryland v. National Mechanics' Bank of Baltimore* (Md.) 27 L. R. A. 476.

Upon the question of the rights of creditors and other third parties in partnership real estate, see note to *Goldthwaite v. Janney* (Ala.) post, 161.

I. General rule as to partner's interests.

Copartners can contribute an interest in real estate to the capital stock of a copartnership as well as money or other personal property, and when so contributed it becomes a part of the assets. *MacFarlane v. MacFarlane* (1894) 82 Hun. 228.

The fact that the property consists of real estate does not change the principles of law governing the ultimate rights and interests of the parties concerned. *Claggett v. Kilbourne* (1863) 66 U. S. 1 Black, 346, 17 L. ed. 218.

And so it is with respect to leaseholds. *Darby v.*

Smith, 81 Ill. 221. See also *Bates*, Partn. § 764, cases cited in *notes*; *Phelan v. Hutchinson*, 62 N. C. 116, 98 Am. Dec. 602, 603; 17 Am. & Eng. Encyclop. Law, p. 1219; *Day v. Lockwood*, 24 Conn. 185; *Blair v. Johnston*, 1 Head, 13; *Knob v. Sprecher*, 68 Pa. 415; *Hollister v. Barkley*, 11 N. H. 501; *Wilder v. Morris*, 7 Bush, 420.

Mr. H. N. Setzer, for respondent:

In all partnerships whether expressed in the deed or not, the partners are bound to be true and faithful to each other. They are to act upon the joint opinion of all, and the discretion and judgment of any one cannot be excluded.

Const v. Harris, Turn. & R. 525; *Story*, Partn. § 123, *note*.

Concealment will amount to fraud, where it is of material facts which one party is under a legal or equitable duty to communicate to the other and which the latter has a right *juris et de jure* to know.

9 Am. & Eng. Encyclop. Law, p. 644, and authorities cited; *Maddesford v. Austwick*, 1 Sim. 83; 1 *Story*, Eq. Jur. § 218.

Canty, J., delivered the opinion of the court:

It is conceded by both parties, and found by the court, that the plaintiff and defendant were partners in the purchase of a tract of land; that it was agreed by and between them that the title should be taken in the name of defendant; that he should advance the purchase price, and

pay the taxes, and plaintiff should sell the land, and, after repaying defendant the money so advanced him and 7 per cent interest thereon, the balance of the proceeds of such sale should be divided equally between them. The land was so purchased April 22, 1883, for \$450, and the title so taken. The land was sold and conveyed by defendant August 6, 1890, for \$1,660. Said purchase money and the taxes paid by defendant, and interest on all of the same up to the time of said sale, amount to \$807.32, leaving \$752.68, the balance of the proceeds of said sale, so to be divided between them. This action is brought for an accounting and a recovery of the sum due plaintiff under said agreement, and the trial court awarded plaintiff one half of said balance of \$752.68, and from the judgment entered thereon defendant appeals. There is no settled case, and the error assigned is that the judgment is not sustained by the findings of fact.

The court further finds that in July, 1890, without the knowledge of plaintiff, defendant negotiated a sale of said land to said purchaser: that the purchaser procured an abstract of title to said real estate from the register of deeds; that said abstract was in fact false, as it omitted one recorded conveyance, a link in the chain of title, and by such abstract it appeared that the original patentee was still the owner in fee of the land, whereas in fact defendant had a good title of record; that the purchaser submitted the abstract to two different and competent attorneys who each advised him

Darby (1856) 3 *Drew*. 495, 2 *Jur. N. S.* 271, 25 *L. J. Ch.* 371, 4 *Week. Rep.* 413.

No partner can insist upon retaining his share unsold, no matter in whom the legal estate is vested. *Darby v. Darby*, *supra*; *Featherstonhaugh v. Fenwick* (1810) 17 *Ves. Jr.* 298.

The mere contract of partnership, without any express stipulation involved in it, implies a contract quite as stringent as if it were expressed, that at the dissolution of the partnership all the property then belonging to the partnership, whether ordinary stock in trade or a leasehold interest or a fee-simple estate in land, shall be sold and the net proceeds, after satisfying all the partnership debts and liabilities, be divided among the partners, each partner and the representatives of any deceased partner, having the right to interest thereon. *Darby v. Darby*, *supra*.

It is subject to all the rules applicable to partnership property so far as the partners themselves and those claiming under them with notice are concerned. *Churchill v. Proctor* (1883) 31 *Minn.* 129.

Liable for the firm debts and to the claims of the partners *inter se*. *Pepper v. Thomas* (1837) 85 *Ky.* 339; *Tillinghast v. Champlin* (1856) 4 *R. L.* 173, 37 *Am. Dec.* 510.

So the surplus proceeds of a sale thereof under power of sale contained in a mortgage is to be so applied. *Lime Rock Bank v. Phetteplace* (1864) 6 *R. L.* 54.

Each partner has an equitable interest in the property until such purposes are accomplished. *Dupuy v. Leavenworth* (1861) 17 *Cal.* 262; *Smith v. Tarlton* (1847) 2 *Barb. Ch.* 333, 5 *L. ed.* 636; *Diggs v. Brown* (1864) 78 *Va.* 232; *Pierce v. Trigg* (1830) 10 *Leigh*, 408; *Wheatley v. Calhoun* (1841) 12 *Leigh*, 264, 37 *Am. Dec.* 654; *Christian v. Ellis* (1845) 1 *Gratt.* 402; *Shanks v. Klein* (1881) 104 *U. S.* 18, 26 *L. ed.* 635; *Parker v. Bowles* (1876) 57 *N. H.* 491; *Hardin v. Jamison* (Minn.) Feb. 25, 1895; *Coder v. Huling* (1856) 37 *Pa.* 84.

A partner has no right to call for the conveyance 38 *L. R. A.*

as tenant in common until the trust fastened upon partnership real estate has been satisfied. *Kruschke v. Stefan* (1892) 83 *Wis.* 373, 335.

Yet partners may withdraw real estate from the partnership and hold it in severalty and so become tenants in common. *Lindley v. Davis* (1887) 7 *Mont.* 206.

If the legal title is in one partner, the others have only a title bond, yet equity treats that as done which ought to be done. *Gritty v. Northcutt* (1871) 5 *Heisk.* 748.

The general principles apply to the adjustment and equalization of the benefits and burdens between the partners themselves. *Espy v. Comer* (1884) 76 *Ala.* 501.

The same mutual confidence which governs all partnership relations in other respects, extending to partnership real estate. *Dyer v. Clark* (1843) 5 *Met.* 562, 39 *Am. Dec.* 697.

There is no distinction in the law of partnership as administered in a court of equity between real and personal assets, the whole constituting partnership stock so inseparable that for all purposes it is personality; whether the partnership be solvent or insolvent; whether they be creditors or not. *Logan v. Greenlaw* (1885) 25 *Fed. Rep.* 290.

As between the parties themselves there is not in reality any difference between partnership property, held for the purpose of trade or business, whether consisting of personal or movable property, or real or immovable property, or of both, so far as their ultimate rights and interests are concerned. *Gray v. Pulmer* (1858) 9 *Cal.* 618.

It is competent for partners to agree among themselves as to the manner in which the partnership property shall be used, and they may enter into new articles and arrangements for the government of the concern, which will bind them *inter se*. *McDougald v. Banks* (1853) 13 *Ga.* 451, in which case the partners made an arrangement as to the receipt of rents of certain real estate.

Partners may, by contract, stipulate that the

that, according to the abstract, the defendant had no title, and defendant was informed by such purchaser of the opinion of said attorneys. Defendant, believing he had no title, at an expense of \$526 then procured a conveyance to himself from said original patentee, and claims that this expense should be allowed him in said accounting as a part of the cost of the land to be deducted from such proceeds of said sale, and that plaintiff is entitled to only one half of the balance of such proceeds, after this \$526 is also deducted therefrom. It is further found by the court that defendant did not inform plaintiff of any of said negotiation, or of the apparent defect in said title, or show him or inform him of said abstract, or consult him as to purchasing the supposed title of said patentee, and that plaintiff had no knowledge or notice of any of these things, or of the sale of said property to said purchaser from defendant, until after the deed thereof was recorded, and he discovered it by an examination of the records; "that had said defendant exhibited said abstract of title to said plaintiff or informed him in what respect said title of said defendant was claimed to be defective, said plaintiff could at once have informed said defendant that said abstract was not a true and correct abstract of title to said lands;" and "that plaintiff was not in any manner ever consulted by defendant in regard to said supposed defect of title." The court further finds

that defendant acted in good faith in the sale of the land, and in expending said sum of \$526 in attempting to cure the supposed defect in his title, but holds that he cannot compel plaintiff to stand one half or any part of such expense. We are of the same opinion. If defendant did not act in bad faith, he was, to say the least, grossly negligent. It does not appear that the plaintiff was not accessible and could not be communicated with in a reasonable time. This land was the only partnership property and its purchase and sale was the only partnership business. It was not an act in the usual course of the partnership business, but one which went to the very foundation of the partnership. It is found by the court that the plaintiff, and not the defendant, conducted the negotiations for the purchase of this land, and procured the conveyance to defendant; and he should be presumed to have had some knowledge of the state of the title. No reason is given by defendant why all the negotiations for the sale of the land, and the purchase of this supposed title by him, were kept secret from plaintiff. In every important exigency the partner about to act should consult the other partner, at least if there are no circumstances which excuse him from so doing.

The order appealed from should be affirmed.

So ordered.

Giffillan, Ch. J., absent on account of sickness, took no part.

ownership of property may remain in one, while the partnership shall have only the use of the property, or may make any other regulations as between themselves in regard to an ownership of property, used in connection with the business of the copartnership not prohibited by law. *Taft v. Schwamb* (1875) 80 Ill. 289.

Yet it cannot be held by the separate owner except to the extent of his interest in the final balance. *Parker v. Bowles* (1876) 57 N. H. 491; *Burnside v. Merrick* (1842) 4 Met. 537.

If such lands are not necessary for the payment of the debts of the firm, they are real estate to all intents and purposes, and no more of them than are necessary for such purpose can be sold. *Weld v. Johnson Mfg. Co.* (1893) 86 Wis. 552.

Partners, so far as real estate is concerned, are joint tenants without the right of survivorship, they are *seised per mi et per tout*. *Anderson v. Tompkins* (1820) 1 Brock. 456.

Where the record clearly shows that the title is held for the joint profit and advantage of the partners and that the property is sold and the proceeds divided according to the respective interests of the partners as a firm, it is of little moment whether the title is in them as a firm or as individuals, the proceeds being treated as assets of the partnership according to their interests in the real estate. *Copp v. Longstreet* (Colo.) Dec. 10, 1894.

The partner is to be regarded in such cases as holding only an interest in the stock or capital of the partnership, which is personal property. *Hewitt v. Rankin* (1875) 41 Iowa, 35.

While the legal title upon the death of a partner will go in ordinary course of descent upon the death of a partner without survivorship, yet the equitable interest will, after the ascertainment of its value by sale, be distributable according to the supposed intention of the deceased partner, as personal property. *Lenow v. Fones* (1896) 48 Ark. 563.

Before it can be taken as a part of the separate estate of the individual copartner, the legal title, converted into a trust, is held devoted to the full.

fillment of all partnership obligations. *Wilcox v. Wilcox* (1896) 18 Allen, 252.

Each partner has a right to have the effects of the firm appropriated to the firm's debts. *Pearson v. Keedy* (1845) 6 B. Mon. 128, 43 Am. Dec. 160; *Rainey v. Nance* (1870) 54 Ill. 29.

As between themselves, they may use it as part and parcel of the firm assets, or they may divide it among themselves and hold in severalty. *Holt's App.* (1881) 98 Pa. 257.

The legal title in partnership lands forming part of the partnership stock is subordinated to incidents of partnership funds and accounting. *Godfrey v. White* (1880) 43 Mich. 171; *Drewry v. Montgomery* (1861) 28 Ark. 266; *Roberts v. McCarty* (1857) 9 Ind. 16, 68 Am. Dec. 604; *Priest v. Chouteau* (1864) 35 Mo. 368, 55 Am. Rep. 877.

The rule that partnership property must first be applied to the payment of partnership debts attaches to real estate as well as to personality, no matter in whom the legal title may be vested, the true and actual interest of each partner in the partnership stock being the balance found due to him after the payment of all the partnership debts and the adjustment of the partnership account between himself and his copartners. *Bopp v. Fox* (1872) 63 Ill. 540; *Rainey v. Nance* (1870) 54 Ill. 29; *Taylor v. Farmer* (1886) (Ill.) 6 West. Rep. 710; *Simpson v. Leech* (1897) 83 Ill. 286; *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 697; *Howard v. Priest* (1845) 5 Met. 582; *Morgan v. Olvey* (1876) 53 Ind. 6; *Meridian Nat. Bank v. Brandt* (1875) 51 Ind. 56; *Henry v. Anderson* (1881) 77 Ind. 361; *Huston v. Neil* (1873) 41 Ind. 504; *Needham v. Wright* (Ind.) Jan. 17, 1895; *Matlock v. Matlock* (1854) 5 Ind. 408; *Allen v. Wells* (1839) 23 Pick. 450, 38 Am. Dec. 757; *Hewitt v. Rankin* (1875) 41 Iowa, 35; *Hoyt v. Hoyt* (1886) 69 Iowa, 174; *Van Aken v. Clark* (1891) 82 Iowa, 256; *Easton v. Courtwright* (1884) 84 Mo. 27; *Carlisle v. Mulhern* (1863) 19 Mo. 56; *Lindley v. Davis* (1887) 7 Mont. 206; *Buffum v. Seaver* (1841) 16 N. H. 180; *Parker v. Bowles* (1876) 57 N. H. 491; *Uhler v. Seiple* (1869) 20 N. J. Eq. 234; *Staats v. Bristow* (1878) 78 N. Y. 204; *Lucas v. Laws* (1856) 27 Pa. 211; *Erwin's App.* (1861) 89 Pa. 526, 80 Am.

WASHINGTON SUPREME COURT.

C. P. DYER, Admr., etc., of George E. Allingham, Deceased, *Resp't.*,

D. W. MORSE *et al.*, *Appts.*

(.....Wash.....)

1. A conveyance of partnership real estate by the surviving partner as such will not in a court of equity have the effect of conveying only his individual interest although upon its face the deed purports to convey only such interest and is joined in by the wife of the grantor.
2. A statute establishing a plan for administering partnership assets passed after a surviving partner has taken possession of partnership real estate all of which is needed to reimburse him for advances made to pay debts of the firm, will not control in equity in determining the validity of the title of his grantee although he does not convey the property until after the passage of the statute.
3. The common-law right of a surviving partner to take possession of real estate to pay debts is not, in the absence of exclusive words in the statute, taken away by a statute establishing a procedure for the winding up of partnerships dissolved by the death of

one of the partners where machinery provided for by the statute can only be set in motion by the representatives of the deceased partner, and his acts in so doing will be valid until some action is taken by such representatives.

4. No relief will be given in equity to the representatives of a deceased partner who neglects to take any steps to set in motion a statute for the winding up of the partnership affairs, until after the surviving partner has necessarily disposed of the partnership real estate in winding up the partnership affairs and paying debts according to the course of the common law.

(January 8, 1895.)

APPEAL by defendants from a judgment of the Superior Court for Clallam County in favor of plaintiff in an action brought to recover possession of certain real estate which defendants claimed as grantees of the surviving partner of the firm to which it belonged. *Reversed.*

The facts are stated in the opinion.

Meers. Struve, Allen, Hughes & McMicken, for appellants:

The surviving partner has a legal right to the possession and disposition of all partnership effects for the purpose of paying the debts

Dec. 542; *Melly v. Wood* (1872) 71 Pa. 488, 10 Am. Rep. 719; *Foster's App.* (1873) 74 Pa. 391, 15 Am. Rep. 553; *West Hickory Min. Asso. v. Reed* (1875) 80 Pa. 85; *Foster v. Barnes* (1876) 81 Pa. 377; *Thrall v. Crampton* (1877) 16 Nat. Bankr. Reg. 261, 9 Ben. 218; *Sigourney v. Munn* (1823) 7 Conn. 11; *Pierce v. Trigg* (1830) 10 Leigh, 403; *Lake v. Craddock* (1783) 3 P. Wms. 158.

And until it is shown that the partnership debts and liabilities have been paid and partnership accounts settled, it remains partnership assets. *Hiscock v. Jaycox* (1875) 12 Nat. Bankr. Reg. 507; *Dyer v. Clark* (1942) 5 Met. 562, 39 Am. Dec. 697; *Goodburn v. Stevens* (1849) 1 Md. Ch. 420; *Tillinghast v. Champlin* (1856) 4 R. L. 173, 67 Am. Dec. 510; *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 375.

So that even a judgment against one partner will not be a lien on his interest in the land. *Du Bree v. Albert* (1882) 100 Pa. 433.

The corpus belonging to none separately but to all alike. *Logan v. Greenlaw* (1885) 25 Fed. Rep. 290.

So long as partnership debts remain unpaid, partnership property continuing such for the purpose of being applied to the payment of the debts. *Rice v. McMartin* (1873) 30 Conn. 573.

And it is immaterial in equity in whose name the legal title to the property stands. *Dupuy v. Leavenworth* (1861) 17 Cal. 262.

And after they are paid, it is divided between them in the same manner as so much capital would be. *Huston v. Nell* (1873) 41 Ind. 504.

They then hold their real estate as tenants in common relieved of any trust in behalf of the partnership. *Lindley v. Davis* (1877) 7 Mont. 206.

Partnership property, once traced into the hands or possession of an individual member of the partnership, must be accounted for by him, or he must show that it was not deemed partnership assets. *Hardin v. Jamison* (Minn.) Feb. 23, 1895.

Where real estate is purchased by a partnership and paid for out of the partnership funds, the partnership is the true owner and represents the partners according to their respective interests, such

partners being the real owners in proportion to those interests. *Thrall v. Crampton* (1877) 16 Nat. Bankr. Reg. 261, 9 Ben. 218.

One member of a firm cannot, even if so disposed, deprive the firm of property taken in payment of a debt due to the firm, by having it conveyed to himself, and property thus conveyed belongs to the firm. *Gannett v. Cunningham* (1853) 34 Me. 62.

Where a partnership was formed for trade purposes, the parties purchasing land which was conveyed to trustees absolutely, a partnership deed being executed whereby the trustees were to be seised and possessed of the estate upon trust for the benefit of themselves and their partners in the joint concern, the buildings to be erected and the land to be considered as personality, the profits being divided between the partners, it was held that the partners had an equitable seisin sufficient to establish a county vote. *Baxter v. Brown* (1845-6) 7 Mann. & G. 193; *Baxter v. Newman*, 14 L. J. C. P. 193, 9 Jur. 823, 3 Scott, N. R. 1019, 1 Lutw. Reg. Cas. 120, note.

The recording acts affect purchasers and creditors, but do not, independent of them, disturb the actual relations of the partners to each other in respect to partnership property, whether real or personal. *Abbott's App.* (1865) 50 Pa. 234.

II. Powers of partners over partnership real estate
a. In general.

One partner cannot be answerable for any act of his copartner out of the course of trade, a partner being considered as vested by his copartners with certain powers for certain purposes, and if such partner has traveled out of these his acts cannot bind his copartner. *Brooks' Syndics v. Hamilton* (1821) 10 Mart. (La.) 235, 18 Am. Dec. 823.

With respect to partnership real estate one partner can bind the other by his acts or contracts within the scope of the partnership business in equity. *Baldwin v. Richardson* (1870) 33 Tex. 16.

One partner may bind his copartners by any contract made within the scope of the partnership business. *Paton v. Baker* (1833) 62 Iowa, 704, —a case of a mortgage to secure a firm indebtedness.

of the firm and distributing the residue to those entitled thereto.

1 Woerner, Administration, p. 283, and cases cited.

Partnership real estate, when acquired and held as partnership property and with partnership funds, is, in equity, treated as personalty.

Collumb v. Read, 24 N. Y. 505; *Paige v. Paige*, 71 Iowa, 318, 60 Am. Rep. 799; *Allen v. Withrow*, 110 U. S. 119, 28 L. ed. 90; *Shanks v. Klein*, 104 U. S. 18, 26 L. ed. 635; *Uhler v. Semple*, 20 N. J. Eq. 288; *Ross v. Henderson*, 77 N. C. 170; *Bopp v. Fox*, 63 Ill. 540; *Shaffer's App.* 106 Pa. 49; *Page v. Thomas*, 43 Ohio St. 38, 54 Am. Rep. 788.

At the common law on the death of one of the partners the partnership real estate is impressed with the character of personalty and devolves on the survivor, and he can sell it for the purpose of winding up the affairs of the partnership.

1 Lindley, Partn. 5th ed. Am. notes by Wentworth, 341; *Shanks v. Klein*, *supra*.

The conveyance of partnership real estate by the surviving partner passes the equitable title to the grantee, and equity will compel the holders of the legal title to convey it.

Shanks v. Klein, *supra*; *Andrews v. Brown*, 21 Ala. 487, 56 Am. Dec. 252; *Dupuy v. Leavenworth*, 17 Cal. 262; *Nelson v. Courtwright*, 84 Mo. 37.

It has likewise been held that the surviving partner has an equitable lien on the partnership real estate for his indemnity against the

debts of the firm and for the balance that may be due to him from the firm.

Gray v. Palmer, 9 Cal. 638; *Dyer v. Clark*, 5 Met. 562, 39 Am. Dec. 697; *Parsons, Partn.* p. 441.

He might also hold the assets of the firm in his possession until all the firm debts were paid, including indebtedness to himself.

Clay v. Freeman, 118 U. S. 97, 30 L. ed. 104.

The remedy or procedure provided by the Act of 1882 is cumulative merely and does not take away the common law in relation to the same matter.

Nelson v. Hayner, 66 Ill. 487; *Sutherland*, Stat. Constr. §§ 202, 399, 400; *Sedgw. Stat. & Const. L.* 2d ed. p. 842.

Under similar statutes in other states, it has been held that until the representative of the deceased partner takes the steps pointed out by the statute, the surviving partner retains his common-law rights and powers over partnership property without giving bond.

Bredow v. Mutual Sav. Inst. 28 Mo. 181; *Easton v. Courtwright*, 84 Mo. 27; *Holman v. Nance*, 84 Mo. 674; *Weise v. Moore*, 22 Mo. App. 530; *Teney v. Laing*, 47 Kan. 297.

Having slept upon their rights so long and permitted the defendants and their grantor to pay taxes and make extensive improvements upon this property in good faith relying upon the sufficiency of title, it is now too late for them to seek relief at the hands of a court of equity.

Bigelow, Estoppel, 8d ed. p. 565; *Brazes v.*

The partners of a firm cannot plead ignorance of its transactions. *Thomas v. Scott* (1842) 3 Rob. (La.) 256.

Under the law governing partnerships, one partner has not the power to convey real estate of the firm, either by deed or assignment, nor make contracts, written or verbal, specifically enforceable against the others. *Ruffner v. McConnell* (1855) 17 Ill. 212, 63 Am. Dec. 362; *Platt v. Oliver* (1842) 3 McLean, 28; *Tapley v. Butterfield* (1840) 1 Met. 515, 36 Am. Dec. 374; *Deckard v. Case* (1836) 5 Watts, 22, 80 Am. Dec. 287; *Sloo v. State Bank of Illinois* (1837) 2 Ill. 428.

A partner cannot bind the copartnership by deed. *Layton v. Hastings* (1837) 2 Harr. (Del.) 147.

In all purchases and sales made on account of a partnership, every partner is bound to act expressly for the benefit of the partnership, and has no right to voluntarily place himself in a situation in which his bias and interest will be in opposition to the interest of the partnership. *Kilbourn v. Latta* (1886) 5 Mackey, 304, 60 Am. Rep. 373.

Yet the principle once established, that a partner may give his copartner authority by parol to bind him by instrument under seal, must extend as well to instruments affecting real estate as to others. *Wilson v. Hunter* (1862) 14 Wis. 683, 30 Am. Dec. 795.

But the power of one partner to bind the other by deed cannot be proved by parol. *Napier v. Catron* (1841) 2 Hymph. 534.

One partner may, however, bind his copartners by deed, if the other partners are present and expressly authorize the act, or the evidence of their conduct and course of business is such as to justify the inference that such authority is given. *Stroman v. Varn* (1883) 19 S. C. 507,—in which case a partner mortgaged partnership real estate, signing the firm's name. *Fleming v. Dunbar* (1835) 2 Hill, 28 L. R. A.

L. pt. 2, p. 532; *Fant v. West* (1856) 10 Rich. L. 151; *Salinas v. Bennett* (1890) 83 S. C. 285, to the same effect.

One partner, in the presence of his copartners, may, by parol authority, execute a deed for them in a transaction in which they are all interested, which will amount to an execution of the deed of all the partners, though sealed by one of them only. *Smith v. Kerr* (1849) 3 N. Y. 144; *Ball v. Dunsterville* (1791) 4 T. R. 313; *Williams v. Walaby* (1808) 4 Esp. 220; *Steiglitz v. Egginton* (1815) 1 Holt, N. P. 141; *Brutton v. Burton* (1819) 1 Chitty, 707.

Yet where no evidence is offered to prove an authority delegated to such partner, or that it is usual in such partnerships for one partner to buy land in the name of the firm, or that the existence of such authority is necessary in order to carry on the business for which the partnership is created, no such power can be implied from the mere existence of the partnership. *Judge v. Braswell* (1877) 13 Bush, 69, 23 Am. Rep. 185.

For one partner cannot by his own act defeat the rights of his copartners. *Kerr v. Kingsbury* (1879) 39 Mich. 150, 33 Am. Rep. 362.

Equity restricting the partners to the same extent in their disposition of them as obtains in regard to personality. *Arnold v. Wainwright* (1861) 6 Minn. 358, 30 Am. Dec. 448.

The Iowa Code, section 2238, which provides that a minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money or property received by him by virtue of the contract and remaining within his control at any time after his attaining his majority, applies to a contract entered into by an infant partner in a partnership concern with respect to the purchase of real estate, and such a disaffirmance would

Schofield, 2 Wash. Terr. 220; *Gallihor v. Cadwell*, 3 Wash. Terr. 511; *Sumner v. Seaton*, 47 N. J. Eq. 103; *Marines v. Goblet*, 31 S. C. 158; *Fraker v. Houck*, 36 Fed. Rep. 407; *Cheesebrough v. Parker*, 25 Kan. 566.

Mrs. Smith & Felger and Harry Ballinger, for respondent:

At the common law, the powers of the survivor extended no further than was necessary to the proper settlement of the partnership business; and for this purpose the partnership was presumed to continue and the survivor was its agent.

For a discussion of these principles see—

2 Lindley, Partn. p. 1299, note; Freeman, Co-tenancy & Partition, § 119; *McNeil v. First Cong. Soc. of San Francisco*, 66 Cal. 105; *Martin v. Morris*, 63 Wis. 418; 1 Warville, Vendors, p. 65, § 9, note 1; Boone, Real Prop. § 364, notes 7, 8; 1 Washb. Real Prop. pp. 702-703, par. 3, and notes.

A deed by a surviving partner, as such, should be given in the name of the firm, or it should otherwise appear in the deed that it was the intention that the partnership interest should pass.

Where a statute is enacted which is repugnant to the common law, the common law is abrogated so far as such conflict extends; and if the statute covers the entire subject-matter, and provides a complete method of procedure, repugnant to the system provided by the common law though not conflicting in all of its terms, the common-law system is abolished.

Endlich, Interpretation of Statutes, 199-201;

Sutherland, Stat. Constr. § 204; *District Twp. of Dubuque v. Dubuque*, 7 Iowa, 262; *Stephens v. Smith*, 77 U. S. 10 Wall. 321, 19 L. ed. 933; *United States v. Tynen*, 78 U. S. 11 Wall. 88, 20 L. ed. 153; *United States v. Three Hundred and Fifty-six Caddies of Tobacco*, 78 U. S. 11 Wall. 652, 20 L. ed. 235; *Bartlet v. King*, 12 Mass. 545; *Com. v. Cooley*, 10 Pick. 39; *Pierpont v. Crouch*, 10 Cal. 816; *State v. Conkling*, 19 Cal. 501.

The statutory method for the settlement of partnership estates is exclusive.

Shattuck v. Chandler, 40 Kan. 516; *Cook v. Lewis*, 36 Me. 840; *Putnam v. Parker*, 55 Me. 235; *Stang v. Hirst*, 61 Me. 17; *Pope v. Jackson*, 65 Me. 168.

Appellants and their grantors occupied the land without giving notice of ouster to their co-tenants.

Their co-tenants had a right to presume that their possession was amicable; and such is the conclusive presumption of the law.

McClaskey v. Barr, 47 Fed. Rep. 154; Freeman, Co-tenancy & Partition, 166, 167; *Northrop v. Marquam*, 16 Or. 178; *Miller v. Myers*, 46 Cal. 589; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *McNeil v. First Cong. Soc. of San Francisco*, 66 Cal. 105.

Hoyt, J., delivered the opinion of the court:

This action was heard in the superior court upon stipulation of counsel, and an agreed statement of facts. By the stipulation it was agreed that the cause should be tried as one

not affect the partnership agreement. *Mehlipop v. Bas* (Iowa) Jan. 27, 1894.

A judgment confessed by one partner in the firm name is good as between himself and the creditor, although void as to his copartners, not only as evidence of the amount of his indebtedness, but as a lien upon his partnership real estate. *York Bank's App.* (1880) 36 Pa. 460.

b. To contract and purchase.

A partner may contract debts and make contracts which will indirectly reach the real estate, as such must be finally subject to the debts of the firm. *Goddard v. Renner* (1877) 57 Ind. 532.

If the expenditures made are such that it is lawful for one proprietor to make in the absence and without the knowledge of his coproprietor, the liability of the latter is for an equal share of the expense accompanied with an equal participation in the resulting benefit. *Smith v. Wilson* (1855) 10 La. Ann. 255.

Partnership lands are no exception to the rule that an oral contract to convey is not binding. *Brewer v. Cropp* (Wash.) Nov. 17, 1894. *Nichols v. Oppermann* (1893) 6 Wash. 612.

In order to make a contract binding upon tenants in common and valid within the statute of frauds, it must be executed by both the complainants or their authorized agents, and the fact that the complainants are mercantile partners and that the name of the partnership firm is used as the signature to the instrument, cannot of itself aid the complainant, as the circumstance of their being partners is not of itself sufficient to confer upon one partner the right to make an agreement for the sale of real estate in the partnership name binding upon the firm. *McWhorter v. McMahon* (1840) Clark, Ch. 400, 7 L. ed. 154.

38 L. R. A.

Although one partner may bind the firm by contract respecting personal estate without special authority, yet he cannot do so as to real estate even though used and employed in the partnership business. *Lawrence v. Taylor* (1843) 5 Hill, 107.

When the partnership business is to deal in real estate, one partner has ample power, as general agent of the firm, to enter into an executory contract for the sale of such real estate enforceable in equity. *Chester v. Dickerson* (1873) 54 N. Y. 1, 13 Am. Rep. 550, affirming (1868) 52 Barb. 349. *Lawrence v. Taylor*, *supra*, to the same effect.

In the latter case the partner had received the purchase money and the sale had been ratified, but no portion of the purchase money had been paid over.

One of several partners dealing in real estate may bind his copartners by a contract relating to the sale thereof. *Copp v. Longstreet* (Colo.) Dec. 12, 1894.

And by a purchase thereof. *Wormser v. Meyers* (1877) 54 How. Pr. 139.

Even though the copartners may be ignorant of it. *Copp v. Longstreet*, *supra*.

And such contract will in equity be specifically enforced against all the partners. *Rovelsky v. Brown* (1891) 92 Ala. 522.

Such contract being within the scope of the partnership business. *Paton v. Baker* (1883) 62 Iowa, 704.

A contract to convey lands belonging to two partners, subscribed by one of them in the firm's name under the parol authority of the other partner, will be binding upon both. *Lawrence v. Taylor* (1843) 5 Hill, 107.

The purchase of land for the purpose of carrying on an ordinary and legitimate business (furnace operations), is within the scope of the ordinary dealings of the firm, which will be bound thereby

in equity, upon such statement of facts, without the introduction of other testimony. From this statement it appeared that in October, 1865, Samuel Atkinson and George E. Allingham were doing business as partners in Clallam county; that as such partners, and for the use of the partnership, they acquired title to the real estate in controversy in this action; that said partnership continued until April, 1870, when Allingham died, in the province of New Brunswick, leaving a last will which devised such real estate to the father of the plaintiff; that, after the dissolution of the partnership by the death of said Allingham, the said Atkinson, as surviving partner, closed up its affairs, and appropriated its property to the payment of the debts of the firm; that the indebtedness of the partnership at the time it was so dissolved was in excess of its assets, and that said Allingham was indebted to his partner in a large sum; that, as such surviving partner, the said Atkinson took possession of the property in question, to reimburse himself for moneys advanced by him to pay the partnership debts; and that in 1883, as such surviving partner, he conveyed such property to the defendants, or those under whom they claim. There were other facts set out in such statement, but these are the only ones which it will be necessary to refer to for the purposes of this opinion.

The superior court found that the plaintiff had the better title to the property, and entered a decree in his favor.

We find it unnecessary to discuss all the reasons for reversal relied upon by appellants, as the respondent seeks to sustain the decree upon only two substantial grounds: One, that since the deed from Atkinson to the appellants, or those under whom they claim, upon its face purported to convey only his individual interest, and was joined in by his wife, it must be assumed that it was not intended to convey more than the interest of said Atkinson in the property, as a tenant in common. This claim would have much force, were there no facts in the case tending to explain or help out the deed; but, unfortunately for this contention, it is agreed in the statement of facts that this conveyance was made by Atkinson as the surviving partner of the firm, and in the light of this concession it cannot be held, in a court of equity, that it only had the effect of conveying his individual interest.

The other question relied upon by the respondent grows out of our statute for the settlement of partnership estates. It is contended in his behalf that this statute is exclusive, and that under the terms thereof all partnership estates must be settled, and that since its enactment a surviving partner has no authority to deal with partnership effects,

Brooke v. Washington (1861) 8 Gratt. 243, 56 Am. Dec. 142.

Where a purchase of real estate is made by one partner, without the knowledge or consent of his copartner, the deed being taken in the name of a third person, who is cognizant of the circumstances of the case, a cause of action is vested in the other partner, against the party holding such property. *Howell v. Howell* (1862) 15 Wis. 55.

But a partner cannot secretly purchase a reversion in a firm lease, pending negotiations by his other partners for the purchase of the same for the firm. *Anderson v. Lemon* (1853) 8 N. Y. 236.

A partner, who purchases real estate for partnership purposes in his own name, each partner having contributed a portion of the purchase money, will be decreed in equity to convey to the other partners their respective interests therein. *Faulds v. Yates* (1870) 57 Ill. 416, 11 Am. Rep. 24.

A partner may purchase with his own funds, and on his own account, the interest of his partner in real estate at public sale, where the transaction is free from fraud, or of a trust apart from that relation, and will hold the property in the same manner as a stranger. *Bradbury v. Barnes* (1861) 19 Cal. 120.

The purchase of a right to the use of a brewery for a period of seven years by a member of a firm, if for the purpose of brewing without limitations as to time, is so directly in the line and so necessary to the prosecution of the partnership business, that although effected by one partner, it will bind the firm, especially where the partnership has ratified the acts of such partner. *Stillman v. Harvey* (1879) 47 Conn. 26.

In the case of an established association or co-partnership, the articles of which give power to the managers to provide a storehouse, not pointing out how their duty is to be performed, it is a matter submitted to their reasonable discretion, which they are at liberty to exercise, either by buying, building, or hiring a store, and therefore 28 L. R. A.

where a store and land are purchased and do not exceed what may be necessary for the purposes of the business, such managers have power to give notes to secure the same which will bind the members of the association, the names of the several parties composing the company being easily ascertained and identified by proving who constitute the company at the time. *Beaman v. Whitney* (1841) 20 Me. 418.

But in a case where, although the language of the articles is clear and explicit, that the purchase and sale of lands are within the scope of the partnership, yet the articles being equally explicit, that no member of the firm, and no member of them less than the whole, have authority to buy lands for the firm, the partnership being a non-commercial one, the partners are not bound by the purchase of land made by one partner. *Judge v. Braswell* (1877) 13 Bush, 69, 26 Am. Rep. 125.

a. To transfer or convey firm property.

Outside of the court of chancery, real estate, though belonging to partners and employed in the partnership business the title standing in their joint names, is deemed to be held by them as tenants in common or joint tenants for all purposes, and one cannot, in virtue of the partnership power, sell for the other. *Lawrence v. Taylor* (1843) 5 Hill, 107; *Coles v. Coles* (1818) 15 Johns. 151, 8 Am. Dec. 231; *Auderson v. Tompkins* (1820) 1 Brook. 456, 463.

Or bind the interest of his co-owners. *Thompson v. Bowman* (1867) 73 U. S. 6 Wall. 316, 13 L. ed. 736.

In the same manner as personality. *Platt v. Oliver* (1842) 3 McLean, 27.

Without the consent and authority of the other partners. *Goddard v. Renner* (1877) 57 Ind. 532; *Deming v. Colt* (1850) 8 Sandf. 284.

Or a sufficient special authority for the purpose. *Foster's App.* (1873) 74 Pa. 391, 15 Am. Rep. 553;

excepting as therein provided. If this is so, the decree of the superior court must be affirmed, for it is not contended that anything was ever done in relation to this property, or the other effects of the partnership, under the provisions of this statute; and it would follow that the property, so far as it is in existence, would yet be partnership property, and that the surviving partner, if in possession, would hold for the heirs of the deceased partner as well as for himself. The appellants attack this position, and claim that the common-law rights of the surviving partner have been changed by the statute only to the extent therein provided, and that such statute should be held to have been in addition to, and regulative of, such common-law rights. At the time of the death of the said Allingham, the statute in relation to this question enacted in 1862 was in force; and it is claimed on the part of the appellants that this statute must govern, while the respondent contends that, since there was no attempt to pass the title to the property in question until 1883, the law upon this same subject enacted in 1873 must control. In our opinion, for the purposes of this case, the contention of the appellants must be sustained. It appears from the agreed statement of facts that the debts were all paid before the passage of the Act of 1873, and that the surviving partner had taken possession of this property, as his own, to reimburse himself for the moneys

advanced by him in paying the debts of the firm, and that for that purpose he had paid out a sum in excess of the value of all its property. This being so, a court of equity will sustain his self-asserted title to the property, if at that time it would have been in his power to have conveyed the property to another for the purpose of paying such debts. This would not be the effect of such action, if all the property had not been required to pay the debts; but, in view of that fact, it would be inequitable to hold that the surviving partner did not obtain by the payment of the firm indebtedness the same right to the property which he could have conveyed to another. If, therefore, the Statute of 1862 did not terminate the common-law rights of the surviving partner, he became, under the agreed statement of facts, the equitable owner of the property before the passage of the Law of 1873.

We have carefully examined the provisions of the Statute of 1862 in the light of the authorities cited upon the part of appellants and the respondent, and are compelled to hold that it did not terminate the common-law rights of the surviving partner. There was no method pointed out by which the surviving partner could set the machinery provided for in the statute in motion, and, unless it was put in motion by the representatives of the deceased partner it could have no effect upon the partnership property. This being

Batty v. Adams County Comrs. (1884) 16 Neb. 44; Chester v. Dickerson (1873) 54 N. Y. 1, 18 Am. Rep. 530; Van Brunt v. Applegate (1871) 44 N. Y. 544.

Or except so far as he has the legal title in himself. Goddard v. Renner, Batty v. Adams County Comrs., Chester v. Dickerson, and Van Brunt v. Applegate. *supra*.

In the absence of express power conferred by deed. Napier v. Catron (1841) 2 Humph. 534.

Or ratification of the partner's acts. Printup v. Turner (1880) 65 Ga. 71.

Even in the case of a partnership formed for the purpose of improving land. Berry v. Folkes (1862) 60 Miss. 578.

Without creating a breach of trust. Parker v. Bowles (1876) 57 N. H. 491; Dyer v. Clark (1843) 5 Met. 562, 39 Am. Dec. 607.

Such a conveyance, unless made to one without notice, being invalid. Dyer v. Clark, *supra*.

The agency resulting from partnership relations, not authorizing such acts and the general implied powers of a partner not extending to binding the firm by instruments under seal. Arnold v. Stevenson (1866) 2 Nev. 234; Foster's App. (1873) 74 Pa. 361, 15 Am. Rep. 553.

One partner cannot sell or mortgage an undivided interest in a specific part of the partnership property, such property constituting a fund or capital for the purpose of carrying on the business of the partnership, and for the payment of the partnership creditors, the separate interest of each partner being in the surplus. Lovejoy v. Bowers (1840) 11 N. H. 404; Morrison v. Blodgett (1836) 8 N. H. 238, 29 Am. Dec. 682.

Yet although it may be conceded that at law a deed made to or by a partnership in the firm name, the full name of neither partner being given, would not pass the title to the land, yet such is not the rule in equity. Frost v. Wolf (1890) 77 Tex. 455; Baldwin v. Richardson (1870) 33 Tex. 16; Lowery v. 28 L. R. A.

Drew (1857) 18 Tex. 786; Byam v. Bickford (1886) 140 Mass. 81; Tidd v. Rines (1879) 26 Minn. 211; Beaman v. Whitney (1841) 20 Me. 413; Lindsay v. Hoke (1862) 21 Ala. 543; Slaughter v. Doe (1880) 67 Ala. 484; Chicago Lumber Co. v. Ashworth (1861) 28 Kan. 213; Morse v. Carpenter (1877) 19 Vt. 615; Hunter v. Martin (1845) 2 Rich. L. 541; Printup v. Turner (1880) 65 Ga. 71.

A deed to a firm being good in equity vesting in the members of the firm by implication the power to convey. Dunlap v. Green (1894) 60 Fed. Rep. 243.

If property stands in the name of a firm, one partner in that name may convey at least an equitable title to it, if he has authority at the time the conveyance is made, or his act may be ratified by subsequent parol consent, and it would seem to be no reason why the legal title should not be held to pass by such a conveyance. Frost v. Wolf (1890) 77 Tex. 455; Lowery v. Drew (1857) 18 Tex. 786; Baldwin v. Richardson (1870) 33 Tex. 16; Peine v. Weber (1868) 47 Ill. 44; Lawrence v. Taylor (1843) 5 Hill, 109; Herbert v. Hanrick (1877) 16 Ala. 581; Grady v. Robinson (1856) 23 Ala. 289; Gunter v. Williams (1867) 40 Ala. 561; Darst v. Roth (1824) 4 Wash. C. C. 471; Wilson v. Hunter (1862) 14 Wis. 683, 30 Am. Dec. 795; Pike v. Bucon (1842) 21 Me. 230, 38 Am. Dec. 259.

One partner may convey the equitable title to a creditor of the firm in payment, or in part payment of a bona fide debt, chargeable against the partnership assets. First Nat. Bank of Gainesville v. Cody (Ga.) Jan. 27, 1894.

So where in the case of an absconding partner, the other, having exhausted the personal estate bona fide in payment of the firm debts, is entitled to sell the partnership real estate for the payment of the debts, and a conveyance of the legal title of the share of the absconding partner will be decreed, either from him or from those holding under him, with notice of the partnership. Dupuy v. Leavenworth (1861) 17 Cal. 232.

so, it cannot be presumed that the legislature intended by its enactment to destroy the common-law interest of a surviving partner, which had theretofore existed. If such rights were cut off, in what capacity would the surviving partner hold until such time as some one over whom he had no control should put the statute in motion? We are unable to think of any status under which he could so hold which would be at all satisfactory, or would not be productive of gross injustice to the surviving partner. He could undoubtedly be compelled to pay the partnership debts, and, if he could make no use of the partnership property for that purpose, would have to pay them out of his own funds, and, by the negligence or default of the representatives of the deceased partner, might be kept from reimbursing himself for moneys thus advanced, for an indefinite period. Such a result could not have been intended by the legislature, and the language used in its enactments must not be so construed as to effect it, unless it is the only construction possible. There are no exclusive words in the statute, and the evident object of the legislature in its enactment will be better subserved by holding that it was intended to be in aid of the common-law method of closing up partnership estates, instead of exclusive thereof. The principal object seems to have been to give to the representatives of the deceased partner the right to invoke the aid of the statute, either to have another person than the surviving partner close up the affairs of the firm, or to have such surviving partner give proper security to that end. Nowhere is the intention manifest to interfere with the rights of the surviving partner under the com-

mon law, excepting to that extent; and in view of the fact before mentioned, that he has not power to set in motion the machinery of the statute, and must hold the property of the partnership in a most anomalous condition until it is set in motion, if his rights under the common law were thereby terminated, we hold that they were not, but remained in full force so long as no steps were taken to procure administration of the affairs of the partnership under the statute. We have carefully examined the cases holding to the contrary of this view, cited by the respondent. The principal ones are from the state of Maine, and, while we entertain the highest degree of respect for the learning and ability of the courts of that state, we are unable to agree with the reasoning of those cases. We have not had an opportunity to carefully examine the statutes therein construed, but, if they were similar to ours, the court overlooked the fact that thereunder it was not in the power of the surviving partner to set on foot administration of the partnership affairs, which fact furnishes the strongest reason for holding that the statute is not exclusive of common-law rights.

It follows from what we have said that, at the time of the death of Allingham, Atkinson was entitled to proceed to close up the affairs of the partnership under the rules of the common law; and this being so, under the facts agreed upon, a court of equity will give no relief at this time to the representatives of the deceased partner.

The judgment will be reversed, and the cause remanded, with instructions to dismiss the action.

Dunbar, Ch. J., and Stiles, J., concur.

An assignment of a mortgage made by one partner in the absence of the other, for the purpose of securing the firm debt, is valid although not signed by the other members of the firm. *Galway v. Fullerton* (1866) 17 N. J. Eq. 389.

Where one partner sold the firm property in order to satisfy a debt owing by him individually, in fraud of the partnership, it was held that an action could not be maintained against the purchaser. *Wells v. Mitchell* (1841) 23 N. C. 484, 35 Am. Dec. 757.

A purchaser from a partner in whom the legal title is vested, is not bound by the record notice of the registration of the deed to such partner. *Tarbell v. West* (1881) 56 N. Y. 230.

Where real estate is conveyed to a partner in payment of a firm debt, the word "trustee" being used in the deed after such partner's name, the deed being so taken for convenience in case of a sale of the land, the partner has power to bind his copartners by a sale thereof, the word "trustee" not affecting his power, the property being personal assets of the firm. *Paton v. Baker* (1853) 62 Iowa, 704.

It is competent to dispose of partnership real estate and to allow a retiring partner to take his share, even as security for the payment of a debt. *Childs v. Pellett* (Mich.) Dec. 7, 1894.

A bond or mortgage is a chose in action, and as such may belong to a firm and may be assigned by mere delivery in payment of the firm debt, such assignment being good in equity. *Galway v. Fullerton* (1866) 17 N. J. Eq. 389.

One partner cannot convey the whole title to real estate, unless such title is vested in him. *Chester v. Dickerson* (1878) 54 N. Y. 1, 13 Am. Rep. 550, aff'd 28 L. R. A.

firming (1863) 52 Barb. 349; *Van Brunt v. Applegate* (1871) 44 N. Y. 544.

The original document as recorded, declaring that it has been agreed "that neither of the parties should use the premises, nor make any disposition thereof otherwise than as the property of the partnership," is not affected by a subsequent change in the partnership members, especially where in the deed changing the legal title, it is expressly recognized that the premises were owned as by the co-partnership articles. *Calkitt v. Thomas* (1858) 1 Phila. 463.

d. To convey his interest.

A partner may convey his undivided interest in real estate. *Jackson v. Stanford* (1855) 19 Ga. 14.

But such conveyance only passes the legal title so far as his interest is concerned. *First Nat. Bank of Gainesville v. Cody* (Ga.) Jan. 27, 1894; *Noreau v. Saffarans* (1856) 8 Sneed, 595, 67 Am. Dec. 582; *Anderson v. Tompkins* (1820) 1 Brock. 456.

And will not bind or affect the title of his copartner. *Goodwin v. Richardson* (1814) 11 Mass. 466.

As each can convey or incumber no more than his own share. *Baker v. Middlebrooks* (1833) 81 Ga. 491, following *Jackson v. Stanford* (1855) 19 Ga. 14; *Healey v. Scofield* (1878) 60 Ga. 452; *Butliffe v. Jones* (1878) 61 Ga. 676; *Harris v. Visscher* (1876) 57 Ga. 229; *Printup v. Turner* (1890) 65 Ga. 71.

And such is the case under the Louisiana law. *Calder v. Their Creditors* (1895) 47 La. Ann. 344.

The interest of one partner in partnership property is only his interest in the surplus remaining after the payment of the partnership debts and the discharge of the liabilities of the partners *inter se*.

Becher v. Stevens (1876) 43 Conn. 587; *Kistner v. Sindlinger* (1870) 38 Ind. 114; *Clements v. Joesup* (1883) 36 N. J. Bo. 569; *Tarbell v. West* (1881) 86 N. Y. 280; *Hill v. Beach* (1858) 12 N. J. Eq. 81; *Cavander v. Bul-teel* (1873) L. R. 9 Ch. App. 79, 43 L. J. Ch. 370, 29 L. T. N. S. 710, 22 Week. Rep. 177.

Such interest, and not a share of the partnership property, being sold. *Tarbel v. Bradley* (1878) 7 Abb. N. C. 279, affirmed *Tarbel v. West* (1881) 86 N. Y. 280. *Menagh v. Whitwell* (1873) 52 N. Y. 146, 11 Am. Rep. 668; *Morse v. Gleason* (1876) 64 N. Y. 204, followed.

Unless with the concurrence of the other partner. *Hanff v. Howard* (1857) 56 N. C. 440; *Potts v. Blackwell*, Id. 449.

And such is the case where a partner indebted to the firm conveyed to his other partner "all his right, title and interest in and to all the property and estate, real, personal, and mixed," and any balance so charged against him individually cannot thereafter be collected. *Beckley v. Munson* (1853) 22 Conn. 290.

Such alienation being subject to the equities of the other partners on a settlement of the partnership accounts. *Boyce v. Coster* (1850) 4 Strobb. Eq. 25.

As tenants in common each partner may sell his individual interest in the land to whomsoever and for what purposes he chooses, subject to the equities of the partnership, and his conveyance will be good and valid in law and equity, and will have priority over the claims of all other creditors. *Jones v. Neale* (1856) 2 Patton & H. (Va.) 539, following *M'Cullough v. Sommerville* (1836) 8 Leigh, 415; *Anderson v. Tompkins* (1820) 1 Brock. 457; *Coles v. Coles* (1818) 15 Johns. 239, 8 Am. Dec. 231; *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 697; *Marrett v. Murphy* (1876) 11 Nat. Bankr. Rex. 131.

As he cannot deprive his cotenants of their lien on the property for partnership debts and liabilities due from the parties selling. *Whitmore v. Shliverick* (1867) 3 Nev. 238.

A sale by one partner of his interest in real or personal property, held by and for the use of the firm, not affecting the right of the other partner to have it subjected first to the payment of the partnership debts. *Kistner v. Sindlinger* (1870) 38 Ind. 114.

Upon the principle that the property belongs to the firm and not to the parties, and that the interest that the parties have in the social effects is the share that will be due to them according to the interest they have in the stock after payment of the debts of the firm. *Maxwell v. Wheeling* (1876) 9 W. Va. 206.

A conveyance of his moiety by a partner carrying on farming business upon lands owned by himself and partner as cotenants, creates a cotenancy in common between the purchaser and the other partner, such purchaser taking subject to the grantor's rights and to the settlement of the partnership accounts. *Mumford v. McKay* (1832) 8 Wend. 442, 24 Am. Dec. 34.

When one of the partners undertakes to sell his interest in the whole or any part of the partnership property, in payment of his individual debt, it is a breach of the partnership agreement for which the other partner, and, as subrogated to his right, the partnership creditors may have a remedy. *Ross v. Henderson* (1877) 77 N. C. 170.

So a partner cannot convey or release to another valuable property without the knowledge or consent of the other partners, for the reason that the partnership business requires the utmost good faith upon the part of each partner towards the others. *Hardin v. Jamison* (Minn.) Feb. 25, 1895.

But where one partner, with the knowledge and consent of his copartners, sells his interest in the firm estates to one who is to take his place in the firm, such sale, passes the seller's interest in the
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firm real estate, which is part of such assets. *Collner v. Greig* (1890) 137 Pa. 606.

So real property of a copartnership may be conveyed by one partner on his individual account, to the extent of his legal estate, so as to cut off the equitable right of the copartnership or its liability to the payment of the partnership debts, the purchase being bona fide and for valuable consideration, without notice of the partnership character of the property. *Dupuy v. Leavenworth* (1861) 17 Cal. 262.

And where the estate is apparently a tenancy in common, though in fact it is partnership property, one partner may convey a good title to his apparent share, as a tenant in common to a bona fide purchaser without notice. *McMillan v. Hadley* (1861) 78 Ind. 590.

In such a case the assignment will be preferred against the equities of the cotenants where the sale is bona fide and for valuable consideration. *Boyce v. Coster* (1850) 5 Strobb. Eq. 25.

A partner in a mining concern may convey his interest without dissolving the partnership. *Dur-yea v. Burt* (1855) 28 Cal. 569.

Where a partner conveyed his individual interest in partnership real estate the firm being solvent, it was held that such conveyance was valid as against his copartner, no matter whether by way of sale or mortgage, and could not be set aside for want of consent or as impairing the credit of the concern. *Treadwell v. Williams* (1862) 9 Bosw. 649.

e. To mortgage.

1. In general.

A mortgage of real estate, though in effect but a lien or security, is in form a conveyance of an estate or interest in land, and must be governed by the same rules as to its execution and validity and capacity of the parties, and their proper designation as is applied to a conveyance. *Gille v. Hunt* (1866) 35 Minn. 357.

A partner executing a mortgage upon the partnership real estate under seal cannot bind his copartners but binds himself alone, the rule being derived from the law of agency, by which, if the agent acts without authority, the principal is not bound but the agent is. *Weeks v. Mascoma Lake Co.* (1877) 53 N. H. 101; *White v. Skinner* (1816) 13 Johns. 307, 7 Am. Dec. 381; *Skinner v. Dayton* (1822) 19 Johns. 519, 10 Am. Dec. 288.

The interest of partners, as tenants in common, in an estate purchased out of the joint property and mortgaged for the joint debt of the firm, is a joint security. *Ex parte Free*, 2 Glyn & J. 250.

Real property, the title to which is vested in the members of the firm, but which is in fact owned and used by the firm as partnership property, though regarded in equity as part of the assets of the concern, and as such subject to some of the incidents of personal property, is nevertheless in law real estate and can only be mortgaged or conveyed as such, and therefore a mortgage upon such property is not a mortgage upon personal property but upon real estate. *Miller v. Proctor* (1870) 20 Ohio St. 442.

The actual, open, and notorious possession of land by a firm at the time that money is loaned to a partner in whom the legal title is vested, constitutes notice of the firm's equitable rights therein. *Bergeron v. Richardott* (1882) 55 Wis. 1-9.

A mortgage by a partner in the firm name, executed and acknowledged by him with the knowledge and assent of the other partner, is legal as to the interest of such partner, and works an equitable mortgage as to the interest of the other partner. *Chavener v. Wood* (1866) 2 Or. 182.

And a mortgage purporting to be signed by all the partners individually, but really signed by one alone, the partnership receiving the money, the notes being payable by the firm, will bind the firm in the absence of fraud, the same being executed

with the knowledge and by the direction of the other partners. *Lemmon v. Hutchins*, 1 Ohio C. Ct. Rep. 388.

A mortgage given by one member of a firm upon real estate vested in him, but in reality part of the partnership estate, will pass under a direction in his will as "real estate" security directing such security to be taken for money loaned. *Miller v. Proctor* (1870) 20 Ohio St. 442.

Where the property mortgaged to the defendants is the property of one partner individually he being the legal owner, and subject to any rights created by his partnership, he is also the beneficial owner, there being no evidence of the terms of the partnership; the only interest which the partner has is that of a tenant at law, and therefore a mortgage executed with the knowledge of such partner is sufficiently valid at law and in equity. *Mason v. Parker* (1899) 18 Grant, Ch. (N. C.) 280.

See also *Lovejoy v. Bowers* (1840) 11 N. H. 404, *supra*, head II. c.

2. For firm's benefit.

If there is evidence that the land is the property of the firm, and is held in trust for it, the members are equitable owners and tenants in common and have power to mortgage the same. *Cottle v. Harrold* (1884) 72 Ga. 830, 839; *Pitts v. McWhorter* (1847) 3 Ga. 5; *Feld v. Jones* (1851) 10 Ga. 239; *Neligh v. Michenor* (1851) 11 N. J. Eq. 539; *Sinclair v. Armitage* (1858) 12 N. J. Eq. 174.

A firm by permitting the title to real estate to stand in the name of one partner, clothes him with authority to mortgage it in his name for firm purposes. *Chittenden v. German-American Bank* (1890) 27 Minn. 143.

Partnership real estate is liable to the partnership debts, and as such may be assigned by one partner to secure the firm's indebtedness. *Baldwin v. Richardson* (1870) 33 Tex. 16.

But there must be a prior authority or subsequent ratification of the partner's acts. *Printup v. Turner* (1880) 65 Ga. 71; *Goddard v. Renner* (1877) 57 Ind. 532.

A partner owning the fee in three fourths of real estate used for partnership purposes can mortgage the same to secure partnership debts, and such mortgage will hold as against other creditors. *McGahan v. National Bank of Rondout* (1895) 156 U. S. 218, 39 L. ed. 404.

A mortgage given in the partnership business for the partnership debt, by the previous consent of all the parties in the name of one partner, the owner of the legal title, in the name of the firm, and acknowledged by such partner as his free act and deed in behalf of the firm, is valid as against him and also as against a subsequent mortgagee with notice. *Wilson v. Hunter* (1862) 14 Wis. 683, 80 Am. Dec. 795.

So the fact of its being executed by one partner in the presence of the other and with his consent as security for a firm debt binds the firm. *Ferguson v. Hanauer* (1892) 56 Ark. 179; *Greer v. Ferguson* (1892) 56 Ark. 224.

Although the deeds may convey the real estate to the partners as individuals, and the purchases may be made in severalty, and the partners may hold as tenants in common, yet if an equity resulted to firm creditors because the purchases were made in furtherance of the joint enterprise, and the lands were devoted to its use, a mortgage by one partner of three fourths of the property standing in his name to secure a partnership debt will be valid and enforceable against the partners. *McGahan v. National Bank of Rondout* (1895) 156 U. S. 218, 39 L. ed. 404.

A mortgage subsequently taken upon the partnership premises and executed by both partners will have priority over a mortgage given by one partner, where the mortgagee has no actual notice 28 L. R. A.

or knowledge of the equities existing between the prior mortgagee and the partner not executing the prior mortgage, and will bind the interests of both partners. *Chavener v. Wood* (1866) 2 Or. 183.

A mortgage by a partner in the name of his copartners, executed by him in the firm name, will create a valid lien if ratified or acknowledged by the firm, or if the firm is benefited thereby. *Stroman v. Varn* (1883) 19 S. C. 307.

So an infant partner will be bound by a mortgage made by his copartner for partnership purposes executed by such partner in the firm name including the name of both, if he does not object thereto upon reaching his majority, having knowledge thereof and reaping the benefits. *Salinas v. Bennett* (1890) 33 B. C. 235.

A deed executed by a partner of his moiety in partnership real estate, for the purpose of securing a partnership creditor, will vest a good title in such creditor, and the creditor is entitled to priority over the other firm creditors, but such a deed executed to secure a private creditor will not vest the property as against the partnership creditors. *Jones v. Neale* (1856) 2 Patton & H. (Va.) 339.

Where a partner mortgaged his individual interest in the partnership real estate to secure a firm debt, it was held that such mortgage was not binding upon the other partner, although made in the firm name, unless executed under authority or subsequently ratified by the partner, and therefore could not be foreclosed as against the interest of such partner. *Sutlive v. Jones* (1878) 61 Ga. 678.

Where a partner mortgages his interest in the partnership property for the purpose of indemnifying indorsers upon negotiable instruments, and subsequently becomes insolvent, the continuing partner has no right to divert the property from the object of the mortgage and to apply it to the discharge of the firm debts. *Moseley v. Garrett* (1829) 1 J. J. Marsh. 212.

The Georgia code does not interfere with the rule that the members of the firm are tenants in common in partnership real estate, and that each member can, for a debt of the partnership, incumber his own interest. *Sutlive v. Jones, supra*.

3. To secure private debt.

A mortgage made by a partner of his interest in real estate belonging to the copartnership is not a mortgage of the property itself nor of an undivided part thereof, but of his interest in the copartnership after its debts are paid and the claims and liens of the partners as between themselves are adjusted. *Tarbel v. Bradley* (1878) 7 Abb. N. C. 279, affirmed *Tarbel v. West* (1881) 86 N. Y. 280.

And a person who takes from one partner a mortgage upon his interest in partnership property with notice takes subject to all the equities of the partnership, not only for the purpose of paying the debts of the firm to third parties, but also to members of the firm *inter se*. *Churchill v. Proctor* (1883) 31 Minn. 120.

Such a mortgage must yield to any use or disposition of the property which the firm may make of it for the purposes of the partnership; there is no distinction between equities existing at the time and those arising subsequent to the execution of the mortgage. *Ibid*.

All that such a mortgagee is entitled to being his mortgagor's interest or a share in what remains after all the equities of the partnership are fully adjusted, which can only be determined by a full accounting of the partnership business. *Ibid*.

Nothing more than a lien upon such partner's share or interest in the balance remaining after settlement of the partnership debts and liabilities, and adjusting the accounts, being created thereby. *Conant v. Frary* (1875) 49 Ind. 530; *Kistner v. Sindlinger* (1870) 33 Ind. 114.

So that a bona fide sale made for payment of a partnership debt, or for money which is applied to the payment of a partnership debt, is good as against such mortgage in the case of an insolvent firm. *Shaw v. McDonald* (1867) 21 Ga. 595.

Where contrary to the partnership agreement a partner mortgages his share, and the real estate is sold upon the winding up of the partnership concern, such mortgagee has no lien upon such real estate for the mortgage therein. *Tarbel v. Bradley* (1878) 7 Abb. N. C. 279, affirmed, *Tarbell v. West* (1881) 66 N. Y. 280.

But a mortgagee of a partner's interest in real estate owned by the partnership, without notice of the facts, has a prior lien and may rely upon the legal effect of the conveyance, the same being bona fide. *Hiscock v. Phelps* (1872) 49 N. Y. 97.

In the case of a mortgage by a partner upon leasehold premises used by the firm, to secure his own private debt, the mortgagees are not entitled to the partner's interest in the machinery free from the rent of the premises, but are only entitled, under their mortgage, to the partner's interest after all the partnership debts and liabilities and accounts have been settled. *Mechanics' Bank of Paterson v. Godwin* (1846) 5 N. J. Eq. 394.

f. To create liens, make assignments, etc.

Partners may create a lien upon partnership real estate by means of a confessed judgment which lien will be valid as against an assignee in bankruptcy. *Re Codding & Russell* (1881) 9 Fed. Rep. 849.

In *Deming v. Colt* (1850) 3 Sandf. 284, the question involved was, whether it was competent for one member of a partnership, without the assent or concurrence of his partner, who was present or capable of acting, to make a general assignment of the property and effects of the firm (including real estate) to a trustee for the payment of the partnership debts ratably and in equal proportions, and the court held that it was not.

A partner has no power to assign in trust for payment of debts without consent and authority. *Goddard v. Renner* (1877) 57 Ind. 532.

Yet an assignment of the firm property by one partner for the purpose of securing the firm debt, such partner acting for and in the name of the firm, will be enforced as a trust against the firm and all claiming under them, having either actual or constructive notice. *Baldwin v. Richardson* (1870) 33 Tex. 16.

g. To make and renew lease.

A lease by one partner of partnership real estate will operate only at law as to his individual share, unless made with the consent of his other cotenants in common. *Mussey v. Holt* (1851) 24 N. H. 248, 55 Am. Dec. 234.

But it has been held that real estate brought into the partnership business, being treated in equity as personal estate, a lease of it by one partner is as much a partnership transaction, as a sale of partnership goods by him would be. *Modewell v. Mullison* (1853) 21 Pa. 237.

There is no legal presumption that a firm has any less power to rent its realty than any one else. *Williams v. Shelden* (1886) 61 Mich. 811.

A lease made by one partner of partnership land, in order to be binding upon the other copartners, must be made in the prosecution of the partnership business, and in exercise of an authority necessarily implied from the nature and object of the partnership. *Mussey v. Holt*, *supra*, following *Coles v. Coles* (1818) 15 Johns. 161, 8 Am. Dec. 231.

It must be in furtherance of the partnership business and for its benefit and be made with the foreknowledge of or be subsequently ratified by the other partner, such knowledge or ratification

being provable by acts and circumstances, or by the verbal declarations and admissions of the partner. *Peine v. Weber* (1868) 47 Ill. 41.

Facts showing a lease of partnership real estate, which was disavowed by the lessor's copartners, who notified the tenants and insisted upon their right to oust them but subsequently agreed to allow them to remain in possession admitting such partners' rights and holding under them, the tenants remaining in possession without objection to such claim, are sufficient to show that the tenants consent to hold under the plaintiffs, and become liable to them for the use and occupation. *Mussey v. Holt* (1851) 24 N. H. 248, 55 Am. Dec. 234.

Where the evidence shows that the tenant wrote one of the partners that he would take a lease for three years from a given date upon certain conditions, which letter was replied to by the partner as agent for the firm, and a subsequent lease by all the partners to a third person who gave notice to the tenant in possession, who refused to quit, the court held that the letters written by the prior tenant and the partner constituted a valid lease, and that the possession of an under-tenant of such lessee was valid. *Shaw v. Farnsworth* (1871) 108 Mass. 357.

A firm lease cannot be renewed by one partner in his own name and for his own benefit, even though the original lease is made to him in his own name, the premises being used for partnership purposes. *Mitchell v. Read* (1881) 84 N. Y. 554.

An assignment of a lease to partners containing a covenant against assignment without the written consent of the lessor, made on dissolution of the partnership, constitutes a breach of the covenant. *Varley v. Coppard* (1872) L. R. 7 C. P. 505, 26 L. T. N. S. 882, 20 Week. Rep. 972.

Under a lease made to two partners as joint tenants, with a covenant against assignment or underletting without consent, with a proviso for re-entry, an agreement being made upon dissolution, by the partners, that the continuing partner shall take such property with the consent of the lessor the retiring partner giving up sole possession, the lessor's consent not being obtained and no assignment executed, the continuing partners remaining in possession there is no breach of the covenant such as will justify a re-entry. *Bristol v. Westcott* (1879) L. R. 12 Ch. Div. 461.

Upon the dissolution of a partnership, a partner leasing his own property to the firm is entitled to ejectment against his other partner, and to recover possession of the house without giving notice to quit. *Doe v. Bluck* (1834) 8 Car. & P. 464.

Under a lease made by a partner in his own name upon conditions giving right to terminate same upon giving certain notice, without clause of re-entry, under which possession is taken and rent paid, the receipts being, after a time, given in the firm name; notice to quit being given in the partner's own name,—the latter is entitled to ejectment. *Doe v. Baker* (1818) 3 J. B. Moore, 133, 9 Taunt. 241.

h. To give note.

To enable a partner, in a partnership existing for the cultivation of land, to bind his copartners by a note, an express authorization, or at least one clearly implied from the course of the business of the firm, is necessary, and in the absence of such express or implied authority it is incumbent on the payee of the note to prove that the land thereof inured to the benefit of the partnership, and was thus enforceable as a liability against the partnership, rather by reason of the circumstances of the case than by force of the note itself. *Benton v. Roberts* (1849) 4 La. Ann. 216.

Where in answer to an action on a note, it was alleged that the note was signed by a copartner in trade in the copartnership name, and was given

for the consideration of the purchase of real estate to which the partner had never assented, and had no knowledge of the negotiation till after the purchase, the negotiation being wholly out of the line of the partnership business, it was held, both partners having accepted a bond relating to such real estate, that in order to avoid such note the partner should wholly have abstained from doing any act whereby he, upon the consideration for the note, might become alienated to any third person; and that he should have offered the grantors a relinquishment of any possible benefit he might have it in his power to derive from it, and that therefore he was bound by his act, so far as related to the liability on the note. *Dudley v. Littlefield* (1842) 21 Me. 418.

In *Beaman v. Whitney* (1841) 20 Me. 412, the managers of an association or copartnership were held entitled to give notes to secure the purchase money of premises bought by them for the use of the firm.

L. To sue.

No action at law will lie by one partner against another, upon any matter connected with the partnership business, until the partnership affairs have been wound up. *Springer v. Cabell* (1847) 10 Mo. 640,—where the parties were partners in real estate.

An action cannot be maintained by one partner against his copartner for a partial division of the assets of the firm. *Kruschke v. Stefan* (1898) 88 Wis. 373.

One partner cannot sue the other for specific sums, the suit must be brought for the settlement of the partnership and embrace an inquiry into the assets of the partnership, its liabilities and profits, and the credits in favor of each partner, and the charges against him; and on these elements the balance for or against the partner is ascertained, and if either partner has paid mortgage debts which the partnership assumed, or if the share of the profits of either partner has been thus applied, there is no subrogation in favor of either partner to the mortgage debt, but the whole rights of the partners are merged in the balance as found due on the settlement. *Reddick v. White* (1894) 46 La. Ann. 1193.

But where a partnership is limited to a single transaction, and is not a general one in the purchase and sale of real estate, assumpsit lies between the partners. *Meason v. Kaine* (1869) 63 Pa. 335, following *Brubaker v. Robinson* (1831) 3 Penn. & W. 295; *McFadden v. Erwin* (1836) 2 Whart. 87; *Finlay v. Stewart* (1867) 56 Pa. 183.

An action lies to recover moneys alleged to have been loaned but claimed to have been advanced under a parol partnership agreement relating to the sale and purchase of land, the lands being purchased by the defendant and the title taken in his name, the partnership being verbal. *Tompkins v. Lee* (1874) 2 Thomp. & C. 589.

An action by a husband for advances made by him to a partnership, which existed between his wife and a third party, against the partner of the wife, is subject to the rule that one partner cannot sue his copartner for specific sums. *Reddick v. White*, *supra*, where the partnership existed for the cultivation of the plantation, the husband receiving a salary from the partnership as manager.

An action, seeking to vest the legal title to property, purchased by a partner in his own name, in the firm, will be denied to partners where no dissolution is sought, where there has been entire good faith, and no breach of confidence, the same being taken for partnership purposes, as such is assets of the firm. *Kruschke v. Stefan* (1892) 83 Wis. 373.

In *Peaks v. Graves* (1888) 25 Neb. 235, the plaintiffs alleged that they were copartners and contracted with the defendant for the purchase from him of a 28 L. R. A.

lumber and coal yard, including the lands upon which the yard and business were located, the purchase money being furnished by them jointly and for the purposes of a partnership about to be formed, the deed for convenience being taken in the name of one partner with the vendor's knowledge, but that the defendant had falsely represented the quantity of land covered by the purchase. The court held that an action could be maintained by them jointly as copartners, under section 29 of the Nebraska Civil Code.

And an agreement to purchase lands, to share equally in the payment therefor, to the equal interests of the parties when paid for, the deed being taken in the name of one for the benefit of the others, the land being afterwards sold by the parties in whose name the conveyance was taken, constitutes the enterprise a partnership so that the plaintiffs will be entitled to recover as against the defendants the price of the land sold. *Knauss v. Cannon* (1891) 7 Utah, 182.

A partner is entitled to an injunction to restrain a sale of partnership lands as against a judgment creditor of one partner. *Harney v. First Nat. Bank of Jersey City* (N. J.) May 15, 1894.

As to the right of a firm to an injunction against a purchaser of real estate from a partner, see *McKee v. Griffin* (1871) 23 La. Ann. 417, *infra*, note as to rights of creditors, purchasers and other third persons in partnership real estate, head, *In Louisiana*.

1. Of continuing partner.

A continuing partner to whom partnership real estate is sold by the retiring partner under written contract by which he is to assume all liabilities, has power to mortgage the same to secure a firm creditor even though the legal title may remain in the partners, the continuing partner having the equity. *Seaman v. Huffaker* (1878) 21 Kan. 254.

Under articles providing that the partnership, terminating by lapse of time, might be continued by an express and tacit consent for the purposes of winding up, and that the stipulations and restrictions of the original articles should be considered as continuing, the power contained in the original articles to bind the partners by deed is neither a stipulation nor a restriction which will uphold a mortgage on the partnership real estate, executed for the purpose of securing a partnership liability, and is not binding upon the firm. *Napier v. Catron* (1841) 2 Humph. 534.

A continuing partner can maintain an action upon an insurance policy the company having notice of the assignment of the same. *Collins v. Charlestown Mut. F. Ins. Co.* (1857) 10 Gray, 155.

In the above case the company sought to relieve itself from liability upon the ground of breach of warranty, the legal title being vested in one partner, the application containing the question, "Do you own the land upon which the building stands?" being answered, "Yes," and signed by the firm. *Ibid.*

And see *Dupuy v. Leavenworth* (1861) 17 Cal. 232, *supra*, head II. c.

III. How conveyed by partnership.

Partnership real estate cannot be conveyed away or alienated by one of the partners alone without a breach of trust and such a conveyance will be invalid against the other partner unless made to one who had no actual or constructive notice of the trust. *Dyer v. Clark* (1843) 5 Met. 562, 30 Am. Dec. 697.

Partners own real estate as tenants in common, and must grant or demise it as other tenants in common. *Dillon v. Brown* (1868) 11 Gray, 179, 71 Am. Dec. 700.

Every reason which supports the transfer of real estate by an individual applying with equal force

to land held by a partnership. *Brewer v. Cropp* (Wash.) Nov. 17, 1894.

The consideration of partnership real estate as personal property for some purposes is an equitable conversion only, and the requirements of the law relating to conveyances of land must be observed in disposing of it. *Ibid.*, following *Davis v. Christian* (1839) 15 Gratt. 11; *Platt v. Oliver* (1842) 8 McLean, 27; *Moreau v. Saffarans* (1836) 8 Sneed, 596, 68 Am. Dec. 552; *Miller v. Proctor* (1870) 20 Ohio St. 442.

Each partner is required at law and in equity to join in every conveyance of real estate, in order to pass the entirety thereof to the grantee, and if one partner only executes it, whether it be in his own name or that of the firm, the deed will not ordinarily convey any more than his own share or interest therein, the rule being founded upon the nature of the property and the provisions of the common law applicable thereto. *Davis v. Christian*, *supra*; *Espy v. Comer* (1884) 76 Ala. 501. To the same effect, *Lang v. Waring* (1854) 25 Ala. 625, 60 Am. Dec. 533, 17 Ala. 145; *Blanchard v. Floyd* (1890) 96 Ala. 53; *Calder v. Their Creditors* (1895) 47 La. Ann. 346; *Richardson v. Packwood* (1823) 1 Mart. N. S. 296; *Skillman v. Purnell* (1822) 3 La. 456; *Baca v. Ramos* (1836) 10 La. 420, 29 Am. Dec. 463; *Thomas v. Scott* (1842) 3 Rob. (La.) 256; *Lee v. Ferguson* (1850) 5 La. Ann. 532; *Weld v. Peters* (1846) 1 La. Ann. 434; *Keck v. Fisher* (1876) 58 Mo. 532; *Dillon v. Brown* (1859) 11 Gray, 179, 71 Am. Dec. 700; *Carlisle v. Mulhern* (1863) 19 Mo. 56; *Duhring v. Duhring*, (1854) 20 Mo. 174; *Sumner v. Hampson* (1838) 8 Ohio, 323, 22 Am. Dec. 722; *Richardson v. Wyatt* (1807) 2 Deane's Eq. 471; *Re Coddling & Russell* (1881) 9 Fed. Rep. 849.

If a partner possesses the authority to sign the firm name to a deed, and thereby to convey the interest of his copartner, the instrument will be as effectually executed by his signing his own name and that of his copartner, as if he signed the partnership name. *Arnold v. Stevenson* (1896) 2 Nev. 234.

An oral contract to convey real estate is not binding. *Brewer v. Cropp* (Wash.) Nov. 17, 1894; *Nichols v. Oppermann* (1893) 6 Wash. 618.

Even between partners for a conveyance of the partnership real estate from one to the other. *Brewer v. Cropp*, *supra*.

Where each partner executes deeds in the firm name without authority of his copartners to purchasers of the lots, the purchasers will acquire the title of all partners. *Batty v. Adams County Comrs.* (1894) 18 Neb. 41.

The partner, in whom the legal title to partnership real estate is vested, must convey to a purchaser to make his title complete. *Paton v. Baker* (1883) 62 Iowa, 704.

Upon a sale of such real estate, in which all the partners join and convey their title, the presumption is that the consideration went for the firm's benefit. *Lincoln v. White* (1849) 30 Me. 291.

Partnership real estate in Massachusetts is not subject to the rules of law which govern the disposition of other partnership property and which authorize one partner to bind the others by the use of the name of the firm, and therefore a grant or demise of real estate owned by partners must be made by each and all of them. *Dillon v. Brown* (1859) 11 Gray, 179, 71 Am. Dec. 700.

A warranty deed executed by three partners to themselves and one other partner, operates as a grant of one quarter to the fourth party, and reduces the shares of the others to a quarter each; and such quarter is an alienation and determines a tenancy at will, and therefore the tenant at will who has actual notice of the alienation is liable to an action to recover possession without three months' notice to quit. *McFarland v. Chase* (1856) 7 Gray, 462. *Howard v. Merriam* (1850) 5 Cush. 563; *Furlong v. Leary* (1857) 8 Cush. 409, followed. 28 L. R. A.

IV. Purchase by partner of firm property.

It is competent for a member of the firm, or for one tenant in common, to purchase the reversion of a life estate held by the partnership or the other tenants in common, and hold the same as his own property, where no equity in favor of the partnership or other tenants in common exists. *Batchelor v. Whitaker* (1833) 88 N. C. 850.

In *Anderson v. Lemon* (1853) 8 N. Y. 236, a bona fide purchase by a partner of the reversion of the partnership in a lease was upheld, the purchase being open and above board.

But it has been held that the purchase by one partner of partnership land, sold under an execution on a judgment against partners, works no extinguishment of the other right to his moiety. *Farmer v. Samuel* (1823) 4 Litt. (Ky.) 187.

In *Wallace v. Wallace* (1886) 68 Mich. 323, by the provisions of the copartnership agreement land was conveyed by a husband and wife to the husband's copartner the widow fraudulently destroying the recorded deed after her husband's decease, the bill being brought to establish the title and restore the deed, and the court held that in equity he was entitled to the relief sought and that the law would aid him in obtaining possession of his property at the proper time, and under proper proceedings for that purpose, but that it could not restore to him the lost deed or order the defendant to make and deliver to him another deed in its stead, such being the peculiar province of the court of equity, and that the circuit court rightly granted the relief.

V. Purchase of deceased partner's interest.

The mere purchase of the interest of the estate of a deceased partner in partnership property does not create a new partnership. *Noonan v. Nunan* (1888) 76 Cal. 44.

Where the court was satisfied that the remaining partners, who owned two thirds of the real estate, could afford to give full market value of the real estate owned by the deceased partner better than any other purchaser, and such partners are willing to give the full value, it was held a case in which the interest of the testator should be sold to them by his executor, even though such executor was a partner in the concern, the transaction being free from fraud and the consideration adequate. *Colgate v. Colgate* (1878) 23 N. J. Eq. 373.

VI. Sale by partner of his interest to his copartners.

A transfer by one partner to his copartners of his interest in the copartnership divests his beneficial interest in immovable property held by the partners jointly on account of the firm, and a transfer by a partner to a third person has the like effect. *May v. New Orleans & C. R. Co.* (1892) 44 La. Ann. 444.

Where a partner agreed by parol to dispose of his individual interest in partnership real estate to his copartners, and received the consideration and was released from liabilities as a partner, but executed no conveyance of his interest in such real estate, the court decreed a release to be executed after his decease. *Van Aken v. Clark* (1891) 82 Iowa, 256.

Where, from fear of pressure of his individual creditors, a partner conveys his interest in partnership real estate to his copartner, for the purpose of saving the partnership real estate from the claims of his creditors, there is no fraud, so far as the partnership creditors are concerned, as the same is in any event liable to the partnership debts. *Jones v. Smith* (1889) 31 S. C. 627.

Where a partner withdraws from the partnership and receives a given sum, he relinquishes his interest in the real estate, and has no subsequent right to demand a sale for a partition. *Baca v. Ramos* (1836) 10 La. 417, 29 Am. Dec. 463.

Under articles of copartnership giving a right of pre-emption, one partner giving notice of his intention to sell, the other becoming rheumatic, not having exercised the option, the right to pre-emption is lost as against a subsequent sale. *Rowlands v. Evans, Williams v. Rowlands* (1861) 30 Beav. 302, 5 Jur. N. S. 83, 31 L. J. Ch. 235, 10 Week. Rep. 135, 5 L. T. N. S. 653.

VII. *Effect of conveyance by partner.*

An instrument under seal, executed by one partner in the firm name, binds him as his separate act. *Layton v. Hastings* (1837) 3 Harr. (Del.) 147.

No sale by one partner can affect the share of his copartners. *Calder v. Their Creditors* (1856) 47 La. Ann. 346; *Richardson v. Packwood* (1823) 1 Mart. N. S. 295; *Skilman v. Purnell* (1832) 3 La. 496; *Baca v. Ramos* (1836) 10 La. 420, 29 Am. Dec. 463; *Thomas v. Scott* (1843) 3 Bob. (La.) 255; *Lee v. Ferguson* (1850) 5 La. Ann. 533; *Weid v. Peters* (1846) 1 La. Ann. 434.

And a conveyance executed by one partner, whether in his own name or in that of the firm, does not ordinarily convey more than his own share. *Keck v. Fisher* (1875) 58 Mo. 532; *Printup v. Turner* (1890) 65 Ga. 71; *Moreau v. Saffarans* (1856) 3 Sneed, 595, 67 Am. Dec. 532.

As no partner can sell more than his individual interest without special authority. *Arnold v. Stevenson* (1866) 3 Nev. 234; *Reed v. Meagher* (1890) 9 L. R. A. 455, 14 Colo. 335.

And if such deed be a mortgage it can be foreclosed only as to the interest of the party making it. *Printup v. Turner, supra*.

A deed made by one partner in the name of the firm, purporting to convey away the property of the firm, is valid and effectual as a conveyance of the real estate of the partner, who has affixed his own name to the deed and personally acknowledged it as well for himself as for the firm. *Chavener v. Wood* (1866) 2 Or. 132.

Where, however, the legal title to partnership lands is vested in one partner, his bona fide grantee or mortgagee takes his title free from the equities of the other partners, or of partnership creditors, but if he has notice that the land is partnership assets he takes subject to their equities. *Tarbell v. West* (1881) 86 N. Y. 230, following *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305; *Hoxie v. Carr* (1833) 1 Sumn. 133; *Hiscock v. Phelps* (1872) 49 N. Y. 97; *Cavander v. Buiteel* (1873) L. R. 9 Ch. App. 79, 43 L. J. Ch. 370, 29 L. T. N. S. 710, 22 Week. Rep. 177.

And a vendee knowing that the property was that of the partnership, is deemed to have notice of the trust, and is held to have purchased only what his vendor might equitably convey, that is, the legal estate of his vendor in a share of the property subject in equity to the state of the partnership accounts. *Ross v. Henderson* (1877) 77 N. C. 170.

He takes such title at his peril and on the responsibility of all persons with whom he deals. *Dyer v. Clark* (1843) 5 Met. 563, 39 Am. Dec. 697.

That the execution of a deed by one partner in whom the legal title to the land is vested, with the consent of the other, makes it their deed, and although there be only one seal, yet in point of law it is the seal of each partner. *Darst v. Roth* (1824) 4 Wash. C. C. 471.

And it is enforceable in equity if ratified or consented to by the other partners, even by parol. *Baldwin v. Richardson* (1870) 33 Tex. 16.

A prior authority or a subsequent ratification, either express or implied, verbal or written, being sufficient to establish a conveyance of land by one partner as the deed of the firm and binding upon it as such. *Herbert v. Hanrick* (1849) 16 Ala. 551,—where the deed was signed by the one partner in the name of each.

So if the deed be executed by one partner in the
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firm name in the presence of his copartners and with their consent, it will operate as a conveyance of the land. *Ferguson v. Hanauer* (1832) 56 Ark. 179; *Pette v. Weber* (1838) 47 Ill. 41; *Pike v. Bacon* (1842) 21 Me. 260, 33 Am. Dec. 256; *Wilson v. Hunter* (1862) 14 Wis. 633; *Smith v. Kerr* (1849) 3 N. Y. 154; *Haynes v. Beachrest* (1832) 13 Iowa. 456; *Gibson v. Warden* (1871) 81 U. S. 14 Wall. 244, 20 L. ed. 797; *Holbrook v. Chamberlin* (1874) 116 Mass. 155, 17 Am. Rep. 146; *Sigourney v. Munn* (1823) 7 Conn. 113; *Edgar v. Donnally* (1811) 2 Munf. 387.

But the fact that the other partners orally assent does not divest their legal title, as the authority to convey lands for another, even if the deed purport to convey the title of the other partners by name, must be in writing under section 2121 of the Alabama Code of 1876. *Brunson v. Morgan* (1864) 76 Ala. 593.

Where a partner, by virtue of the partnership relations, has the power to convey or mortgage the real estate of the partnership, the manner in which he signs the deed, so long as it is executed for and on behalf of the firm, is a matter of little or no consequence. *Arnold v. Stevenson* (1866) 2 Nev. 234.

A deed executed by a partner in the firm name is effectual to convey all his interest. *Batty v. Adams County Comrs.* (1864) 16 Neb. 44; *Clement v. Brush* (1832) 3 Johns. Cas. 180; *McBride v. Hagan* (1823) 1 Wend. 323; *Nunnely v. Doherty* (1820) 1 Yerg. 23; *Waugh v. Carriger*, Id. 31; *Morris v. Jones* (1843) 4 Harr. (Del.) 423; *Jackson v. Stanford* (1855) 19 Ga. 14; *Caldwell v. Farmer* (1876) 56 Ala. 405.

And estoppel from afterwards disputing its validity. *Elliot v. Dycke* (1834) 73 Ala. 150.

But if a partner with the concurrence of his copartner conveys the effects of the firm to secure his individual debts, the property passes and it is binding upon the firm creditors, for the reason that they have no lien on the firm effects, and can only work out an equity to subject the firm effects to the payment of the firm debts under and through the partners. *Potts v. Blackwell* (1857) 56 N. C. 449; *Clement v. Foster* (1844) 33 N. C. 213.

A conveyance by a partner after the dissolution of the firm by death, in the name of the firm, of lands constituting a portion of the partnership assets in payment of a debt, for which neither the firm nor its assets are liable, will convey nothing but the individual interest of the partner so conveying, and the purchaser will take such interest subject to the payment of the debts. *First Nat. Bank of Gainesville v. Cody* (Ga.) Jan. 27, 1894.

A sale by an executor of a deceased partner under a power given by will of "all the right, title, and interest which the testator had at the time of his decease" passes the legal title to one half the land, and an equitable title to the additional interest held by the deceased in the partnership property. *Putnam v. Dobbins* (1865) 38 Ill. 394.

The circumstance of undertaking to convey the title of his copartners and describing the grantors as well in the body of the deed as in the signature as, "I deed Haines & Bro." does not change the fact that the partner signed, sealed, and acknowledged the deed for himself, nor does it alter the manifest intention of the party to convey his own interest. *Chavener v. Wood* (1866) 2 Or. 132.

Where, upon the formation of a partnership, one partner conveys to the other an equal portion of real estate for valuable consideration, the whole property being afterwards in the possession and occupation of the firm for partnership purposes, the firm improving the same and placing the rent to partnership account, a conveyance made by one partner of his share in such property upon the firm's insolvency without his other partner's knowledge or consent, to a creditor of the firm, is valid as against the assignee of the firm and vests a good title in such creditor. *Van Brunt v. Applegate* (1871) 44 N. Y. 544.

VIII. *Liability of the firm for partner's acts.*

A firm accepting the benefits derived from its partner's acts is bound by a contract relating thereto. *Kramer v. Dinsmore* (1893) 152 Pa. 264.

Where the ostensible partner is alone known in the transaction, all persons sharing in the profits are held responsible as partners to third persons, and it is therefore immaterial whether a mortgagee does or does not know, at the time he takes the mortgage of partnership property, of the existence of the partnership; all the partners being liable for the debt created in that enterprise. *Williams v. Gillies* (1878) 53 How. Pr. 429.

Where the person in whose name the title is taken gives a bond in his individual name, the name of the other party not appearing, there being no indication that it is executed on behalf of or for his benefit, he cannot be made liable thereon. *Williams v. Gillies* (1878) 76 N. Y. 197, reversing (1878) 13 Hun, 422.

A retiring partner will be discharged from liability upon a note given by the firm by the fact of the mortgagees giving the continuing partner who assumed all the liabilities of the firm upon its dissolution, a discharge of the mortgage debt without receiving payment, for the reason that he cannot reconvey the property to him. *Allison v. McDonald* (1896) 23 Can. Sup. Ct. Rep. 635.

A third partner joining in the execution of the bond and mortgage, and suffering them to be deposited and remain in the hands of a mortgagee, is bound by his copartner's transfer of the policy of insurance. *Day v. Perkins* (1845) 2 Sandf. Ch. 359, 7 L. ed. 625.

A copartnership firm will be bound by an arrangement entered into by one of its partners with one of its debtors, whereby proceedings to open a judgment against such debtor were to be discontinued and the real estate seized under execution, bought in at the sale, was to be conveyed to the debtor's wife upon tender of the purchase money within two years. *Kramer v. Dinsmore* (1893) 152 Pa. 264.

A partnership firm contracting with another party to advance money for land speculation, the profits to be divided among them in specified proportions, the partnership firm not to be liable or responsible for any losses beyond the capital contributed by them, the association being denominated as a copartnership for two years, will be liable for services rendered by a book-keeper in conducting the business of such joint association. *Benness v. Harrison* (1854) 19 Barb. 53.

In a case of real estate sold at auction and purchased by a partner in his own name the partner in part payment making and executing his individual note and bond and mortgage, such deeds and mortgages being duly recorded, and entered on the firm books as real estate bought on account of the firm, declarations of trust executed by such purchaser but never recorded declaring the purchase money paid to be partnership stock and that the land was held by him in trust as partnership property, the owner cannot be made liable upon such bond or mortgage, the only remedy being upon the individual bond and mortgage of the partner, the debt due being an individual and not a partnership debt, any profit made on a sale belonging to the partnership creditors. *North Pennsylvania Coal Co's App.* (1893) 45 Pa. 181, 84 Am. Dec. 487.

IX. *The question of ratification.*

One partner is presumed to consent to all the acts of his copartners, within the scope of the business of the firm. *Paton v. Baker* (1883) 63 Iowa, 704; *Boardman v. Adams* (1857) 5 Iowa, 224.

The principle of equity that if a man, having a title to an estate which is offered for sale, know-

ingly allows another to sell it to a purchaser who supposes the title to be good, without at the time asserting his title, shall be bound by the sale and neither he nor his privies shall be allowed to dispute its validity, has been applied to a case of exchange by one partner of partnership real estate in his own name, where the proceeds of the lot received by him in exchange became part of the partnership funds. *Moran v. Palmer* (1886) 13 Mich. 367. To the same effect, *Wendell v. Van Rensselaer* (1845) 1 Johns. Ch. 344, 1 L. ed. 165; *Storrs v. Barker* (1822) 6 Johns. Ch. 166, 2 L. ed. 88, 10 Am. Dec. 810; *Tilton v. Nelson* (1857) 27 Barb. 595; *Cochran v. Harrow* (1859) 22 Ill. 845; *Bryan v. Ramirez* (1857) 3 Cal. 451, 68 Am. Dec. 840; *Cicotte v. Gagnier* (1833) 9 Mich. 383.

Where a deed is executed on behalf of a firm by one partner, the other partner will be bound, if there be either a previous parol authority or a subsequent parol adoption of the act, and such ratification may be inferred from the presence of the other partner at the execution and delivery, or from his action under it, or taking the benefits of it with knowledge. *McGahan v. National Bank of Rondout* (1895) 156 U. S. 218, 39 L. ed. 404; *Cady v. Shepherd* (1831) 11 Pick. 405, 22 Am. Dec. 379; *Peine v. Weber* (1868) 47 Ill. 41; *Frost v. Wolf* (1890) 77 Tex. 455; *Schmertz v. Shreeve* (1870) 62 Pa. 457, 1 Am. Rep. 433; *Wilson v. Hunter* (1862) 14 Wis. 638, 30 Am. Dec. 795; *Rumery v. McCulloch* (1832) 54 Wis. 585; *Pike v. Bacon* (1842) 21 Me. 280, 33 Am. Dec. 259; *Russell v. Annable* (1871) 109 Mass. 72, 12 Am. Rep. 695; *Gunter v. Williams* (1897) 40 Ala. 551; *Sullivan v. Smith* (1864) 15 Neb. 476, 48 Am. Rep. 354; *Haynes v. Seachrest* (1862) 13 Iowa, 455; *Grady v. Robinson* (1856) 28 Ala. 299; *Skinner v. Dayton* (1822) 19 Johns. 513, 10 Am. Dec. 293; *Anderson v. Tompkins* (1890) 1 Brock. 462; *Gram v. Seton* (1833) 1 Hall, 232; *Bond v. Aitkin* (1843) 6 Watts & S. 165, 40 Am. Dec. 550.

An absent partner may be bound by a deed executed on behalf of the firm by his copartner, provided there be either a previous parol authority, or a subsequent parol adoption of the act. *Smith v. Kerr* (1849) 3 N. Y. 144; *Batty v. Adams County Comrs.* (1864) 16 Neb. 44.

The receipt of part of the price of real estate belonging to a copartnership, which has been sold by one of the partners, is a ratification of the sale. *Thomas v. Scott* (1842) 3 Rob. (La.) 256; *Weld v. Peters* (1846) 1 La. Ann. 432.

So the fact of the remaining partners reaping the benefit of the consideration without objection to the sale will be considered as ratifying it. *Weld v. Peters, supra.*

The acceptance of notes taken by a partner in payment of partnership real estate sold by him, which are held by the firm for some time as part of the assets, will be held an affirmation of a contract for commission entered into by a partner upon the sale of such real estate. *Copp v. Longstreet* (Colo.) Dec. 10, 1894.

An infant partner will be bound by a mortgage made on the partnership real estate by his copartner, where he has acted in such a manner, after attaining his majority, as to confirm the partnership contract; and if the funds so advanced have been used in the business, he cannot assert the want of authority in his partner to execute such a mortgage. *Salinas v. Bennett* (1890) 33 S. C. 235.

The execution of a contract for the sale of real estate owned by a partnership firm by one partner, in the firm name, in the presence of and with the approbation and consent of the other partner, is a sufficient memorandum in writing to satisfy the statute of frauds. *McWhorter v. McMahan* (1840) Clarke, Ch. 400, 7 L. ed. 154.

The subsequent ratification relates back to the original transaction. *Lawrence v. Taylor* (1843) 5 Hill, 107; *Gunter v. Williams* (1897) 40 Ala. 551; *Hербert v. Hanriok* (1849) 16 Ala. 581.

But the ratification of such deed must be clear and express, or implied from circumstances equally clear and undisputed. *Haynes v. Seachrest* (1862) 13 Iowa, 455.

Such parol ratification may be proved by verbal evidence. *Gunter v. Williams*, *supra*, following *Herbert v. Hanrick*, *supra*.

So, where there is an express authority from each partner conferred upon the president and secretary of a joint-stock corporation, to execute deeds in the name of the copartnership. *Batty v. Adams County Comrs.* (1884) 16 Neb. 44.

X. Partner's right to reimbursement.

Partnership real estate is subject to the payment of the partnership debts, and where one partner advances money to the firm, such advances must be paid out of the firm's property, whether real or personal. *Divine v. Mitchum* (1844) 4 B. Mon. 488; 41 Am. Dec. 241; *Jones v. Parsons* (1866) 25 Cal. 100; *Bryant v. Hunter* (1869) 6 Bush, 75; *Galbraith v. Geddes* (1855) 16 B. Mon. 631.

The share of each partner indebted to either or both of his copartners is liable to the other partner or partners to whom the debt is due. *Parker v. Parker* (1878) 65 Barb. 205.

But one partner cannot sue the other for reimbursement. *Heddlak v. White* (1884) 46 La. Ann. 1198.

A partner who has paid a portion of a purchase-money note given with respect to real estate is entitled to recover the same from his copartner, there being no evidence of a copartnership existing with respect to such lands, except the fact of their cutting and manufacturing a portion of the timber. *Soule v. Frost* (1884) 76 Me. 119.

XI. Equitable lien of partners.

Each partner is liable for all the debts of the firm, and is properly therefore entitled to an equitable lien on all its property, whether real or personal, for indemnity and re-imbursement, and for this purpose, while the eye of a court of law can see only the legal title of real estate, yet a court of equity will treat it as personality and firm assets as to the payment of the firm debts, and the adjustment of the partnership rights. *Flanagan v. Shuck* (1855) 82 Ky. 617.

His lien extends not only to the amount of his interest, but for moneys advanced beyond his contribution to capital to the uses of the partnership. *Whitney v. Colten* (1876) 53 Miss. 689; *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 697; *Hodges v. Holman* (1833) 1 Dana, 50.

Or rather an interest in it proportioned to his share in the partnership fund. *Deloney v. Hutcheson* (1823) 2 Rand. (Va.) 183.

And is valid as between the partners themselves, and also as against creditors or purchasers with notice. *Williams v. Love* (1858) 2 Head, 80, 73 Am. Dec. 191; *Taylor v. Farmer* (1886) (Ill.) 6 West. Rep. 710.

And against a vendee under an execution sale as against one partner or the title cast by law upon the legal representatives of the deceased partner. *Rainey v. Nance* (1870) 54 Ill. 27.

It secures not only his appropriation but also any final balance in his own favor. *Pearson v. Keedy* (1845) 6 B. Mon. 128, 43 Am. Dec. 180.

And there is nothing in the statute of frauds which can prevent one partner from giving to another partner, by verbal contract, a lien upon his interest in the real estate of the firm, to secure moneys advanced for the payment of his proportion of the firm's debts. *Taylor v. Farmer* (1886) (Ill.) 6 West. Rep. 710.

To the same effect are the following cases: *Matlock v. Matlock* (1854) 5 Ind. 403; *Black v. Bush* (1846) 28 L. R. A.

7 B. Mon. 210; *Allen v. Wells* (1839) 22 Pick. 450, 38 Am. Dec. 757; *Buffum v. Seaver* (1844) 16 N. H. 160; *Wright v. Wright* (1879) 59 How. Pr. 1-6; *Hansom v. Van Deventer* (1863) 41 Barb. 307; *Scott v. Guernsey* (1871) 43 N. Y. 124, 60 Barb. 180; *Hannan v. Osborn* (1834) 4 Paige, 243, 3 L. ed. 463; *Betts v. Letcher* (1860) 1 S. Dak. 122; *Boyce v. Coster* (1860) 4 Strobb. Eq. 25; *Boyers v. Elliott* (1846) 7 Humph. 204.

It has been held to be a specific lien on the partnership property, not only for the debts and liabilities due to third persons, but also for his own share of the capital stock and funds, and for all money advanced by him for the uses of the concern. *Duryea v. Burt* (1865) 23 Cal. 599; *Dilworth v. Mayfield* (1858) 36 Miss. 40; *Ives v. Miller* (1855) 19 Barb. 200; *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 43 Am. Dec. 305.

As against his copartners and the individual creditors of each. *Evans v. Hawley* (1872) 35 Iowa, 68; *Pierce v. Wilson* (1855) 2 Iowa, 20.

The whole partnership estate being considered as set apart and held, not only to pay the debts of the partnership, but as security to each partner for the ultimate balance due to him for his own share of the partnership debts. *Wright v. Wright* (1879) 59 How. Pr. 188.

Of which a partner cannot by partition proceedings deprive his copartner. *Holmes v. McGee* (1859) 27 Mo. 597.

Descending to his personal representatives. *Williams v. Love* (1858) 2 Head, 80, 73 Am. Dec. 191.

Even though the legal title may, by the death of the party holding it, be cast by dissent on his heirs-at-law. *Murrell v. Mandelbaum* (1892) 85 Tenn. 22.

And vest in the widow and heirs-at-law. *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 697; *Howard v. Priest* (1843) 5 Met. 582.

And although there is an agreement by which the property is to be conveyed to creditors of the firm, which agreement fails, the property still remaining partnership property subject to partnership liabilities. *Lane v. Jones* (1882) 9 Lea, 627.

The basis of such lien being an implied trust or pledge. *Wright v. Wright* (1879) 59 How. Pr. 186.

And is for the benefit of the partners alone, with the exception of such other persons as may be equitably entitled to be subrogated to the rights of one partner as against the other. *Wilhite v. Bouliware* (1839) 88 Ky. 169.

Such lien being superior to that of a creditor of an individual member of the firm, even though such partnership may have been dissolved for five years, and the property may have stood in the individual name of a member. *Lane v. Jones*, *supra*.

Yet it is only enforceable in equity and not recognized in law, being simply an equitable right to have the property applied in payment of the partnership debts. *Coles v. Coles* (1818) 15 Johns. 160, 8 Am. Dec. 231; *Greene v. Graham* (1831) 5 Ohio, 264; *Ross v. Heintzen* (1868) 36 Cal. 814; *Blake v. Nutter* (1841) 19 Me. 18; *Peck v. Fisher* (1851) 7 Cush. 387; *Buchan v. Sumner* (1847) 2 Barb. Ch. 198, 5 L. ed. 611, 47 Am. Dec. 305; *Long v. Waring* (1864) 25 Ala. 643, 60 Am. Dec. 533; *Lowe v. Alexander* (1860) 15 Cal. 293; *Dupuy v. Leavenworth* (1861) 17 Cal. 262; *Stokes v. Stevens* (1870) 40 Cal. 391.

So each member of a mining partnership has a lien upon the partnership property for the debts due the creditors of the concern, and for money advanced by him for its use, which he may enforce in equity, even if there has been no agreement among the partners that such lien exists. *Duryea v. Burt* (1865) 23 Cal. 599; *Divine v. Mitchum* (1844) 4 B. Mon. 488, 41 Am. Dec. 241; *Winslow v. Chiffelle* (1824) Harp. Eq. 26; *Carlisle v. Mulhern* (1853) 19 Mo. 57.

In *Taylor v. Farmer* (1886) (Ill.) 6 West. Rep. 710, the legal title to the firm's real estate was in the member of the firm who had assumed and paid partnership liabilities, and it was held that he had a valid

lien upon such estate therefor, and that the case was not within the statute of frauds.

The equity against each other exists for the purpose of producing equality among themselves, and fastens itself and is a lien upon their respective interests in the land, bought and held in common, of which neither can be deprived by the other, or by a creditor of such other or a purchaser from him with notice. *Pearl v. Pearl* (1872) 1 Tenn. Ch. 206; *Sweat v. Henson* (1847) 5 Humph. 49; *Gee v. Gee* (1854) 2 Sneed, 306; *Williams v. Love* (1858) 2 Head, 30, 73 Am. Dec. 191; *Withers v. Pemberton* (1860) 8 Coldw. 62.

But the partners are not entitled to a lien upon the partnership real estate until the debts are paid. *Thrall v. Crampton* (1877) 16 Nat. Bankr. Reg. 231, 9 Ben. 218.

A partner having firm's money for the purchase of another's interest in the firm, has no equity prior to that of the partnership creditors. *Ames v. Ames* (1888) 37 Fed. Rep. 30.

So a cross-bill alleging payment of the purchase money by the individual means of one partner, merely presents the case of a purchaser using the means of another in purchasing lands for himself, which, though rendering him a general debtor for the money used, creates no lien upon the property purchased in favor of the person whose money has been used. *Bowman v. O'Reilly* (1856) 31 Miss. 281.

Where it is shown that the partnership property has been equally divided between the partners, and that one has stood and actually paid the firm debts, and the taxes on the property received in the partition, and upon the land until the time of its sale, the equitable title to the land is in him. *Murrell v. Mandelbaum* (1892) 85 Tex. 22.

When a mining lease is taken by parties for the purposes of working the mine in partnership, and the managing partner becomes in the course of such management indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday v. Wrightwick* (1829) 1 Russ. & M. 43, 141. 250.

XII. Partition of partnership real estate.

Upon the theory that two partners hold the land as tenants in common, a parol partition of the land is valid, and not within the statute of frauds. *Murrell v. Mandelbaum* (1892) 85 Tex. 22.

If the partnership real estate is not susceptible of a just division between the partners, it must be sold and the proceeds divided, on the winding up of the partnership estate. *Cooper v. Frederick* (1854) 4 G. Greene, 403.

Real estate purchased with partnership effects and held for partnership purposes being considered as assets, is not liable to partition until a settlement of all partnership accounts has been had. *Baird v. Baird* (1837) 21 N. C. 524, 31 Am. Dec. 390; *Thompson v. Holden* (1863) 117 Mo. 118; *Pennybacker v. Leary* (1884) 65 Iowa, 220.

Where upon proceedings for partition the petition stated that the plaintiff and defendant were joint owners of the tract of land, and that they were equal partners in the same; that the tract had been subdivided into town lots, a number of which had been sold; that the residue of the joint property was the property of the plaintiff and defendant, a demurrer to such bill was not sustained on the ground that it appeared that the parties were partners and a dissolution of the partnership was not averred; neither was it stated that the partnership debts had been paid, but that the land having been laid out in lots the plaintiff had no right to partition of the original tract but only of the subdivisions. *Holmes v. McGee* (1859) 27 Mo. 597.

Where, however, there are no partnership debts to pay, the real estate should be partitioned, if practicable. *Gray v. Palmer* (1888) 9 Cal. 618; *Patterson v. Blake* (1859) 13 Ind. 436.

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So upon the dissolution of a firm, real estate may be divided by compulsory partition, when it is shown that it is not required to satisfy the liabilities of the partnership. *Pepper v. Pepper* (1837) 24 Ill. App. 316; *Strong v. Lord* (1883) 107 Ill. 25; *Lang v. Waring* (1854) 25 Ala. 625, 60 Am. Dec. 538; *Shearer v. Shearer* (1867) 38 Mass. 107; *Scruggs v. Blair* (1870) 44 Miss. 406.

In *Flanner v. Moore* (1854) 47 N. C. 123, it was held that a partition suit, under the North Carolina Act of 1829, chap. 17, re enacted in 1836 (1 Rev. Stat. chap. 85, § 16), could not be instituted with respect to partnership property, the rights of the partners only being enforceable in a court of equity.

Upon partition the court will allow a partner who has improved the property or a part thereof to retain the specific portion as his share thereof. *Cooper v. Frederick* (1854) 4 G. Greene, 403.

When a commercial firm buys real estate, although the legal title to it be in the members of the firm, and each holds an undivided share or interest in it, yet the whole value thereof belongs to the partnership which has an equitable title to it, and one partner after parting with all his interest in it has no right to avail himself of his legal title to sue for a partition. *Thomas v. Scott* (1842) 3 Rob. (La.) 256.

The administrator of a partnership estate has no power to partition the partnership real estate, his power extending only to the collection of the debts due to the partnership and the payment of partnership demands, with the incidental power invested by order of the court, after proper steps taken, of selling the personal property and so much of the real estate as is necessary to pay the partnership debts, leaving the questions that might arise among the partners and their representatives on a settlement of the affairs of the partnership among themselves, and the partition of the partnership real estate, or its sale and the distribution of the proceeds, to the determination of a court of equity. *Burnside v. Sawyer* (1876) 6 Or. 154.

Where relief is sought by way of partition of the buildings and possessory rights to land, the fee whereof is vested in the United States, or for a sale of the same and a division of the proceeds, the latter course will be pursued, the title to the land being only possessory the fee being in the government, and for the reason that although such interests were chattels real, being bought and constructed with partnership moneys for the business of the firm, yet they can legally be regarded as any other chattel interest pertaining to the partnership, and for that reason a partition is not a correct remedy. *Tarabino v. Nicoli* (Colo.) Feb. 11, 1893.

On a dissolution one of several persons jointly entitled to several leases in a colliery, co-owners of the leases, cannot insist on a partition, though there may be no debts, but the whole must be sold. *Wild v. Milne* (1869) 28 Beav. 504.

XIII. Position of partner advancing purchase money.

In the case of a joint purchase of land, the partner advancing the purchase money is entitled to be reimbursed and to have all the claims against such estate settled in priority to an attaching creditor of his partner. *Furman v. McMillan* (1878) 2 Lea, 121.

As between a partner purchasing property for a firm giving his own note for the price, and the firm, it is to be regarded as the debt of the firm to pay, and he acts in the transaction as the agent of the firm. *Dewey v. Dewey* (1863) 35 Vt. 555.

A purchase by the financial partner of a concern for the purpose of promoting the firm business of real estate improved by the firm money, will inure for the benefit of the firm and be deemed firm property, and that, even though such purchase may be taken in the partner's own name and out of

funds kept by him separate and distinct from the firm's he being looked upon as a trustee and entitled only to a moiety, the money paid being considered as advances made by him, to which he will be entitled to repayment on a settlement of the partnership account in equity. *Lacy v. Hall* (1861) 87 Pa. 360.

A partner advancing his individual money to be invested along with the moneys of the firm in the purchase of property for partnership purposes, has the right, at any time before the appropriation is actually made, to change his intention and make a different application of the funds, the money being his until the investment is made, and if such funds are withdrawn before the appropriation the subsequent use of such funds for that purpose will raise a trust in favor of such individual partner, though such a trust may be waived or discharged by parol in the same manner as all trusts either express or implied created by parol. *Owens v. Collins* (1853) 23 Ala. 837.

But the mere fact that one partner in the purchase of partnership real estate pays more money than another does not increase such partner's interest in the land in the absence of an express contract. *Farmer v. Samuel* (1823) 4 Litt. (Ky.) 187, 14 Am. Dec. 106.

So the grantee of real estate in trust for a firm advancing money to one of his copartners, who pledges his interest in such real estate as security for the advances, cannot claim a lien upon partnership assets prior to the claim of the separate creditors, by merely showing that the money loaned went into the partnership. *Hill v. Beach* (1858) 12 N. J. Eq. 81.

Where the title to partnership land is in the partner advancing the money, and the property is afterwards purchased from the first by another partner who takes possession without conveyance, an action at the suit of his grantee will lie to quiet title against the partner originally purchasing and his wife. *Dickey v. Shirk* (1891) 128 Ind. 278.

Where real estate is purchased and buildings erected thereon for business purposes, one partner furnishing the land as part of his share of the capital, the lien created upon a subsequent sale by him of his interest to a new partner, upon the legal title to the land as security for the price, and for payments he may have to make on account of the firm, is subordinate to that of a partner who has advanced money to the concern prior to such partner retiring. *Savage v. Carter* (1840) 9 Dana, 400.

Where one partner was to furnish the land and buildings and the other to advance the money for partnership purposes, and to loan money for the purpose of increasing the property and for business purposes, such advances to carry no interest, and the land and improvements no rent, subsequent agreements showing that such partner might withdraw the money advanced the advances being considered as loans, it was held that the death of one partner intestate prevented the partnership operations from being carried on according to the agreement, and that the money advanced for building must be refunded as supplementally stipulated for, and the partner was entitled to recover those advances in the same manner as if no partnership had ever existed; in other words that as collateral security for the payment of such advances, the partnership had been rendered inoperative by death and consequently the liability to which the partner had subjected himself to pay such advances out of the profits became, if not instant and absolute at the time of his decease, at least thus absolute and uncontingent within such reasonable time as, had the business been carried on, the money could have been earned. *Bierman v. Braches* (1861) 14 Mo. 24.

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XIV. Position of partner purchasing property at sheriff's sale.

Where each partner in business owned the real estate upon which the business was carried on, and had the title thereto vested in them in undivided half shares, and subject to a mortgage by one partner of his portion of the land, the same was seized under an execution for the firm's debts, and bought in at sheriff's sale by the other partner, it was held in an action to foreclose the mortgage that before the partner could recover such property as belonging to the partnership, he must show that the share so mortgaged constituted a part of the partnership assets, and that the mortgagees had notice of the fact. *Hogle v. Lowe* (1877) 12 Nev. 288.

The purchase by one partner of partnership lands sold under an execution on a judgment against partners works no extinguishment of the other's right to his moiety. *Farmer v. Samuel* (1823) 4 Litt. (Ky.) 187, 14 Am. Dec. 106.

XV Position of new partner.

As between the partners themselves, a partner is liable for his share of the purchase money of real estate, contracted to be paid by him at the time of his entering the firm with interest thereon. *Parker v. Parker* (1873) 65 Barb. 205.

The introduction of a new partner into a partnership firm will not have the effect of vesting in him any share in the partnership real estate of the old firm, in the absence of an express agreement to that effect, such an introduction constituting a dissolution of the old firm. *Hatchett v. Blanton*, (1882) 72 Ala. 423.

Where real estate is mortgaged to a partnership for the purpose of securing a debt due, and subsequently the partnership is dissolved by the admission of a new partner, such new firm taking new notes, cannot claim the benefit of such mortgage. *Abat v. Penny* (1867) 19 La. Ann. 239.

A partner purchasing an interest in real estate and in the business carried on thereon, the real estate being subject to a prior mortgage which is removed by the owners, and also to a mechanic's lien of which the partner has no notice, is entitled as a creditor of the firm to be reimbursed out of the joint fund, so far as such liens have been satisfied from the real estate or firm property, to the exclusion of the separate creditors of the partners. *Rainey v. Nance* (1870) 54 Ill. 29.

One of two partners holding a mortgage upon the other's share selling his interest in the partnership to a third party, asserting at the time that his partner's interest is unincumbered, the new partnership afterwards mortgaging partnership property, is estopped by reason of his assertion from setting up a claim to the prejudice of the new partner, and such partner has a lien upon the partnership assets, not only to secure any balance found due upon the settlement of partnership affairs, but has the right to have the partnership assets applied to the payment of partnership debts, and so save his individual property from being applied for that purpose, till all the partnership's assets have been exhausted. *Ricketts v. Croom* (Ala.) Jan. 31, 1894.

XVI. Fraud by partner.

A fraud committed by a member of a copartnership in relation to real estate will bind the other partners of the firm, even though they have no knowledge, and do not participate in the fraud. *Chester v. Dickerson* (1873) 54 N. Y. 1, 13 Am. Rep. 550, affirming (1868) 52 Barb. 349.

The fraudulent sale by one partner of partnership real estate to satisfy his own private debt will not give a right of action by the firm against the purchaser. *Wells v. Mitchell* (1841) 23 N. C. 434, 35 Am. Dec. 737.

Where partners purchasing real estate, the conveyance being taken by one partner in his own name by reason of fraud, contribute more than their share of the purchase money, they will not be entitled to recover the excess of the purchase money, upon a decree seeking a conveyance of their proportions, as such conveyance can only be granted upon the specific terms of the arrangement. *Faulds v. Yates* (1870) 37 Ill. 414, 11 Am. Rep. 24.

A fraudulent intent to deprive his partners of their rights in partnership real estate, by taking a conveyance thereof in his own name, cannot be presumed against a partner, especially when he unites with them in a suit to recover a portion thereof, alleged to have been conveyed to him in exclusion of their rights. *Gannett v. Cunningham* (1854) 34 Me. 62.

If the property is purchased with partnership funds and for partnership purposes, and has thus become an executed contract between the partners, it is a fraud upon the partnership afterwards to appropriate it to the private use of either of the partners without the assent of the others. *Hoxie v. Carr* (1882) 1 Sumn. 173; *Forster v. Hale* (1798) 3 Ves. Jr. 696 (1800) 5 Ves. Jr. 306.

Where by a contract between two persons for the purchase and resale of real estate, one of them has an equitable title in two fifths of the land, and the legal title to the land is in the other, the fraudulent misconduct of the former party in making sales of the land may defeat his claim for commission, but will not operate to forfeit his equitable title in the lands. *Shaeffer v. Blair* (1896) 149 U. S. 248, 37 L. ed. 121.

XVII. Estoppel of partner.

A partner executing a conveyance of firm property in the firm name is estopped from denying its effect or validity. *Elliott v. Dycke* (1884) 78 Ala. 150.

A partner who enters into possession of property under a lease executed only by his partner is estopped from showing the want of authority in the partner to assign it. *Holbrook v. Chamberlin* (1874) 116 Mass. 155, 17 Am. Rep. 146.

See also *Ricketts v. Croom* (Ala.) Jan. 13, 1894, *supra*, head XV.

XVIII. Statute of limitations.

No length of possession of real estate, purchased with partnership funds and conveyed to one partner, will bar the right of the other partners. *Riddle v. Whitehill* (1890) 135 U. S. 621, 34 L. ed. 232.

And one partner cannot plead the statute as against his copartners in the case of real estate purchased in his name for partnership purposes. *McGuire v. Ramsey* (1849) 9 Ark. 518.

Cattle belonging to one of several partners engaged in real estate transactions, converted into money and invested in the business, become a part of the trust fund against which the statute of limitations does not run. *King v. Hamilton* (1864) 16 Ill. 190.

By an agreement that one partner shall close up the business of the partnership and settle its affairs, which have been under his management, a trust is created and the statute of limitations does not begin to run against the right to account for partnership dealings so long as such partner acts under the trust until he repudiates it. *Riddle v. Whitehill*, *supra*.

XIX. Tender of purchase money by partner.

Where parties are partners in the purchase of real estate, and in dealings in timber land, a tender made by one of them pursuant to an agreement entered into by them for the purchase of real estate is sufficient to enable them to compel specific performance of the agreement. *Smith v. Jones* (1856) 12 Me. 387.

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XX. Dormant partner.

When lands are sold, no man as a dormant partner can claim any part of the lands by virtue of any conveyance to which he is not on the face of it a party. *Pitts v. Waugh* (1806) 4 Mass. 424.

In the above case the court considered that the law-merchant by which one is answerable as a dormant partner on a compact made by the partnership did not apply to real estate speculations.

Yet in *Gray v. Palmer* (1868) 9 Cal. 616, the court stated that there could be between the parties themselves be a partnership in the purchase and sale of real estate, although the law would not apply to third parties.

So a dormant partner can have a title in equity enforceable as to the land. *Benvers v. Harrison* (1854) 19 Barb. 53.

Such a partner in real estate partnerships is liable to all persons dealing with the firm. *Chester v. Dickerson* (1873) 54 N. Y. 1, 13 Am. Rep. 550, affirming (1868) 52 Barb. 349.

XXI. Deceased partner's share.

After the death of one of the partners it is treated in equity as personal property for all the proper and necessary purposes, needs, and requirements of the partnership. *A. & W. Sprague Mfg. Co. v. Hoyt* (1896) 29 Fed. Rep. 427; *Tillinghast v. Champlin* (1860), 4 R. L. 173, 67 Am. Dec. 510; *Way v. Stebbins* (1869) 47 Mich. 230; *Shearer v. Shearer* (1867) 98 Mass. 107.

If there is nothing peculiar in the articles of co-partnership, real estate, composing a part of the capital stock of the firm, will on the death of a partner pass by will, or go in moieties to the remaining partners, subject to the payment of debts which act on each moiety according to the law. *Robertson v. Miller* (1820) 1 Brock. 466.

The interest of a deceased partner in partnership real estate, even though the legal title may be in him, is all that will pass upon a sale under an order of the orphan's court, for the payment of the deceased's debts. *McCormick's App.* (1868) 57 Pa. 54, 38 Am. Dec. 191.

Where lands and buildings belonged to a deceased partner before the partnership firm existed, and were not bought with partnership funds nor for partnership purposes, nor credited on the books as part of his capital, but he was paid for their use as his own individual property, upon his decease and the turning of the partnership into a corporation, his estate will be allowed its fair present value in stock with respect to such property. *Ballantine v. Frelinghuysen* (1884) 38 N. J. Eq. 266.

A trust created by a devise of partnership real estate along with other property upon trust, after payment of legacies, for charities, is void so far as it relates to the testator's interest in partnership real estate. *Ashworth v. Munn* (1890) L. R. 15 Ch. Div. 633, 28 Week. Rep. 935, 50 L. J. Ch. 107, 43 L. T. N. S. 553.

The share of a deceased partner in partnership real estate, consisting of freehold and copyhold property, is not personal estate for the purpose of being included in the value or amount, in respect of which probate duty is payable. *Custance v. Bradshaw* (1845-6) 4 Hare, 315, 9 Jur. 436.

XXII. Homestead rights.

A partner has no interest in the partnership real estate upon which a homestead can be based until partnership debts are paid, and the Illinois statute regarding homesteads was not intended to apply to partnership property, but only to exempt individual property. *Trowbridge v. Cross* (1886) 117 Ill. 106.

The right to homestead exemptions stands upon no higher ground. *Robertshaw v. Hanway* (1876) 52 Miss. 715.

XXIII. In partnership formed for the purchase and sale.

There may exist as to the subject-matter in the case of land bought or improved with partnership funds, all the rights and liabilities which attach to members of a firm in other cases, and among them the liability to account and to contribute to losses. *Meason v. Kaine* (1869) 68 Pa. 385.

In such partnerships the partner has an interest in the net profits of the transaction, but not in the property, his contract resting in parol, and the consideration money being paid by the one individually, the title taken in his name, entitles the other to an accounting. *Alpaugh v. Wood* (1888) 45 N. J. Eq. 153; *Budd v. Soudder* (N. J.) June 20, 1893.

XXIV. When partnership in lands continues after the death of a partner.

In an action brought by the heirs and representatives of a deceased shareholder in a land syndicate, the members contributing money placed in the hands of a trustee to purchase a tract of land and for improvements thereon, with power to sell when improved, the proceeds to be distributed among the shareholders, the partnership was not one terminating upon the death of a shareholder, nor the assignment of his interest, differing from an ordinary trading partnership, in that the *delectus personæ* was an important consideration, the court relying upon, *Kahn v. Central Smelting Co.* (1881) 102 U. S. 641, 28 L. ed. 266; *Bissell v. Fos* (1885) 114 U. S. 292, 29 L. ed. 129; *Horner v. Meyers* (1893) 29 Ohio L. J. 403.

XXV. The question of dissolution.

The question whether the land is to be considered as real or personal property upon the dissolution of a partnership, is made to depend upon the previous intention or agreement of the copartners. *Robertson v. Baker* (1897) 11 Fla. 192.

As to the intention of the partners to consider real estate as partnership property, see *note* to *Robinson Bank v. Miller*, *Lamport v. Miller*, 27 L. R. A. 449, 455.

Upon the dissolution of a partnership, the authority of a partner over the joint stock of the partnership will cease and cannot be used by him for his own benefit, or in any way inconsistent with the closing of the firm business, the whole partnership property being subject to the firm debts. *Baldwin v. Johnson* (1831) 1 N. J. Eq. 441.

But it is lawful for the partners, in cases of a dissolution by consent, to agree that the partnership property shall belong to one of them, and if the same is bona fide, and the agreement for valuable consideration, it will transfer the entire property to such partner holding free from the claims of the joint creditors. *Mayer v. Clark* (1866) 40 Ala. 259.

In the case of a voluntary dissolution of a partnership, partners may agree that the joint property of the firm shall belong to one of them, and such agreement being bona fide and for valuable consideration, will transfer the whole property to such partner free from the claims of the company's creditors. *Waterman v. Hunt* (1862) 2 R. L. 296.

In such a case the equitable interest in such real estate becomes vested in the partner who is to assume the liabilities; the retiring partner being considered a trustee for the benefit of the continuing member, although the legal title might still be vested in the outgoing partner. *Baldwin v. Johnson*, *supra*.

Partners as between themselves may agree to dissolve and divide according to their respective interests, and when the division is made, the property allotted to each becomes his separate property, so that one of them with respect to his liability for the debts or his payment of them has no lien upon

the property of the other, the rights of a party standing on agreement and division, and one of them cannot set up a claim inconsistent with his contract, which he ought to have provided for before he parted with the control of the partnership effects. *Holmes v. Hawes* (1851) 43 N. C. 21. *Clement v. Foster* (1844) 38 N. C. 213, followed.

The members of a firm do not become tenants in common by reason of a dissolution of the partnership, without a settlement of the partnership affairs so as to authorize proceedings under the North Carolina Partition Act of 1829, chap. 17, re-enacted in 1836, 1 Rev. Stat., chap. 85, § 16. *Flanner v. Moore* (1854) 47 N. C. 123.

The dissolution of a firm, occurring after a mortgage given by a partner in whom the legal title is vested, will not destroy the quasi joint tenancy of the partners in the firm assets, or create a tenancy in common, the partnership continuing for the purpose of winding up. *Tarbell v. West* (1881) 88 N. Y. 280; *Murray v. Mumford* (1836) 6 Cow. 441; *Deimonioo v. Guillaume* (1845) 2 Sandf. Ch. 393, 7 L. ed. 627.

A partner, at the time of dissolution taking the notes together with a mortgage on the partnership property to secure himself from his liability on the partnership debts, and for his liability to pay any other debts of the continuing partner, and the ultimate payment of the partnership notes, the partnership property being afterwards sold with his consent, part only of the consideration going in payment of the liabilities, is entitled to have the proceeds of such mortgage to indemnify himself against the partnership debts and liabilities, the balance going in payment of the notes given to him. *Low v. Allen* (1856) 41 Me. 248.

The proceeds of the sale of the decedent's share of the real estate is personal property and will be disposed of as such. *Maddock v. Astbury* (1890) 32 N. J. Eq. 181.

A dissolution of the partnership is a practical abandonment of the object of a lease executed for the purpose of promoting the partnership business, providing for the use of the land only for an especial purpose, and the parties thereto or the devisees entering into a new agreement, making partition of the land and setting aside part to the lessee without limitation as to use, the lessee is discharged from using the land for the purposes stated in the lease, and an inquiry as to the rental value of the land should not be confined to its value for the limited use, the party having a greater interest in the land assigned to him than acquired under a lease. *Campbell v. Hunt* (1885) 104 Ind. 210.

If the parties are merely partners in the purchase and sale of real estate, the partnership is terminated by the sale of the real estate, the land being the only subject of the assumed partnership. *Thompson v. Bowman* (1867) 73 U. S. 6 Wall. 316, 18 L. ed. 733.

Where the contract of partnership was entered into solely for the purpose of purchasing, improving, and equipping the property, the profits of the partnership business to consist of lands and not money, the lands being converted into realty as soon as realized, by investing the money obtained for payment, improvement, and equipment of the place, the end and object of the partnership being the ownership of an improved and arable plantation, the partnership being the means by which the end was attained, it was held that such lands were partnership property, in so far as to be bound for the debts of the firm, that the partners were capable of dealing with them as partnership property, by doing any acts within the scope of the partnership business, and that on a dissolution of the partnership they passed to the heirs and not to the personal representatives of the deceased partner, and that neither partner had the right to

assist upon their sale for distribution of their proceeds. *Berry v. Folkes* (1882) 80 Miss. 576.

Where a member of a banking firm, which dealt in real estate, bought property with money (part of an overdraft) taken from the bank without the knowledge of his partners, the title being taken in his wife's name, it was treated as firm property, the profit derived therefrom being equally divided between the partners. *Daniels v. McCormick* (1894) 7 Wis. 255.

Where a partner contributing real estate at an estimated value to the capital stock reserved the right upon dissolution not to be bound by such estimated value, and to withdraw the property, such right to withdraw was considered as of contract provision for correcting the estimated valuation. *Clark's App.* (1872) 72 Pa. 142.

In *Bentley v. Bates* (1840) 4 Younge & C. Exch. 182, 11 L. J. N. S. Exch. Eq. 30, 4 Jur. 552, it was held that the ownership of a colliery placed the partners for some purposes in the situation of mercantile partners, but not for all purposes, and that the joint ownership of a colliery was not put an end to by a dissolution of a partnership before an account could be taken; and further that in the case of joint tenants or tenants in common of a colliery, one partner could not compel another to sell his share and dissolve the concern previously to taking the account, the rule as to the necessity of praying for a dissolution, in order to take a partnership account, being meant to apply only to mercantile partnerships.

XXVL. *Winding up of firm.*

After dissolution a partnership will be considered as continuing for the purposes of winding up, the partners retaining their original powers in the absence of a stipulation to the contrary. *Gannett v. Cunningham* (1852) 34 Me. 62; *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 395, 7 L. ed. 627; *Tarbell v. West* (1881) 86 N. Y. 200; *Murray v. Mumford* (1826) 6 Cow. 641.

Lands belonging to the partnership are, equally with the personality, liable to the payment of the debts of the firm and will go into the balance of account between the partners on settlement of profit and loss. *Rufner v. McConnell* (1855) 17 Ill. 22, 63 Am. Dec. 362.

Being part of the partnership assets it cannot in the absence of any accounting between the partners or adjustment of partnership accounts, be separated from the rest of the partnership property, and may be the subject of a separate action to divide the same or the proceeds thereof between the parties. *MacFarlane v. MacFarlane* (1894) 82 Hun. 238.

Where the land is purchased with partnership funds for partnership uses and conveniences, and conveyed to the partners as tenants in common, it vests in them in equity in their partnership capacity, to be applied to partnership purposes in payment of the partnership creditors, and in settling the accounts of the individual partners, upon the winding up of the partnership, as against the claim of the widows and heirs-at-law of a deceased partner. *Price v. Hicks* (1874) 14 Fla. 566.

Upon the dissolution of a partnership real estate purchased by them with partnership funds should be divided as partnership property, each taking that interest in it which he has in the personal property of the partnership, unless at the time of making the purchase it is understood to be an individual and not a partnership transaction. *Thayer v. Lane* (1848) Walk. Ch. (Mich.) 200, following *Greene v. Greene* (1824) 1 Ohio, 535, 13 Am. Dec. 642; *Sigourney v. Munn* (1828) 7 Conn. 11.

There can be no division of partnership property until all the accounts of the partnership have been taken and a clear interest of each partner ascer-

tained. *Baird v. Baird* (1857) 21 N. C. 524, 31 Am. Dec. 399.

Partnership business only will be adjusted upon a settlement of the partnership accounts in equity. *Reid v. McQuesten* (1899) 61 N. H. 421.

In order to entitle a partner to suit in equity for an account, and to have real estate declared partnership assets, it is not necessary that he should in the first place obtain judgment against the partner in whose name the title stands. *Deveney v. Mahoney* (1872) 23 N. J. Eq. 247.

A court of equity having full jurisdiction of all cases between partners touching partnership property will inquire into, take account of and administer upon such property, whether real or personal, and will not allow one partner to commit a fraud or a breach of trust upon another by taking advantage of the statute of frauds. *Holmes v. McCray* (1875) 51 Ind. 358, 19 Am. Rep. 735; *Chester v. Dickerson* (1873) 84 N. Y. 1, 13 Am. Rep. 550, following *Dale v. Hamilton* (1846) 5 Hare, 399, 16 L. J. Ch. N. S. 123, 11 Jur. 163; *Essex v. Essex* (1855) 20 Beav. 449; *Bunnell v. Taintor* (1822) 4 Conn. 568.

There is no difference between partnership real estate and other partnership property, in the settlement of the affairs of a partnership in Michigan. *Godfrey v. White* (1890) 43 Mich. 171.

Real estate belonging to a copartnership effects should follow the same law of distribution in a court of chancery which is applied to personal property. *Rice v. Barnard* (1848) 20 Vt. 479, 50 Am. Dec. 54.

Before the partners can obtain relief, the partnership property must be within the control of the court and in the course of administration. *Case v. Beauregard* (1879) 99 U. S. 119, 25 L. ed. 870.

Real estate purchased as firm property and held as such partakes in equity of the character of personality, to the extent that it is under the control of the chancellor in making a final adjustment of the affairs of the partnership, whether in stating an account between the partners, or in marshalling the assets among the creditors. *Mauck v. Mauck* (1870) 54 Ill. 281.

If the partnership accounts have once been fairly settled between the parties, and the lands to which the settlements refer were, as to the unsold balance of the tracts, divided between them as to such property, it ceases to be partnership assets, is effectually withdrawn from the partnership business, and such a settlement, if fairly made in the absence of fraud or mistake, will stand until reopened or set aside by appropriate proceedings for that purpose. *Kendall v. Hackworth* (1885) 66 Tex. 499.

In making a final settlement and division of partnership property, including real estate, the court will look into the peculiar circumstances, and if consistent with the rights of the parties, will protect a partner in his rights by allowing him for improvements and benefits which he has bestowed upon the land. *Cooper v. Frederick* (1864) 4 G. Greene, 403.

Where a retiring partner takes his interest in partnership real estate as security for the payment of a debt, such property cannot as between the partners be treated as partnership property in adjusting the accounts as between the partners themselves unless they discharge the lien. *Childs v. Pellett* (Mich.) Dec. 7, 1894.

The payment of money to release partnership real estate from any incumbrances which existed thereon at the time of its purchase although not a debt which the partnership were otherwise bound to pay is in accordance with the rights and interests of the copartners as such and may properly be taken as a part of the adjustment of the partnership affairs by division. *Shearer v. Shearer* (1867) 98 Mass. 107.

The same evidence which makes it partnership

property for the payment of debts and adjusting the equities between the parties, establishes it for the purpose of a final dividend. *Jones v. Smith* (1899) 81 S. C. 527.

In a bill for the winding up of a partnership's affairs, the contract or agreement for the formation of the copartnership, with its terms and conditions, must be set forth in order to show an existing partnership, and it must also be shown that there was an understanding or agreement between the partners, whereby land purchased was to become partnership property, and it should also be shown that it was purchased with partnership funds, otherwise the bill will be defective. *Little v. Snedecor* (1875) 53 Ala. 167.

The fact that a lease of mining property, to be used for the joint benefit of the partners, was taken in the name of one with the understanding that he was to transfer to the others their respective interests, is immaterial in a suit between partners for the settlement of partnership affairs. *Reed v. Meagher* (1890) 9 L. R. A. 455, 14 Colo. 835.

Where the complainant is to furnish the capital and the defendant to perform the labor in the purchase of property in a partnership relating to the buying and selling of lands, the losses are to be borne equally between the partners and will be ordered sold by the court upon the winding up of the partnership. *Oloott v. Wing* (1845) 4 McLean, 15.

An account for clearing and building upon joint lands, and of the rents thereof, is a proper matter of consideration in proceedings for the settlement of partnership affairs. *Jones v. Jones* (1861) 23 Ark. 212.

Where the plaintiff is adjudged the owner in fee of the premises, free from any lien thereon by defendant's judgment, neither party can recover costs. *Koot v. Wheeler* (1861) 12 Abb. Pr. 299.

In a suit instituted by one partner praying a sale of the partnership property, the court will, on motion, direct an inquiry whether it be for the benefit of all parties interested, that the works and property should be sold, or carried on for the purpose of winding up the concern. *Crawsbay v. Maule* (1818) 1 Swanst. 495.

Where partnership property is indivisible and suited only to a certain purpose, and the interest of the parties required that it should be sold, the power of the court to order a sale and conveyance is unquestionable. *Megibben v. Perin* (1892) 49 Fed. Rep. 183; *Power v. Power* (1891) 12 Ky. L. Rep. 793.

Under an agreement alleging that the real estate should be divided between them, or that the partner should be allowed to retain the portion that stood in his name and in his possession at the date of the dissolution, any balances being credited to the party entitled to it, the partners are entitled to have the whole of the partnership property sold upon the winding up of the firm's affairs. *Lyman v. Lyman* (1829) 2 Paine, C. C. 11.

If the surviving partners have not acted in good faith, and accounted to the parties entitled for the surplus assets of the partnership property, including real estate, the remedy is against them. *Solomon v. Fitzgerald* (1872) 7 Helsk. 552.

The mere fact that a difficulty in the title of partnership lands exists, is no objection upon a dissolution and settlement of the partnership, to the ordering of sale of such title as the partnership has, although such difficulty might prevent the best sale from being effected. *Waugh v. Mitchell* (1837) 21 N. C. 610.

In *Waters v. Taylor* (1813) 2 Ves. & B. 299, the court decreed a sale of the whole partnership estate, real and personal, in a partnership business, dissolved by the conduct of the partners, making it impossible to carry on the partnership.

And at such sale the partners have been given a right to bid. *Rowlands v. Evans*, *Williams v. Row-*
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lands (1861) 30 Beav. 302, 8 Jur. N. S. 83, 31 L. J. Ch. 265, 10 Week. Rep. 183, 5 L. T. N. S. 658.

Where a business carried on in partnership was afterwards transferred to other premises, which were purchased by one of the partners with partnership property, bought in the first instance partly with such property and partly with money borrowed by one partner, and afterwards repaid out of the partnership effects and partly upon the credit of the former house, which belonged to the partnership, it was held that a decree, upon a petition for winding up the partnership business, that such house should be sold, was correct. *Nerot v. Burnand* (1827) 4 Russ. 247.

To a bill filed for the settlement of a partnership, in the purchase and sale of lands, and praying an account, the defense of the statute of frauds must be specially pleaded. *Patterson v. Ware* (1846) 10 Ala. 444.

In closing the partnership affairs, the partners have the legal right as against a mortgagee of one of the partner's shares to sell the real estate for money, and for this purpose can give a good title unaffected by the mortgage, or they can exchange it for other available property for the purpose of conveniently adjusting their affairs with creditors and each other, and for the purpose of winding up their business. *Tarbel v. Bradley* (1878) 7 Abb. N. C. 379, affirmed, *Tarbell v. West* (1881) 86 N. Y. 230.

Where, previous to the death of one partner, a salary was paid to another partner, and he also claimed compensation for caring for the premises used in the business, which were the property of himself and another deceased partner, who also had other real estate not so used and which he took care of and showed a profit, it was held that although in the latter he was entitled to compensation, yet as to the former he was not so entitled. *Beck v. Thompson* (Nev.) May 7, 1894.

Where partners, for the uses and purposes of their business, took a conveyance of lands and subsequently another became a member of the firm the deed continuing in the name of the original grantees, and later one partner sold out to his copartners all interest in the firm property and quit-claimed to original partners his real estate, took from them a mortgage, the new firm continuing in business using the real estate until their failure when they compromised with their creditors, including such retiring partner who signed the composition deed for a certain amount as unsecured, and subsequently sought to foreclose the mortgage which it was contended the composition deed destroyed,—it was held that the receipt of the mortgage and the accompanying bond caused the claim against the partnership to cease and that such retiring partner could therefore only look to his security for the purpose of paying his debt. *Baxter v. Bell* (1879) 19 Hun, 367, 368.

Where a portion of the real estate standing in the name of one partner at his decease, upon which a portion of the building built by the firm with the firm's money was placed and greatly increased its value, was devoted to the business of the firm showing their intention to treat it as partnership property, the court held that in making a division of the partnership property the estate of the deceased partner should be allowed to value the land at the time of its appropriation by building, but that the increased value should be divided among the copartners in proportion to their respective interests in the profits of the business from the funds of which the improvements were made. *Ballantine v. Frelinghuysen* (1884) 38 N. J. Eq. 363.

Where the plaintiff and defendant, copartners in business of cutting and selling wood and timber, plaintiff, being the owner of certain land, verbally agreed to sell defendant one undivided half of the wood and timber standing thereon, and that the same should then be the property of the firm, a

small portion of the wood and timber being taken off the purchase money not being paid, and plaintiff mortgaged the lot and notified the defendant that he would not be allowed to cut any more timber and in the settlement of the partnership accounts the defendant claimed damages equal to the amount he would have realized by the cutting of the remaining wood, the court held that such damages could not be allowed in the taking of the partnership accounts. *Beld v. McQuesten* (1881) 61 N. H. 421.

In *Falkner v. Hunt* (1875) 73 N. C. 571, a bill was filed in equity to set up and settle the partnership, plaintiff alleging that he and the defendant had entered into an agreement for the purchase of a tract of land in which a millsite and mill were situated, and that they were to build a new mill, the plaintiff doing the work and the defendant furnishing the materials and money, and out of the profits the land was to be paid for, the defendant reimbursing his outlay and plaintiff being paid for his work, and afterwards the profits or losses were to be shared equally as partners; and the defendant received the profits, reimbursed himself, and paid all but a small balance for the land. The court held the partner was entitled to an account and that such contract need not be in writing.

Where real estate was contributed to the capital stock of a company at an estimated valuation, and was afterwards destroyed by fire and rebuilt by mutual consent with partnership funds, the loss falling upon the partnership, the property being partnership property and a part of the capital, the partner contributing it having been credited with its value in the stock account, it was held upon a dissolution he could not withdraw the burnt part, while the buildings which filled its place were the product of the investment of partnership funds with his consent, and were of a different value, and the court held that such property could only be settled by treating such property as partnership property, ascertaining its value at the time of dissolution and stating the account accordingly. *Clark's App.* (1872) 72 Pa. 142.

Where the evidence showed that the property in question was partnership property, used and treated as such by the parties and improved with partnership funds, the title thereto being by agreement taken in the name of one partner really for the use and purposes of the partnership and vested as the partners intended that it should be, it was held that although the property was really, yet in the estimation of a court of equity it has been thus converted into personal estate for all partnership purposes, and along with other partnership effects was subject to the firm's debts and losses and to a return of the capital advanced by each partner upon a division of the balance of the firm profits, and that therefore one partner had no right to call for a conveyance of his interest as a tenant in common until the trust fastened upon such property for partnership purposes had been fully satisfied, the legal title remaining in the party in whom the mutual consent of the parties had vested it, the only remedy of such party being by action to dissolve the partnership and for an accounting. *Kruschke v. Stefan* (1893) 83 Wis. 573.

XXVII. *Division by partnership prior to dissolution.*

Where part of partnership real estate has been divided, there is no presumption of the division of the residue in the absence of evidence to that effect. *McGuire v. Ramsey* (1849) 9 Ark. 518.

XXVIII. *In Louisiana.*

Under the Louisiana laws immovables bought for the partnership must be deemed owned jointly 28 L. R. A.

by the individual partners, and cannot be regarded as owned by the partnership, yet the partners have the right to require the application of such property to pay the partnership debts. *Calder v. Their Creditors* (1895) 47 La. Ann. 346.

Whether acquired in the partnership name, or when shown to have been purchased in the name of one of the partners for the partnership. *Ibid.*

If any immovable property be purchased in the name of the firm, the partners become joint owners. *McKee v. Griffin* (1871) 23 La. Ann. 417; *Guilbeau Bros. v. Melancon* (1876) 23 La. Ann. 637; *May v. New Orleans & C. R. Co.* (1892) 44 La. Ann. 444.

Yet they hold for the firm benefit. *May v. New Orleans & C. R. Co. supra.*

It is not partnership property, liable to the payment of the firm debts. *Bernard v. Dufour* (1841) 17 La. 596.

And therefore one partner cannot afterwards alienate it without the consent of the other partners. *Civil Code, art. 2796; Thomas v. Scott* (1842) 3 Rob. (La.) 256; *Weld v. Peters* (1846) 1 La. Ann. 432.

The title to a portion of the property may be in the partner, but the value belongs to the partnership. *Baca v. Ramos* (1836) 10 La. Ann. 417, 29 Am. Dec. 463; *McKee v. Griffin, supra.*

But the partners have a right to partition it. *Pecot v. Armelin Bros.* (1899) 21 La. Ann. 667.

Either of the partners has the right to sell his undivided share or interest in the property, and such is liable to be used for his private debts. *McKee v. Griffin* (1871) 23 La. Ann. 417; *Baca v. Ramos* (1836) 10 La. 417, 29 Am. Dec. 463.

A transfer of the share of a partner by him will operate as a divestiture of his interest and preclude his contesting the transferee's title. *May v. New Orleans & C. R. Co.* (1892) 44 La. Ann. 444.

Commercial partners may own real estate, but the real estate owned by them does not enter into their commercial assets. *Guilbeau Bros. v. Melancon* (1876) 23 La. Ann. 637.

Yet in equity real estate acquired for the partnership is liable for the partnership debts. *Calder v. Their Creditors* (1895) 47 La. Ann. 346.

So equity will enforce the rights of the equitable owner by compelling the legal one to make a conveyance to the other. *Baca v. Ramos, supra; Hall v. Sprigg* (1819) 7 Mart. (La.) 242, 12 Am. Dec. 506.

Where partnership entries are relied upon to overthrow the title of the partner to immovable property acquired by him, the entry shall clearly import the acquisition was for the partnership. *Calder v. Their Creditors, supra.*

If the books of the firm explicitly show that the land in question was bought and paid for with the funds of the partnership, for the account and use of the partnership, such a purchase of immovable property by members of a copartnership, even though the title be taken in the names of the individual partners, has precisely the same effect as if the title be taken in the name of the firm; in either case the individual partners become joint owners. *May v. New Orleans & C. R. Co.* (1892) 44 La. Ann. 444, following *Allen v. Whetstone* (1833) 35 La. Ann. 849; *Thomas v. Scott* (1842) 3 Rob. (La.) 256.

Where the act of sale by which real estate was acquired showed that the purchase was made by the parties as partners trading under a firm style, a note being given for half of the purchase money signed by the firm, it was held the partners were joint owners and that either of them could sell his undivided share or interest in the property which was liable to seizure for his private debts. In such a case, however, the partner must account for the price, as he could not acquire any part for his private use without compensating his partners. *Baca v. Ramos* (1836) 10 La. 417, 29 Am. Dec. 463. E. W.

VIRGINIA SUPREME COURT OF APPEALS.

COMMONWEALTH of Virginia, *Ptff. in Err.*,
v.

Iverson BROWN.

(.....Va.....)

1. **The requirement of equality and uniformity in taxation** is satisfied by such regulations as will secure an equal rate and just valuation without reference to the method of valuation, and in order to be uniform a tax need not be imposed and assessed upon all property by the same agency or officers.
2. **A tax on sales of oysters to be assessed and paid weekly** while other property is assessed and taxes paid thereon once a year, does not for that reason violate the principle of equality and uniformity.
3. **A tax on sales of oysters expressly authorized by Const., art. 10, § 2**, is not an income tax within section 4, which exempts incomes under \$500.
4. **A provision for a fine on a tong man who fails to make a weekly return of sales of oysters for taxation** does not add to or increase the tax so as to affect its equality and uniformity.
5. **A provision giving an option to pay the sum of two dollars** in discharge of all obligation for taxes on sales of oysters, which is merely in lieu of the tax imposed on such sales to be paid weekly, does not, at least as to one who does not avail himself of the privilege, make the tax a license instead of a property tax.
6. **An act to amend and re-enact certain sections of the code of Virginia and repeal others in relation to oysters**, and to add independent sections thereto, all of which have a natural connection with the general subject of oysters, does not embrace more than one subject.
7. **The title of an amendatory statute** need not express the subject of its provisions if the title of the original statute amended is sufficient to embrace the matters covered.
8. **The title of a statute amending, re-enacting, repealing, or adding to any part of the code** sufficiently states the object by adopting and expressing the number and subject of the chapter of the code affected thereby.
9. **The amount of a tax on oysters is sufficiently stated** within the meaning of the Constitution, art. 10, § 16, by a provision that it shall equal the amount of taxes levied on any other species of property.
10. **The object of a tax being sufficiently stated in the statute which creates it**, the title of a subsequent mandatory statute merely continuing the tax need not repeat the object of the tax.
11. **The object of an oyster tax being expressly stated "to obtain revenue"** it complies with the constitutional provision that the object must be stated although the Code, chap. 97, § 2135, provides that the taxes shall be paid "into the public treasury to the credit of the

oyster fund," since the oyster fund is merely an account and not the object of the tax.

(March 21, 1896.)

ERROR to the Circuit Court for Gloucester County to review a judgment in favor of defendant in a proceeding to subject him to the penalty for violation of the oyster law. *Reversed.*

The facts are stated in the opinion.

Mr. R. Taylor Scott, Atty Gen., for the Commonwealth.

Messrs. J. N. Stubbs and W. C. L. Toliaferro for defendant in error.

Riely, J., delivered the opinion of the court:

Section 5 of the Act of the General Assembly approved February 25, 1892, entitled "An act to amend and re-enact sections 2131, 2133, 2134, 2135, 2137, 2148, 2151, 2153, and to repeal sections 2141, 2142, 2143, 2144, 2145, and 2147 of chapter 97 of the Code of Virginia in relation to oysters, and to add independent sections thereto" (Acts 1891-92, chap. 363, p. 595), contain the following provision: "The inspector shall require each tong man registered in his district to make to him, on the Saturday of each week, or within three days thereafter, during the lawful season, a true and accurate return of the amount of sales made by him during the week preceding; and the inspector shall collect from said tong man on the aggregate amount of sales for that week an amount equal to the amount of tax that may be levied by the state on any other species of property; but if at the time of registering his boat, any tong man shall prefer, and elect to pay, and pay to the inspector the sum of two dollars, the inspector shall give him a receipt therefor, in which he shall state that the said payment is a discharge of his obligation under this section for the entire season for which his boat is registered, so far as the weekly returns and the amount to be paid thereon is concerned. . . . If any tong man shall fail to make such report as is provided in this section, he shall be guilty of a misdemeanor, and upon conviction thereof he shall be fined not less than ten dollars nor more than fifty dollars." Iverson Brown, the defendant in error, who was a tong man of oysters, and had not elected, at the time of registering his boat, to pay to the inspector the sum of two dollars in discharge of his obligation for the entire season, was indicted under the said statute in the county court of Gloucester on the 5th day of October, 1893, for failing to make the return which was due from him to the inspector on the week ending September 16, 1893, or within the three days thereafter, of the amount of his sales of oysters. To the indictment the defendant

NOTE.—For public fisheries in general, see *Lawton v. Steele* (N. Y.) 7 L. R. A. 134, and *note*; *Wright v. Mulvaney* (Wis.) 9 L. R. A. 807, and *note*.

As to state regulation of shipments of oysters or taking of them by nonresidents, see *State v. Harub* (Ala.) 15 L. R. A. 761.

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As to equality of taxation, see *Daly v. Morgan* (Md.) 1 L. R. A. 757, and *note*; *Chaddock v. Day* (Mich.) 4 L. R. A. 809, and *note* (including distinction between licenses and taxes); *Cook v. Port of Portland* (Or.) 13 L. R. A. 533, and *note*; *State v. Moore* (N. C.) 22 L. R. A. 472.

demurred. The court sustained the demurrer, and gave judgment for the defendant. Upon a petition by the commonwealth to the judge of the circuit court of Gloucester county for a writ of error to the said judgment there was a *pro forma* refusal, in pursuance of an agreement between the attorney for the commonwealth and for the defendant, in order that the case might be promptly brought before this court. A writ of error was thereupon granted by one of the judges of this court. By an agreement in writing and filed with the record all errors and objections to the indictment, except as to the validity of the statute upon which it was based, were waived by the counsel for the defendant.

The only question, then, for our consideration is the constitutionality of the statute above quoted. It is first assailed on the ground that the tax prescribed is not equal and uniform, and that, therefore, the statute is obnoxious to section 1 of article 10 of the Constitution. In support of this contention quite a number of objections to the act were urged. Section 1 of article 10 of the Constitution prescribes that: "Taxation, except as hereinafter provided, whether imposed by the state, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value." An inspection of the statute under consideration shows that the principle of equality and uniformity was strictly observed in the imposition of the tax. The value of the oysters for taxation could not well be ascertained or fixed in a more just manner than is prescribed by the statute. It is to be ascertained by the aggregate amount of sales each week during the oyster season. It is their actual value in market, and not merely their appraised value. A more accurate mode of ascertaining the valuation for taxation of oysters subject to be taxed could not well be devised; and the rate of taxation is precisely the same as is prescribed for other property. The inspector is to collect each week from a tong man on the aggregate amount of his sales for that week an amount equal to the amount of tax that may be levied by the state on any other species of property; no more, no less. The tax prescribed is exactly the same as that which is levied by the state on any other species of property, and the valuation is ascertained in the most accurate and just manner. There is no just ground to complain of the tax for inequality or want of uniformity.

It is objected that the valuation for taxation of oysters is not ascertained in the same way, or by the same method, that is prescribed for other property; that the valuation of other property is assessed by officers elected or appointed for the purpose; that the tax on oysters is to be assessed and paid weekly, while all other property is only assessed annually, and the tax paid annually; and that the failure of a tong man to make weekly a return of his sales to the inspector is made a misdemeanor, and subjects him,

on conviction, to the payment of a fine, while the owners of other property subject to taxation are not liable to be punished for a like delinquency. Neither one nor all of these objections affect the equality or uniformity of the tax imposed on a tong man, nor offend against section 1 of article 10 of the Constitution. Whether true or false, they do not operate to impose any greater burden on him than is borne by the owner of any other species of property of the same value. They do not add one iota to the tax he has to pay, and the statute is therefore in strict accord with both the letter and spirit of the constitution in the respect complained of. The constitution does not prescribe that the valuation of all property for taxation shall be ascertained in the same way or manner. It is not even implied. In the nature of things, it could not be done. The many kinds or species of property with their diverse characteristics render it impossible. The valuation is to be ascertained as prescribed by law,—that is, by the legislature,—and in as just a manner as possible; and on such valuation the same rate of tax shall be imposed as on other property, so that "no species of property . . . shall be taxed higher than any other species of property of equal value." The requirement of equality and uniformity is satisfied by such regulations as will secure an equal rate and a just valuation without reference to the method of valuation, and, in order to be uniform, a tax need not be imposed and assessed upon all property by the same agency or officer. *Shenandoah Valley R. Co. v. Clarke County Suprs.* 78 Va. 269; *Kentucky Railroad Tax Cases*, 115 U. S. 837, 838, 29 L. ed. 419; *Central Iowa R. Co. v. Wright County Suprs.* 67 Iowa, 199; and *Louisville & N. A. R. Co. v. State*, 25 Ind. 177. The legislature may prescribe any method it may deem best for attaining a just and fair valuation of any species of property, and the court could not declare any such law void, unless it manifestly violated the principles required by the constitution. The fact that oysters are required to be assessed, and the tax to be paid every week, while other property is only assessed and the tax paid once a year, does not work inequality in the amount of the tax paid. The tong man does not pay weekly on the same property. In the result he only pays on the aggregate amount of his sales during the season the regular *pro rata* tax that is paid on all other property. The fact that he pays the tax in weekly installments instead of one annual payment does not increase the amount of his tax one stiver. The amount to be paid to the state is precisely the same, whether paid in one single payment or in weekly installments.

It is claimed that the tax in question, being assessed on the aggregate amount of sales of oysters, is an income tax, and is, therefore, violative of section 4, article 10, of the Constitution, which exempts incomes under \$600 from taxation. It is a sufficient answer to this objection to say that the tax is assessed on sales, and not upon income, and that the section of the constitution referred to has no application to the case; and, fur-

thermore, that the tax on the "amount of sales of oysters" taken from their natural beds is expressly authorized by section 2 of the said article of the Constitution.

It is further objected that because the act subjects a tong man to a fine of not less than \$10 nor more than \$50 if he fail to make to the inspector the required weekly return of sales, it discriminates against the tong man, as no other owner of property subject to taxation is liable to a fine for a like delinquency. If this were in fact true, it would not be cause to declare the statute void for inequality or want of uniformity in the tax imposed on tong men of oysters. It in no wise adds to or increases the tax. That remains fixed, and is the same that is "levied by the state on any other species of property." If the tong men respect the law by which the valuation of oysters for assessment is to be ascertained, they will never incur the fine. A statute that is otherwise valid is not rendered invalid by having a penalty affixed for its violation. The wrong of the citizen can never make a valid law void. But the claim of discrimination is not founded in fact. Owners of other property are subject to punishment for a like delinquency. The penalty prescribed by the statute in question is for failing to make the return of sales to the inspector, who is to assess the tax. Under the general law, forms for lists of valuations are furnished by the assessor to the owners of personal property, which they are required to fill out by listing their property and affixing valuations thereof, and which, after being verified by oath, are required to be returned to the assessor or clerk of the court within ten days thereafter; and the failure to return the same within the time required, and to make oath to its truth and fairness, subjects the offender to a forfeiture of not less than \$50 nor more than \$1,000. *Va. Code*, §§ 491, 494, 497. Statutes imposing penalties for failure or refusal to make such returns or to return such lists are quite common, and have been uniformly upheld. *Washington v. Com.* 2 Va. Cas. 258; *Com. v. Byrne*, 20 Gratt. 165; *State v. Bell*, 61 N. C. 76; *Com. v. Cooke*, 50 Pa. 201; *Hartford v. Champion*, 58 Conn. 268, 25 Am. & Eng. Encyclop. Law, p. 206. Nor does the statute infringe in the least on the provision of the constitution which authorizes a tax to be imposed on "the amount of sales of oysters" taken from the natural beds by any citizen "in any one year . . . at a rate not exceeding the rate of taxation imposed on any other species of property." Article 10, § 2. It imposes, as has been seen, a tax on the weekly sales of oysters equal to the amount of the tax that may be levied by the state on any other species of property; but provides that "if at the time of registering his boat any tong man shall prefer and elect to pay, and pay to the inspector the sum of two dollars, the inspector shall give him a receipt therefor in which he shall state that the said payment is in discharge of his obligation under this section for the entire season for which his boat is registered, so far as the weekly returns and the amount to be paid thereon is concerned." It is insisted

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that this is in substance and effect a license tax, and not a property tax, and is therefore obnoxious to section 2 of article 10 of the Constitution. This claim is not well founded. The constitution expressly authorizes the legislature to impose a tax on the amount of sales of oysters taken from their natural beds by any citizen in any one year, but limits the tax to the rate imposed upon any other species of property. The statute, pursuing directly the constitutional provision, requires a tong man to make return to the inspector of the amount of his sales of oysters so taken, and the inspector to collect from the tong man on the aggregate amount of sales an amount equal to the amount of tax levied by the state on other property. Thus the tong man is required to pay on the amount of his sales as the constitution authorizes, and not otherwise; and only such amount as is equal to the tax imposed by the state on other property. The statute does not, therefore, offend against the constitution, and it is difficult to see how it can be so claimed. The provision that if the tong man, at the time of registering his boat, shall prefer and elect to pay, and pay the sum of two dollars, such payment shall be a discharge of his obligation for the entire season for the tax imposed on the amount of his sales, is simply a privilege extended to him, which he may either accept or decline. He is under no compulsion whatever to avail himself of it. He is without cause of complaint on this score. Nor, unless accepted, does it affect the tax imposed in strict adherence to the constitutional provision. We have now disposed of the many objections raised to the constitutionality of the statute on the ground of inequality or want of uniformity in the tax it imposes, and the objection that it is a license, and not a property tax. It is, in my opinion valid against such attack.

It is next contended that it is repugnant to section 15 of article 5 of the Constitution, which is as follows: "No law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended with reference to its title, but the act revived, or the section amended, shall be re-enacted and published at length." The title of the act was stated at the beginning of this opinion, but for convenience in examining the objection made to its validity or sufficiency under the foregoing provision of the constitution, it will be here repeated. It is entitled: "An act to amend and re-enact sections 2181, 2183, 2184, 2185, 2137, 2148, 2151, 2153, and to repeal sections 2141, 2142, 2143, 2144, 2145, and 2147 of chapter 97 of the Code of Virginia, in relation to oysters, and to add independent sections thereto." It is claimed that the body of the statute embraces many objects, instead of one object, as required by the constitutional provision, and, further, that these many objects are not expressed in the title; that it both amends and repeals many sections of the code, and that the independent sections have various objects, such as registering boats to be used in taking oysters from their natural beds, arranging oyster districts, surveying oyster-planting ground, assigning

and renting oyster ground, tax on sales of oysters taken from their natural beds, and other similar provisions; and it is contended that "the title should have stated and shown what subject each section as amended and re-enacted had reference to, what subject each section repealed had reference to, and that the subject-matter in the independent sections should have been clearly set forth in the title." The provision of the constitution is a wise and wholesome one. Its purpose is apparent. It was to prevent the members of the legislature and the people from being misled by the title of a law. It was intended to prevent the use of deceptive titles as a cover for vicious legislation, to prevent the practice of bringing together into one bill for corrupt purposes subjects diverse and dissimilar in their nature, and having no necessary connection with each other; and to prevent surprise or fraud in legislation by means of provisions in bills of which the titles gave no intimation. And, on the other hand, it was not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject. It was not designed to embarrass legislation by compelling the multiplication of laws by the passage of separate acts on a single general subject. Although the act or statute authorizes many things of a diverse nature to be done, the title will be sufficient if the things authorized may be fairly regarded as in furtherance of the object expressed in the title. It is therefore to be liberally construed and treated, so as to uphold the law, if practicable. *Cooley, Const. Lim.* p. 175. All that is required by the constitutional provision is that the subjects embraced in the statute, but not specified in the title, are congruous, and have natural connection with, or are germane to, the subject expressed in the title. This has been, so far as I am aware, the construction given this provision of the constitution by this court, by the highest courts of other states whose constitutions contain the same or a similar provision, and by the Supreme Court of the United States. *Powell v. Brunswick County Supra*, 88 Va. 707; *Leacallett v. Com.* 89 Va. 878; *State v. Union*, 88 N. J. L. 350; *People v. Briggs*, 50 N. Y. 553; *Johnson v. Harrison*, 47 Minn. 578; *Falconer v. Robinson*, 46 Ala. 347; *Carter County v. Sinton*, 120 U. S. 528, 80 L. ed. 702; *Montclair v. Ramsdell*, 107 U. S. 155, 27 L. ed. 433; *Independent School Dist. of Ackley, Harden County, Iowa v. Hall*, 113 U. S. 142, 28 L. ed. 957; and *Unity v. Burrage*, 108 U. S. 457-459, 26 L. ed. 408, 409.

It is very plain that the subjects of the various sections of the act under consideration are not dissimilar or discordant, but have natural connection with each other, and relate to the general subject (oysters) expressed in the title. They are all the means to an end. They are instrumentalities for the accomplishment of the general object of the act. No one interested in the subject-matter of the statute could be misled by the title, or be put off his guard by hearing it read by the title. Under the just and fair

interpretation that has been uniformly given to the provision of section 15 of article 5 of the Constitution, the title to the act in question is sufficient, and it was unnecessary to set forth in it the various subjects of its different sections, which would have, indeed, made the title what the constitutional provision never intended to require, an abstract of the law or an index of its contents.

There is another view which may be urged in support of the sufficiency of the title. It will be observed that it is an amendatory act, and not the original act on the subject. In such case, if the title of the original act is sufficient to embrace the matters covered by the provisions of the act amendatory thereof, it is unnecessary to inquire whether the title of the amendatory act would of itself be sufficient. If the title of the original act is sufficient to embrace the matters contained in the amendatory act, whether that of the amendatory act is in itself sufficient is unimportant. *State v. Ranson*, 78 Mo. 78; *St. Louis v. Tiegels*, 42 Mo. 590; *Brandon v. State*, 16 Ind. 197; *Morford v. Unger*, 8 Iowa, 82; *State v. Algood*, 87 Tenn. 163; and *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214, 224. The act in question is amendatory of chapter 97 of the Code of Virginia, on "Oysters." This chapter contains and embraces the statute law on the subject of oysters enacted in Acts 1883-84, chap. 254, p. 824, as revised by the revisers of that code; and the section under which the defendant in error was indicted was in substance contained in section 8 of said Act, and was incorporated in the code as section 2142. That section of the code is repealed by Acts 1891-92, chap. 363, p. 595, and section 5 enacted in its place as an independent section. We have already set forth the said section at length. Is it germane to the subject expressed in the title of the Act of 1883-84 referred to? Would it have been legitimately covered by its title? The title was as follows: "An act for the preservation of oysters and to obtain revenue for the privilege of taking them within the waters of the commonwealth." These questions can only be answered in the affirmative. Section 2142 of the Code, taken from the original Act of 1883-84, and incorporated into the code by the revisers, and the independent section under discussion, numbered 5, of the Act of 1891-92, relate directly and expressly to the object expressed in the title of the original act. This cannot be questioned. And, being fully covered by it, the title of the Amendatory Act of 1891-92 is a sufficient compliance with the constitutional requirement. It may, however, be said that the act in question did not purport to amend the original Act of 1883-84, but to amend and re-enact and repeal various sections of chapter 97 of the Code of Virginia, and add other sections to it. This is true, and it is also true that the revisers of the Code (1887) incorporated into it the provisions of the Act of 1883-84, and that the sections so amended and re-enacted and those repealed were mainly taken by the revisers from the said act. But the fact that the act purports to amend the code instead of the original act, so far from invalidating it, is an additional reason why

it is not obnoxious to the constitution in respect to the matter of its title. The laws contained in the present code were enacted before, and the great body of them very long before, they were incorporated into it. They were taken from previous codes and compilations of the general laws, and from statutes passed subsequent to such codes and compilations. It is to be presumed that they were constitutionally enacted, as well as to the title as in other respects. They were collated, revised, and digested under appropriate titles and chapters, and divided into sections in pursuance of an act of the legislature, and then passed by it as one act under a proper title with the object of the act therein duly expressed: "An act to revise, arrange and consolidate into a code of the general statutes of the commonwealth, approved May 16, 1887," in strict compliance with the constitution. It was not to amendments of general statutes thus consolidated into a code that section 15 of article 5 of the Constitution was intended to apply, but it was aimed at the separate acts in their original enactment, when the opportunity existed for the evils and the mischief to be done, which the constitutional provision was designed to prevent or defeat. It is not necessary, therefore, to do more, if so much, in amending and re-enacting or repealing any part of the code or adding thereto, than refer to the proper chapter and section thereof to be amended or repealed or added to, and adopt and express in the title of the amendatory act the number and subject of such chapter, if the provision of such amendment by re-enactment or by additional section or sections is germane to the subject of the chapter. *Second German Bldg. Assn. v. Newman*, 50 Md. 62; *Lankford v. Somerset County Comrs.* 78 Md. 105, and 119, 11 L. R. A. 491, 496; *Heath v. Johnson*, 86 W. Va. 782; *Dogge v. State*, 17 Neb. 140; *State v. Berka*, 20 Neb. 876; *People v. Howard*, 73 Mich. 10; and *People v. Parvin* (Cal.) 14 Pac. Rep. 783. The chapter of the code, whose sections are affected by the act in question, is numbered 97, and "Oysters" is expressed to be its subject. The act whose constitutionality is questioned refers in its title to that chapter by number, and uses its title; and, as I have previously shown, the provisions of all the sections of the act relate directly and expressly to the subject "Oysters." It is not, therefore, in conflict with the constitution.

The constitution of Maryland contains a similar provision to that of our own, and the court of appeals of that state has held that in amending its code of laws, which is divided into articles, it is sufficient to refer to the number of the article. The subject of its ninety-fifth article is "Usury," under which is contained the whole legislation of the state regulating the rate of interest, declaring the penalties and forfeitures for usury, and prescribing the manner in which such forfeitures shall be enforced. The legislature of Maryland passed an act amending the said article, under the title: "An act to amend article ninety-five of the Code of Public General Laws by adding an additional section thereto." Laws 1876, p. 601. In 28 L. R. A.

Second German Bldg. Assn. v. Newman, *supra*, the act was assailed as repugnant to the constitution, but the court held that the title of the act complied with the constitutional provision requiring the subject of an act of assembly to be described in its title; and added that "it was not necessary to state in the title that the section to be added to the code related to the subject of usury. The reference to the particular article in the code, which relates only to the subject of usury, clearly indicated the subject of the law." The act that was drawn in question in *Heath v. Johnson*, *supra*, was entitled "An act to amend 'An act to amend and re-enact section 58 of chapter 45 of the Code of West Virginia.'" It was objected to on account of the insufficiency of its title, but the court held otherwise, and said: "The provision cited seems to refer rather to original acts than to those which are only amendatory; but, supposing it to apply to the latter, when the amendment in its title points not only to the chapter which is to be amended, but to the very section, it seems to us to amount to a sufficient expression of the object of the law to prevent any of the evils which the constitutional provision was intended to remedy." The title of the act which was questioned in *People v. Howard*, *supra*, read as follows: "An act to amend chapter 158 of the Revised Statutes of 1846, being chapter 180 of the Compiled Laws, entitled 'of offences against the lives and property of individuals.'" Laws 1867, p. 153. The amendment consisted in adding to the chapter a new section. In its opinion the court said: "It is claimed that the object of the act, which was to create a new felony, is not expressed in the title; that an amendment means a change or alteration in something already existing, and does not mean creation, or the bringing in of substantially new matter; and that the precise purpose of the act should have been clearly stated in the title. . . . Acts entitled 'Acts to amend a named act' are not obnoxious to the constitution, if the amendment comes fairly within the scope of the title of the original act. Nor would the amendment of a compiler's section, if the subject-matter of the section was expressed in the title. But it is said that the chapters and sections of the compiled laws have no titles, the titles being placed there by the compilers, and not by the legislature. . . . When the chapters are referred to and they are identical in sections, and the title as used by the compiler is substantially stated, and an amendment is proposed to such chapter, the public are notified that a change is proposed in the law relating to the class of offenses treated of in such chapters, and that amendments may always be made by adding a new section, as an act is amended by adding a new section."

It is further contended that the act is unconstitutional because it imposes a tax without stating the tax, or the object of it, and is therefore repugnant to section 16 of article 10 of the Constitution, which provides that "every law which imposes, continues, or revives a tax, shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any

other law to fix such tax or object." So far as I am aware, this particular provision of the constitution has not heretofore been reviewed by this court. It was not in any constitution of the state prior to 1869. It appears there for the first time. It is true that the act contains a tax. Is it distinctly stated? It is prescribed to be "an amount equal to the amount of tax that may be levied by the state on any other species of property." It is made exactly the same as that which is imposed on other property. Tong men are required to pay the same tax on the fair value of the oysters taken and sold by them that is paid by others on other property of the same value. The tax is accurately prescribed. It is not open to mistake or doubt. It is, in the sense of the constitution, distinctly stated. The act specifically and definitely fixes the amount of the tax, and in this respect complies with the letter and purpose of the constitutional provision.

Next, as to the object of the tax. It is claimed that this is new legislation, and not an amendment of a former law, but the enactment of a new section, and that, therefore, it imposes a tax. But this is a mistake. It does not impose a new tax. It simply continues a tax already existing and in force when the act was passed. The very act which prescribes the tax repeals a section of the Code taken from the act of 1883-84 (chapter 254, § 8), which fixed the same tax. It is simply the substitution by the same act of another section for the original section, both containing the same tax. The act, therefore, instead of imposing a tax, simply continues it. We have already seen, in discussing the objection to the title of the act, that where an act is amendatory of an original act, and the title of the original act is sufficient to cover the matter of the amendment, it is sufficient, and the title of the amendatory act becomes unimportant. For the same reason, where an amendatory act merely continues a tax without stating the object to which it is to be applied, it will be a compliance with the constitutional provision if the original act which imposed the tax states the object to which it was to be applied. Under the constitution the title is a necessary part of every statute. The tax which the act in question continues was imposed by the Act of 1883-84. We have only to refer to that act to find a satisfactory answer to the constitutional objection now urged. It is entitled "An act for the preservation of oysters to obtain revenue for the privilege of taking them within the waters of the commonwealth." The object of the tax is concisely but expressly stated. It is "to obtain revenue." What is "revenue?" It is the income which a state collects and receives into its treasury, and is appropriated for the payment of its expenses. The object of the act, then, was to raise money for the support of the government of the state. It is concisely defined by the words to "raise revenue" but by that phrase the object of the tax is as popularly understood as if it had been declared in the title or body of the act that the object was to raise money for the current expenses of the government. While the Act

of 1891-92 does not purport to amend the Act of 1883-84, but the code, yet it is that act as put into the code which is in reality amended.

It cannot be necessary in an amendment which continues a tax contained in the original act without changing the object of the tax, to repeat the object. The statement of it in the original act is sufficient. It appears from section 2185 of chapter 97 of the Code, where the Act of 1883-84 was incorporated into it, that each inspector of oysters is required to pay all taxes on sales of oysters, together with all fees and fines collected by him "into the public treasury, to the credit of the oyster fund." This section, as amended and re-enacted by the Act of 1891-92 uses the same language. The "oyster fund" here referred to is merely an account that shows upon the credit side the amount of taxes, rents, fees, and fines derived from oysters, and upon the debit side the expenses incurred in sustaining the means furnished by law for their preservation and obtaining revenue from them. It is simply kept for the information of the executive of the state, the general assembly, and the public, in order that it may be conveniently seen whether oysters are a source of revenue to the state, and, if so, to what extent. It has no reference to the object of the tax, and in no wise alters or affects its object as expressed in the title of the Act of 1883-84, or diverts the moneys received under the tax from the payment of the ordinary and current expenses of the state. The tax is distinctly stated in the act. And there can be no misunderstanding or doubt as to the object to which it is to be applied. The law is valid.

The constitution of New York contains the same provision in the same identical words.

It has been construed more than once by the courts of that state, and liberally interpreted. It came before the supreme court of New York in *People v. Orange County Suprs.*, 27 Barb. 575, where the act prescribed that the money raised should be "paid into the treasury of the state to the credit of the general fund." It was objected that this was not a sufficient statement of the object to which the tax was to be applied, as required by the constitution, but the court held otherwise, and declared the act valid. An appeal was taken to the court of appeals of New York, which affirmed the judgment of the supreme court. *Id.*, 17 N. Y. 235. It was again before the supreme court of New York in the case of *People v. National F. Ins. Co. of Hartford*, 27 Hun, 188, where the act specified that the taxes "shall be applicable to the payment of the ordinary and current expenses of the state." It was held that this sufficiently stated the object of the tax. These decisions show that under a reasonable and fair interpretation of this provision of the constitution it is sufficient to indicate generally the purpose to which the tax is to be applied; otherwise it would be necessary, after having stated the tax, and the fund to which, when collected and paid into the treasury, it is to be credited, to go further, and specify the persons to whom, and the purposes for which, it should be disbursed. It was well said by the court in one of the

cases cited above that if this were necessary, "every tax bill would then be an appropriation bill also,"—a requirement that would be of infinite embarrassment to the government, and practically deprive the legislature of all power to raise money by taxation. Every law enacted by the legislature is presumed to be in conformity with the constitution, until the contrary is shown, and it devolves on him who alleges its invalidity to show it. It is a grave responsibility for a court or judge to pronounce a solemn and deliberate act of the sovereign lawmaking power unconstitutional and void. It should never be done in a doubtful case, and especially where no great principle of liberty or the security of property

"enshrined in the Constitution of the United States and repeated in that of the state" is involved, but only some rule of legislative action. When it is done, the conflict between the constitution and the law must be clear and palpable. To doubt is to affirm the validity of the law. The statute, which has been assailed on so many constitutional grounds, is, at least not to my mind, in plain and palpable conflict with the constitution.

The result is that the judgment of the County Court of Gloucester County must be reversed and annulled, and the demurrer to the indictment overruled.

MONTANA SUPREME COURT.

Re ESTATE OF Christopher P. HIGGINS,
Deceased.

(.....Mont.....)

1. **Persons who are named in a will as executors**, who petition the court for a probate of the will, and are duly appointed as executors, stand before the court in that capacity subject to all orders properly directed to them as such until they are duly discharged therefrom according to law.
2. **Executors cannot relieve themselves from the statutory duty to file an inventory** of the estate and publish notice to creditors by showing that the entire estate was given to them absolutely as trustees and filing their *ex parte* affidavits that there are no debts, but they are subject to the orders of the court requiring such duties to be performed.
3. **Authority from the probate court is necessary**, at least in jurisdictions where executors have the right of possession of real estate, to release from his executorial trust one who has assumed the duties of executor under a will which also gives the entire estate to him in trust for certain purposes.
4. **Executors who have qualified cannot assume duties imposed upon them by the will as trustees** for the management of the estate until the court has approved their accounts as executors and ordered a distribution of the estate and authorized a transfer of the estate in their hands as executors to themselves as trustees.
5. **An order directing persons named both as executors and trustees in a will to render an account** as executors against their claim that they hold the estate as trustees involves a decision that administration is necessary and is therefore final so as to authorize them to appeal from it.

(March 4, 1895.)

APPEAL by the executors under the will of Christopher P. Higgins, deceased, from an order of the District Court for Missoula County refusing to quash a former order directing

NOTE.—The relation to an estate of an executor who is also a testamentary trustee, is discussed with a review of many authorities in the above case. See also *Lindley v. O'Reilly* (N. J.) 1 L. R. A. 79, and *note*.
28 L. R. A.

them to file an inventory of decedent's estate.
Affirmed.

Statement by Hunt, J.:

Appeal by Julia P. Higgins, Francis G. Higgins, and George C. Higgins, executors and trustees of the last will and testament of Christopher P. Higgins, deceased, from an order made by the district court overruling the motion of said executors and trustees to set aside an order made requiring said executors and trustees to file in said court a complete inventory and appraisement of the estate of the said Christopher P. Higgins, deceased, situated in the state of Montana, which has come into their hands as such executors. The order referred to recites that Francis G., George C., and Julia P. Higgins were on November 20, 1889, duly appointed executors of the last will and testament of Christopher P. Higgins, deceased, and all duly qualified as such executors on the 20th of November, 1889; that more than three years have elapsed since their qualification as such executors; and that no inventory and appraisement have been filed. The court therefore ordered that they prepare and file in said court, on or before July 8, 1893, a full inventory and appraisement of the estate of the deceased, and which had come into their hands as such executors, as required by law. The motion to set aside the order of the court was based upon the grounds that the court had no jurisdiction in the matter of said estate, coming under the probate laws of the state of Montana, to make any other order with reference to said estate, but that the jurisdiction to make any orders is vested by law in a court of equity; that a court of equity alone had jurisdiction with reference to said estate since the order probating the will; that the district court, as a court of probate, has no jurisdiction to make any order relating to said estate, or to direct the said Julia, Francis, and George Higgins to do any act in said estate. The motion was based upon the will, and affidavits of Francis G., George C., and Julia P. Higgins.

The will and testament is as follows: First. I give, devise, and bequeath to my executors, hereinafter named, all and singular my property, real and personal, where-

soever situated, and all moneys belonging to me, of which I may die possessed, in trust, nevertheless and to and for the following uses and purposes, namely: Second. I direct that my said executors shall continue to carry on the banking business in which I am now engaged under the name of C. P. Higgins Western Bank, and to that end that they shall, so soon after my death as shall be expedient, proceed to incorporate said bank, with a capital stock of one hundred thousand dollars, under the laws of the United States or the laws of Montana; and, when so incorporated, my said executors shall transfer to said bank all of the moneys, property, and assets now used in the business of said bank, and so much of any other funds that may come into the hands of my executors as shall be necessary to make up the amount of the capital stock of said bank; and that, upon the incorporation of said bank, the capital stock of the same shall be equally divided among my heirs, hereinafter named. Third. I further direct my said executors, hereinafter named, to proceed to construct the block of buildings now in the course of construction by me, according to the original plan, designs, and contracts, under which the same is now being constructed. Fourth. In order to carry out the purposes and directions above mentioned, I hereby authorize, empower, and direct my said executors to sell, convey, and dispose of any of my estate, whether real or personal, which may come into their hands. Fifth. I further authorize, empower, request, and direct my said executors to sell and convey any of the estate and property belonging to me which may come into their hands, wheresoever situate, in such manner as may in their judgment be most for the interest of my estate, and to convert the same into cash; and I direct my said executors to invest such proceeds of sale, with all other moneys which may come into their hands, unless herein otherwise provided, and keep the same invested in safe manner, as in their judgment may seem best for the joint and equal benefit of all my heirs hereinafter named; and, in order to carry out the provisions of this instrument I hereby authorize and empower my executors, hereinafter named, to sign, seal, execute, acknowledge, and deliver, in due form of law, all and every such deed or deeds, conveyances and assurances in law, whatsoever, as shall be necessary for granting, conveying, and assuring the same, or any part or parcel of land or real estate sold and conveyed by the authority herein granted. Sixth. I further request and direct my said executors, out of such moneys belonging to me as may come into their hands, to provide for the support and maintenance of my family, and the proper education of my minor children, to wit, Maurice G. Higgins, Arthur E. Higgins, Helen U. Higgins, Hilda H. Higgins, Ronald Higgins, and Gerald Higgins. Seventh. It is my wish and request that all the members of my family, while they remain unmarried, shall continue to live together at my present homestead, and, so far as possible, be united in business, and endeavor to carry out my wishes and plans relative to business, as I have heretofore ex-

plained to them. Eighth. After deducting all necessary expenses of the settlement of my estate, and the support and maintenance of my family, and the education of my minor children, I hereby devise and bequeath all the residue and remainder of my estate, of every kind and nature, and wheresoever situated, unto my wife, Julia P. Higgins, and my children, Francis G. Higgins, John R. Higgins, George C. Higgins, Maurice G. Higgins, Arthur E. Higgins, Helen U. Higgins, Hilda H. Higgins, Ronald Higgins, and Gerald Higgins, equally, share and share alike, and it is my will and meaning that the provision herein made for my said wife, in manner and form as aforesaid, shall be, and shall be deemed, adjudged, and taken to be, in lieu and bar of her dower, or other portion of and in all my estate. Ninth. I hereby nominate and appoint my wife, Julia P. Higgins, and my sons Francis G. Higgins, John R. Higgins, and George C. Higgins to be executors of this, my last will and testament (without bond); and, in case of the death or refusal to act of any of them, the survivors or others of them are hereby empowered to act and carry out the provisions of this instrument."

Francis G. and George C. Higgins, each for himself, filed an affidavit to the effect that they were conversant with the condition of the estate of the decedent, and that at the time of his death he owed nothing; that the expenses of his last sickness and his funeral were paid; that the will was duly approved, admitted, and probated on November 16, 1889; and that no debts or claims of any kind have been presented to the executors and trustees. Julia P. Higgins, one of the surviving executors and trustees, also swears that no claims have been presented, and that the funeral expenses and the expenses of the last illness of decedent were paid.

Messrs. Webster & Wood, and McConnell, Clayberg & Gunn, for appellant:

The title in fee to all the estate of decedent passed to, and vested in, the persons named executors, as trustees, immediately upon the death of decedent. The powers conferred by the will attached to the persons named as executors and not to their office.

The office of executor is independent and distinct from that of trustee.

Re Delaney's Estate, 49 Cal. 76; *Judson v. Gibbons*, 5 Wend. 226; *Conklin v. Egerton*, 21 Wend. 430; *Larned v. Bridge*, 17 Pick. 339; *Williams v. Conrad*, 80 Barb. 524; *Mott v. Ackerman*, 92 N. Y. 558; *Cooke v. Platt*, 98 N. Y. 35; *Ward v. Ward*, 105 N. Y. 68; *Tracy v. Murray*, 49 Mich. 85; *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293; *Tobias v. Ketchum*, 32 N. Y. 319; *Simpson v. Cook*, 24 Minn. 180; *Stoutenburgh v. Moore*, 37 N. J. Eq. 63; *Re Besley's Estate*, 18 Wis. 455; *Hodgin v. Toler*, 70 Iowa, 21, 59 Am. Rep. 435; *Creamer v. Holbrook*, 89 Ala. 52; *Hunt v. Hunt*, 11 Nev. 442.

The territorial legislature had no authority to confer chancery jurisdiction on probate courts.

Ferris v. Higley, 87 U. S. 20 Wall. 375, 23

L. ed. 883; *Chadwick v. Chadwick*, 6 Mont. 566.

If the matters under consideration belong to equity, the district court sitting as a probate court would have no jurisdiction whatever.

Courts of equity have exclusive jurisdiction in all questions of trusts.

Pom. Eq. Jur. § 1154, p. 121; *Re Hawley*, 104 N. Y. 262; *Downer v. Downer*, 9 Vt. 231; Wells, Jurisdiction of Courts, § 265; Woerner, Administration, p. 848; *Re Van Wyck*, 1 Barb. Ch. 585, 5 L. ed. 496; *Williams v. Nichol*, 47 Ark. 254; *McBride v. McIntyre*, 91 Mich. 406; *Oremer v. Holbrook*, 99 Ala. 52; *Harland v. Person*, 93 Ala. 273; *King v. Jenkins*, 8 Dowl. & R. 41.

The rights of two classes of persons are always considered in administration, to wit, creditors and distributees.

Woerner, Administration, §§ 199, 432.

It must necessarily follow that when these purposes are wanting no administration is required.

To require administration in such a case would be to place a restriction upon alienability of property.

Wynchamers v. People, 13 N. Y. 396; Woerner, Administration, § 7; *Tracy v. Murray*, 49 Mich. 85.

It is within the power of the testator to place his property beyond the control of the probate court.

Fallon v. Butler, 21 Cal. 81, 81 Am. Dec. 140; *Payne v. Payne*, 18 Cal. 292; *Re Delaney's Estate*, 49 Cal. 76; *Tracy v. Murray*, *supra*.

In this case administration was not required.

Wright v. Smith, 19 Nev. 143; *Vandeveer v. Alston*, 16 Ala. 494; *Welch's Succession*, 36 La. Ann. 702; *Marshall v. Crow*, 29 Ala. 278; *Brandon v. Mason*, 1 Lea, 630; *Begien v. Freeman*, 75 Ind. 398; *Salter v. Salter*, 98 Ind. 523; *Holzman v. Hibben*, 100 Ind. 338; *Watworth v. Abel*, 53 Pa. 370; *Taylor v. Phillips*, 30 Vt. 238; *Babbitt v. Bowen*, 32 Vt. 438; *Johnson v. Johnson*, 108 N. C. 619; *Patterson v. Allen*, 50 Tex. 23; *Flood v. Pilgrim*, 82 Wis. 376; 19 Am. & Eng. Encyclop. Law, p. 208, and cases cited; Woerner, Administration, §§ 199 *et seq*.

Where there are no executorial duties to be performed the probate court can never become invested with control of the estate, and can make no order in it.

Jasper v. Jasper, 17 Or. 590; *Laytin v. Davidson*, 95 N. Y. 263.

If administration is not necessary or required in this case, then, of course, the order directing the inventory and appraisal is entirely without jurisdiction, because the inventory and appraisal are only incident to administration, and will stand or fall upon the question as to whether administration is required.

Mr. H. J. Haskell, Atty. Gen., and Miss Ella L. Knowles, amici curiae:

As in this case where a power is coupled with a trust or duty, the court has authority to enforce the proper and timely exercise of such power.

The executors are testamentary trustees.

Re Valentine's Estate, 1 Misc. 491.

Trust estates will not pass under a general devise where there is a charge or debts or legacies, or debts and legacies.

The court, under the probate practice act, 23 L. R. A.

has supervisory power over all property of an estate as well as all persons entrusted with its care, management, and control, so far as the rights of minor children or wards are concerned.

Probate Practice Act, § 118, p. 299.

The failure to file the inventory and return of appraisement is a breach of duty on the part of the executors.

Oranson v. Wilsey, 71 Mich. 359; *Wooden v. Kerr*, 91 Mich. 196; *Hall v. Oushing*, 9 Pick. 396.

Before there could be any transmutation of property, the executor must have settled his final account of administration in the court of probate, in which the balance due from him as executor should be allowed to his credit, as being retained by him in his capacity as trustee for the minor children.

Conkey v. Dickinson, 18 Met. 54; *Williams v. Oushing*, 84 Me. 370; *Ryan v. Kinney*, 2 Mont. 454.

Hunt, J., delivered the opinion of the court:

Whether or not the district court exceeded its jurisdiction in making an order requiring the executors of the will of decedent to file an inventory and accounting is the ultimate question to be decided by the court. But in reaching a conclusion upon this very important case, it becomes proper to discuss several incidental questions involved: (1) The attitude of appellants towards the court, under the will of decedent. (2) If they are executors, what may the court say must be done by them under the law? (3) To what extent shall their executorial duties go before they may be discharged, if a discharge be necessary at all? (4) If trust duties are imposed by the terms of the will, at what period of time may there be a discharge of appellants as executors, and a distribution to them as trustees? We do not find it necessary to enter into any discussion of the question of what the rights of the appellants may have been had they never qualified as executors, or to discuss at any length exactly what powers were conferred upon them independently of their executorial duties and the trusts imposed in the performance of such duties. The appellants stand before the court as having been named by the decedent as the executors of his will and testament, and as having voluntarily rendered themselves subject to the jurisdiction of the district court by duly petitioning for the probate of the will, and by duly receiving appointments as executors, according to law.

The will conferred authority upon the appellants to perform duties within the general powers of executors as such. It is not claimed, and could not be, we take it, that these executorial powers were illegally assumed, but merely that, although they were assumed by the appellants, still, under the provisions of the will, the title in fee to all of the estate of the decedent passes to and vests in the persons named executors, as trustees, immediately upon the death of the decedent. It is therefore contended that no inventory need be filed; that no notice to creditors need be given, and that, without

proceeding any further than to probate the will, administration is unnecessary, and not demanded by the laws of the state; that no accounting is required by the executors as such; and that without any formal order of court, and by operation of the effect of the will itself, the property passed to the trustees. There are, undoubtedly, conferred upon the persons named as executors of the will, duties and powers properly within the offices of trustees; for instance, the direction to invest moneys, and keep the same invested for the joint benefit of the heirs named in the will, and perhaps, the direction to provide for the support of the family. The intention of the testator seems to have been to repose a personal trust in the persons named as executors; but, however that may be, it cannot relieve the executors, now qualified, from proceeding as such, and executing the provisions of the will, subject to the law and the approval of the court. Charges upon the estate, collecting the assets, and keeping them, administration charges, debts, and other expenses, may arise. Under such conditions, even a trust estate may not always pass under a general devise. *Buffum v. Tiverton*, 16 R. L. 643, 7 L. R. A. 886.

When the executors of the will qualified, they therefore took upon themselves certain executorial duties. By section 118 of the Probate Practice Act, they are required to make and return to the court a true inventory and appraisement of all of the estate of the decedent, including the homestead, if any, which has come into their possession or knowledge. This inventory must contain all of the estate of decedent, real and personal; a statement of all debts, partnerships, and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to decedent; and an account of all moneys belonging to decedent which have come into the hands of the executors, and, if none, the fact must be so stated in the inventory. It is to be observed, too, that so sweeping is the provision requiring an inventory under our statutes, although an appraisal of money is not required, yet "an inventory must be made" and returned, as in other cases. The executor must swear to the inventory, and if property not included in the first inventory comes into the possession or knowledge of the executors, they must make another inventory after the discovery. The object of the inventory is to show creditors and other persons interested of what the estate may consist. The executor being chargeable by section 248 in his own account with the whole of the estate which may come into his possession, at the value of the appraisal contained in the inventory (except as especially provided), his responsibility may be governed and limited by the valuation with which, under this statute, he is obliged to charge himself. The heirs properly look to the inventory as essential, in case they institute action against the executor because of any maladministration on his part or any misappropriation of the estate. The authorities regard the inventory of a decedent's estate as of the highest importance. It has been held in New York by

the surrogate's court that a will containing a clause dispensing with an inventory was invalid so far as such a clause might operate to relieve the executor of complying with the law requiring him to file an inventory. The question arose in an action involving a very large fortune; but the surrogate decided that it was against public policy "to permit such interference with the forms of procedure established by law, or to remove the barriers designed to protect estates from misappropriation. The safety, preservation, and honest distribution of the decedent's estate require that provisions like the one in question should be declared invalid and of no effect." *Re Potter's Will*, 8 Dem. 108. "It is the bases upon which the representative makes his accounts. It shows the amount for which he is chargeable, and limits presumptively his responsibility, except for increments, income, and such assets not therein appraised, through ignorance, inadvertence, or other cause, as may come afterwards to his hands. On the other hand, the heirs and other parties interested have, in the recorded inventory, the best evidence possible, under the circumstances, of the assets, their condition and value, as they came to the representative's possession and knowledge at the outset of his administration, and supplies them with essential evidence in case it becomes necessary to institute proceedings against him or oppose the allowance of his accounts, because of negligence or misconduct while invested with his responsible office." Schouler, Exrs. § 237.

By our laws, too, the possession of realty passes to the executor, who is authorized to collect rents, "until the estate is settled, or until delivered over to the heirs or devisees." The right to maintain an action for the possession of real estate, or of quieting the title to the same, is conferred upon the executor, who may act in such suit with or without the heirs or devisees. The supreme court, in *Black v. Story*, 7 Mont. 238, decided that, under the statutes quoted above and others of the probate practice act, ejectment would lie against mere trespassers for the possession of realty of a decedent, when brought by his administrator. By section 83 of the Probate Practice Act, when it is expressly provided in the will that no bond shall be required, sales of real estate may be made and confirmed without any bond, unless the court, for good cause, require one to be executed. The right of the court, however, to demand this bond, is unquestionable, and conforms with the policy of the probate laws of the state which enable the court to exercise a supervision over the affairs of the estate, lest because "of some change in the situation or circumstances of the executor, or for other sufficient cause," the rights of those interested may be endangered. Section 88 gives the court, upon a showing made on oath that the executor is wasting the property of the estate, the authority to suspend an executor's powers until the application to require him to give bond is determined. This power of the court may be exercised where, by the terms of the will, no bond was originally required, and is to be invoked by the probate judge him-

self, without any application, when it comes to his knowledge that the bond, if one is given, is insufficient. His letters may be revoked if he fails to give new sureties, and all his powers taken away from him.

In passing upon the right of possession of realty conferred upon an executor, Field, *Ch. J.*, in *Meeks v. Hahn* (1862) 20 Cal. 621, held that under the Code of Civil Procedure of California, which contained at that time a provision similar to section 127 of the Montana Probate Practice Act, although the estate of an intestate descended to the heirs subject to the payment of his debts, "yet this provision must be read in connection with the clauses of the other statutes to which we have referred which place the right of present possession in the administrator;" and that such right of possession remained in the executor until the estate was settled, or delivered over to the heirs, by order of the probate court. And the court conclude that under the statutes of California, which are substantially like ours, the "right to the possession of the real property of an intestate remains exclusively with the administrator until the estate is settled, or distribution is directed by order of the probate court." The supreme court of Nevada, in *Gossage v. Crown Point Gold & Silver Min. Co.* (1879), 14 Nev. 153, in discussing the possession of realty by an administrator as given by a statute, similar to that of this state, held that such possession "is for the benefit of the creditors and the heirs," and for the purposes of administration. The court, quoting from the case of *Bufford v. Holliman*, 40 Tex. 575, 60 Am. Dec. 223, says: "By law the whole of an estate vests in the heirs, testate or *ab intesto*, at the death of a person deceased. It passes from them *sub modo* for the purposes of administration, and the administration is required to be speedy, so that the remainder, if any, may be returned to its real owners, the heirs." The plaintiffs in that case brought ejectment, alleging that the first administrator had rendered his final account; that all the debts had been paid; that the second administrator had left the state of Nevada; and that the administrator appointed in his place had declined to commence any suit to protect the rights of the plaintiffs, and waived all rights which he might have as such administrator. Under such peculiar facts, the court held that the heirs might maintain the suit in their own name; and although the right of possession of the realty is conceded, in the opinion, to have been exclusively in the administrator until settlement of the estate, yet, as the heirs alone would be benefited or injured by the result of the suit, the facts warranted their being held to be real parties in interest. We are cited by appellants to *Flood v. Pilgrim*, 82 Wis. 376, but in that case the real estate devised had passed into the possession of the devisees thereof and those claiming under them. The executor of the will did not qualify. There was no estate whatever at the time that the plaintiff was appointed administrator of the estate of the decedent, nine years after his death. There were no debts. The court held that the administrator had no

right to sue to establish the title of the devisees as against the defendant, and that the statutes which conferred the right of possession of the realty upon the administrator only applied where there was an estate. The case does not apply to the case at bar, where there is an estate, and where executors have qualified, and where the devisees do not appear to have parted with their title. It is fair to say, too, that the opinion cites no authorities, and, apart from its applicability to the particular facts, is entitled to but little weight.

Again, the executors are required to publish a notice to creditors. This requirement, the books say, is ingrafted upon our probate practice act in pursuance of the practice of English chancery courts, where notices were issued requiring creditors to file their claims with the executor within a certain time. Under section 147 of the Statutes, the notice in this case, assuming the estate exceeds in value \$10,000, would be ten months from the date of the first publication. By section 153, when a claim is presented to an executor he must indorse thereon his allowance or rejection, and thereafter he must present the claim to the probate judge, who must allow or reject the same. And the only way by which creditors may secure recognition of their just claims, except where they are without the state, is by proceeding in the manner just outlined. The creditor cannot maintain his suit under section 157, against an estate, unless he has presented the claim to the executor. And by section 150, if the claim be one arising upon a contract, unless presented within the time limited in notice, it is barred forever, except under particular conditions. We are at a loss to see how the *ex parte* affidavits of Mrs. Higgins, and others interested in this particular estate, to the effect that there are no debts, can be sufficient proof to enable a court in a judicial decree to find the fact to be as stated by the affiants. Creditors have never had the requisite notice. They have not been obliged to present their claims, and, as the law gives them ten months after the first publication to file them, we think that, until that time has elapsed, there cannot be enough proof upon which to base a final decree that there are no debts. This notice to the creditors is regarded as a reasonably certain way of reaching creditors and enables the court to exercise jurisdiction over the estate in protecting the interests of those concerned. How is it known that there are no debts? And upon what is the court to now base an order to that effect? Creditors have a right to rely upon a compliance with the statutes by executors, and may rest secure in that reliance, under the belief that, the property being in the possession of the executor, the estate is held for the payment of debts of the testator, as well as legacies and devisees.

Passing on to investigate the method by which the duties of appellants as executors may cease, and their duties as trustees may begin, we will examine the decisions bearing upon this subject.

In *Hall v. Cushing* (1830) 9 Pick. 395, in discussing the liability upon a probate bond,

the supreme court of Massachusetts uses this language: "The defendants' counsel contend that the office of executor (so far as the law furnishes other security than the personal responsibility of the executor for the faithful performance of its duties) consists in the care of the funeral, in the probate of the will, in the payment of debts, and the payment of or assent to legacies, and ceases when the residue is paid over to the legatees, or a transmutation of property is effected by the act of the executor or by the operation of law." We think however, very clearly, that the duties of an executor are not confined within such narrow limits. There are other important duties which devolve upon him, the performance of which is intended to be secured by his official bond. He is required to keep the property of the testator, while remaining in his hands as assets, without suffering it to be wasted, and to account for it under oath, when cited by the probate court for that purpose; and, if he fails in either of these particulars, it will amount to unfaithful administration and a forfeiture of his bond. Or if he neglects to object to claims against the estate, which cannot be recovered by law, as in the case of *Parson v. Mills*, 1 Mass. 431, 2 Mass. 80, or if judgment be recovered against him on a suggestion of waste, the judgment creditor will be entitled to a remedy against him on his probate bond. *Foy v. Bradley*, 1 Pick. 194. . . . And, again, before there could be any transmutation of property, as contended for by defendants' counsel, the executor must have settled his final account of administration in the court of probate, in which the balance due from him as executor should be allowed to his credit, as being retained by him in his capacity as trustee for the minor children."

In *Newcomb v. Williams* (decided in 1845, by Shaw, Ch. J.) 9 Met. 525, in an action of debt on a probate bond, where a will appointed R., one of the executors, "a trustee of all his property, except so much as the executor will require to pay debts and expenses, to take full possession, and keep it at interest, to apply the income of a part to the support of his mother, and, subject to that appropriation, to pay over the residue to his nephews," that truly learned judge goes on to say: "Now, it is argued that as the testator had the *jus disponendi*, and did direct the property, immediately after his decease, to go into the exclusive possession of the trustee, it was rightly disposed of according to the will, and the executors, as such, had no further control over it, and were no longer responsible for it. This argument is plausible; but we think it is fallacious, and founded on a misconception of the powers of the testator, and the relative rights and duties of an executor and a trustee. It is not legally correct to say that a testator has the *jus disponendi* of his property; it is true only *sub modo*. The executor, as such, is bound to administer the whole estate, as well that not given by the will as that embraced in it. *Hays v. Jackson*, 6 Mass. 149. The first claim on the estate is that of creditors; and it cannot be known until an inventory is returned, and an account settled, whether the whole estate will not be neces-

sary for the payment of debts. So children, or their issue, who have no share given them, and posthumous children, are entitled to the same distributive shares which they would be entitled to if the estate were intestate. These claims are paramount to those of legatees, and no disposing power of the testator can defeat them. To meet these claims, and to enable the executors to perform the trust which the law devolves upon them, the whole property must, in the first instance, come to them, and be disposed of, in an orderly course of administration, which the testator cannot control. For this purpose, it is an established rule of law that all the personal property of the testator vests in the executors, for some purposes, before probate of the will; but, to all intents and purposes, upon its probate. This they take, not merely as donees, by force of the gift, as *inter vivos*, but by operation of the rules of law controlling, regulating, and giving effect to wills. A trustee, therefore, who is but a legatee, can take only through the executors. If a testator were to appoint no executor, or direct that the estate should go immediately into the hands of legatees, or of one or more trustees, for particular purposes, such direction would be nugatory and void; and, it being a will in which no executor is appointed, it would be the duty of the judge of probate to appoint an administrator with the will annexed, who would have all the powers of an executor, and in whom all the personal property would vest. Rev. Stat. chap. 63, § 1. Being of opinion that, by this will and the acts done under it, the executors became jointly possessed of the personal property, and responsible for it, we are then to consider whether the taking of it by one of them, who was also sole trustee, under the circumstances stated, discharges the executors. When the executors and the trustees are different persons, there is no difficulty. Nothing but an actual payment to the trustees by the executors will discharge them. So, if the trust is cast upon them as executors, the execution of such trust is a duty superadded to their official duties as executors, and until they qualify themselves, and assume to act in their separate capacity, as trustees, the bond to perform their duties as executors binds themselves and their sureties to the execution of such trust. *Hall v. Cushing*, 9 Pick. 395; *Dorr v. Wainwright*, 18 Pick. 328; *Towne v. Annidown*, 20 Pick. 585. What would amount to such change of capacity when the same persons are executors and trustees, so as to exonerate the sureties on the executorship bond, would depend on circumstances. If, by the constitution of the trust, they were exempted from giving bonds, as they may be (Rev. Stat. chap. 69, § 2), it would probably be held sufficient—as no actual payment can be made to one's self—to show, by any authoritative and notorious act, that they had elected to act in the capacity of trustees; as, for instance, if they claim a credit in their executorship account, filed in the probate office, for a sum held by themselves as trustees, and also file an inventory or account, charging themselves with the like sum as trustees. 9 Pick., *ubi supra*. But, when a bond to the judge of probate is required, such

transmutation of the property cannot be complete, so as to discharge the executors, until such bond has been given. Rev. Stat. chap. 69, § 1. And we think the same rule applies when one of the executors is himself trustee. Such charge in the one capacity, and claim to be discharged in the other, would avail if no bond were required."

In *Prior v. Talbot* (1852) 10 Cush. 1, Prior was appointed executor and trustee of his father's will, and was directed to set apart a certain part of the estate, and invest the money, and to appropriate the income to the widow for life, and upon her death to distribute the principal. Prior qualified as executor, and invested certain moneys for the widow, which were repaid him. He used these funds, and became insolvent afterwards. In filing his accounts in the probate court as executor, he did not charge himself with certain of the funds set apart for the widow. The court decided that the appointment of Prior as executor imposed a duty upon him to retain the principal fund, and invest it, and that he was responsible until he discharged himself of the implied trust. "Here," continued the court, "he was appointed executor and trustee. If, for greater convenience, he wishes to close his account as executor, and open a new account as trustee, he must give bond in the capacity of trustee, and charge himself in one capacity, *eo instanti*, and by the same act by which he claims his discharge in the other." *Miller v. Congdon* (1859), reported in 14 Gray, 114, bears closely upon the contention of the appellants in the case at bar. Miller and wife sued to recover the unpaid balance of a legacy bequeathed to Mrs. Miller by the will of Peleg Clark, her father. Congdon was executor. Judge Hoar speaking for the court, said: "It has been also held that, where the executor is thus entitled to act in a double capacity, he will be required to account in his capacity of executor, and the sureties in his bond as executor will be liable for the faithful discharge of his duties as trustee, unless, for greater convenience and with the assent of the judge of probate, he chooses to open a new account as trustee, in which event he must give a new bond as trustee, and transfer to his account as trustee the property to be held and administered by him in that character, before his liability as executor will terminate." It was argued in the case just cited that the executor, who in good faith, in his own mind, set apart and appropriated a promissory note for \$1,000 as a part of the fund for the payment of legacies to the plaintiff, performed sufficient acts to effect such an appropriation as to satisfy the law. No settlement of his account as executor had ever been made in the probate office, and no proceedings were ever had in relation to his appointment as trustee other than by his qualification as executor. He had been appointed guardian of the plaintiff, but never had made or kept an account of the funds in his hands as such guardian. "He did, in his own mind, set apart and appropriate the said promissory note for one thousand dollars of the Vermont Railroad Company, mentioned and specified in his said answer, to be and constitute a part

of the fund for the payment of the said legacies to the plaintiff; and that, from and after that time when he so determined to set apart and apply the said promissory note for that purpose, he always kept and retained the said note, together with the said bond taken as collateral security for the payment thereof, as a part of the fund belonging to her, as for the payment of the legacies due to her; and that he kept and retained the same for no other purpose, and with no other intent whatever. But he never made any entry of said note on any book or on any account, and had kept no account of the assets of which the said fund was composed or was to consist; and the said promissory note constituted a part of said fund, and was appropriated solely to the payment of said legacies to the plaintiff, only by the said determination to this effect in his own mind as aforesaid." He further testified 'that he had never made any settlement of his account, or rendered any account of his proceedings as executor as aforesaid, in the probate office; that no legal proceedings had ever been had in relation to his appointment as trustee of plaintiff, otherwise than by his appointment to and acceptance of his said office of executor; that he had been duly appointed as guardian of the plaintiff, but that he had never kept or made any account of funds or property in his hands as such guardian.' But the court are of opinion that it still remains their duty to determine whether the appropriation to which he testifies is such an appropriation as the law requires, in order to produce that result. The executor did no act whatever to effect such an appropriation, or transmute the property. Giving the fullest effect to his testimony, all that he did was 'in his own mind.' In our judgment, this is not an appropriation which the law will recognize. To produce such an important change in the rights of parties, there should certainly be some decisive, intelligible, and irrevocable act; and a mere purpose or mental determination is not sufficient. However respectable and trustworthy this defendant may be, the rules of law in reference to the administration of trusts must be so applied as to afford some reasonable protection against men who are not honest. If the executor had died, or if the investment he had made of the money had been in property which had increased in value, what security would there have been for the rights of the beneficiary?" The court, further on, uses the following language: "No authority has been found or suggested which sustains this defense, and we cannot recognize or adopt the doctrine upon which it rests." This case, and the principle that some act of appropriation is necessary other than a mere holding of the property and intention that it shall constitute a trust fund, are approvingly cited in the recent case of *Sheffield v. Parker*, 158 Mass. 330.

In *Daggett v. White* (1880) 128 Mass. 393, where John Daggett was appointed executor, and there were no duties imposed upon him as executor beyond the duty of paying debts and settling the estate, but where, after his duties as executor were performed, the re-

mainder of the estate was bequeathed and devised to him in trust, for the use and benefit of certain parties named in the will, it was decided that the testator intended to give a "distinct and independent character to the trustee thus named, and to impose upon him duties and powers in no manner connected with his duties as executor," and the act of the probate court was affirmed in requiring him, if he wished to close out his account as executor and take upon himself the duties of a trustee, to give bond in the latter capacity, and that there was no merger of the two offices in him.

In *White v. Ditson* (1885) 140 Mass. 351, in discussing the liability of the sureties on an executor's bond, the court says: "While Healy fully completed the administration of the estate by the payment of all debts, legacies, and expenses, he settled no final account as executor, and did not, by any open and notorious act, discharge himself as such in the probate court by assuming to transfer the residue of the property to himself as trustee, or by any other act indicating an intention thereafter to hold the same for the purposes of trust. The will gave to him two characters,—those of executor and trustee; and the duties of the latter character were entirely distinct from and independent of those of the former. As actual payment cannot be made by one to himself, it has been held that, where the same person is executor and trustee, he must give bond in his character of trustee before he can exonerate himself from his liability as executor." It was further said that "even if this were a case where the trustee might be, and was by the will, exempted from giving bond, we should not be prepared to say that the facts that Healy ceased at a certain time to do any acts as executor, all that was necessary in that capacity being then completed, and thereafter did certain acts showing an intention to execute the trust, were alone sufficient, without any settlement of his account as executor in the probate court, to exonerate him and the sureties on his bond as executor. There should in that case be some public act, which could only take place in that court, indicating a discharge of himself in one capacity, and the acceptance of the trust imposed upon him in the other, before this transfer could take place. *Newcomb v. Williams*, *ubi supra*. This might perhaps be by any definite act assented to by that court, as where an executor who had been appointed trustee, and had also qualified as such, charged himself in his account as executor with money paid to himself as trustee, which account had been allowed."

In *Crocker v. Dillon* (1882) 133 Mass. 91, it was held that "where the same person is named both as executor and trustee under a will, and the same hand is to pay and receive the money, there can be no evidence of the actual transfer of the property from himself in one capacity to himself in another, except from some declaration or authoritative and notorious act on his part showing a change in the manner in which the property is held.

And an executor who is also trustee under a will cannot be considered as holding any
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part of the assets in the latter capacity until he has settled an account in the probate court as executor, in which he is credited as executor with the amount which he holds as trustee; and such account should not be allowed by the judge of probate without requiring him to give bond for the faithful performance of his duties as trustee."

We find the same principle laid down in *Williams v. Cushing* (1852) 34 Me. 370, where the court decided that the duties of the executor and trustee are similar and distinct. "They may be conferred upon and performed by one and the same or different individuals, as the testator shall deem expedient."

Whether the executor and trustee is or is not the same is immaterial. Legally they are to be viewed as equally distinct, whether these trusts are held by one or more." *Cushing*, defendant in that case, was appointed executor and trustee under the will, but never gave bonds as trustee. More than a year after he became executor, and all debts were paid, he balanced his accounts in the probate court, and a trustee was appointed. It was decided that the amount due by him as executor properly remained in his hands until he rendered an account showing that the payments had been made to the trustee, whether the trustee be the executor or some one else.

In *Deering v. Adams*, 37 Me. 264, in construing a will, *Appleton, J.*, for the court, said: "The duties of executors and trustees are separate and distinct, and separate and distinct bonds must be given. The bonds given by executors will not protect the estate against the nonfeasance or misfeasance of the trustee, though they be the same individuals."

The supreme court of South Carolina, in *Anderson v. Earle* (1877) 9 S. C. N. S. 460, held that, where the same person was executor and trustee, and by a statement of the accounts as executor a credit was given for a legacy which could only have been paid by him as executor to the trustee, it was a necessary inference that by such entry the executor intended to transfer the amount from his liability as executor to his liability as trustee, and that of itself would be a sufficient circumstance to show that he had accepted the trust. The court says, quoting with approval: "Where the same person is appointed both executor and trustee, it is difficult, though sometimes of importance, to determine when the office of executor has ceased and that of trustee has commenced. The rule appears to be that, if a part of the assets have been clearly set apart and appropriated by the executor to answer a particular trust, he will be considered to hold the fund as trustee for those trusts, and no longer as mere executor." It is to be observed, however, that the inference drawn by the court was held only to be a necessary one after the executor had filed his accounts, and had set apart assets for the particular trust involved.

The circuit court of the United States for Connecticut, in *Parsons v. Lyman* (1863) 5 Blatchf. 170, took a similar view of the necessity of separating the two relations—that of a trustee separate from that of executor—by some formal act. Samuel Parsons died, leav-

ing a will, with defendants named as executors. They qualified and proceeded to settle the estate in the probate court. One year after testator's death, the executors substantially completed their duties by adjusting their accounts, "after due notice of the time and place of hearing to all parties interested, according to law." The will, however, after certain bequests, provided that "the residues of my estate . . . I give, devise, and bequeath to my executors, hereinafter named, . . . in trust." Judge Shipman says: "It will be seen from this statement that the defendants sustained two relations to the will and the estate of the deceased; namely, that of executors and that of trustees. As executors, it was their duty to prove the will, to give the requisite bond, with the aid of appraisers to prepare and file an inventory, to pay the funeral expenses and debts of the deceased, and the disbursements necessary in the progress of administration, and to perform all that the law requires of those who administer on testate estates, including the final settlement of their accounts in the court where all their proceedings were had. All these duties the defendants, as executors, performed, the last one being completed on the 20th of November, 1849, when their accounts as executors were adjusted, and substantially closed." And further on, again: "For, as already intimated, I hold that the relation of the defendants to this trust estate, as trustees, is the same as if they had not been named as executors in the will, and the property had been devised and bequeathed to them in trust by their individual names. It would, of course, have been competent for the testator to confer this trust upon them by his will, and still name any other person as sole executor of the latter. In that case there would have been no clashing of duties and powers between such executor and the trustees. The duties and powers of the latter would have begun where those of the former ended. And, although the defendants are appointed by the will to act in both capacities, this fact does not obliterate the distinction which the law makes between the duties and powers that pertain to these respective offices. The defendants seem to have properly recognized this distinction, by filing in the court of probate, since the settlement of their executors' account, an annual account, at first voluntarily, and, since 1853, in accordance with a statute of Connecticut relating solely to guardians of minors, conservators, and trustees of estates."

In *Newport Probate Court v. Hazard*, 18 R. I. 1, in an action against an administrator's bond for neglect to act, it was held that the executor was obliged to retain his representative functions, and was liable to an accounting until released by some appropriate act, and that his mere mental determination, without any "overt act," was not sufficient. See also *Scituate Probate Court v. Angell*, 14 R. I. 495.

In *Wilson v. Wilson*, 17 Ohio St. 150, 91 Am. Dec. 125, an administrator showed by his final accounts that he had certain moneys belonging to the devisees under the will. The administrator was the guardian of the de-

vises, who were infants. In a suit upon his bond as administrator, he set up that he held the fund as guardian. The court held that he might demonstrate in which capacity he held the money by charging himself with the money in his account as guardian, and crediting himself with having made payment of it to the guardian in his account as administrator. He refrained from doing this, however, and he was held liable as administrator.

In *Oranson v. Wiley*, 71 Mich. 356, suit was brought on an executor's bond. The executors were directed to invest and reinvest certain moneys, and to educate children, for many years after the death of the testator. Suit was commenced to require the executors to account, and to file a new bond. They failed to respond, and were removed. The circuit court found that the executors had failed to invest the funds as required by the will, but held that after an order of distribution, which had been made some fifteen years before the suit was instituted, the executors held the estate, not officially as executors, but as donees of a power in trust. Campbell, J., speaking for the court, says: "We do not think the conclusions of law are correct. An order of distribution alone cannot discharge executors until the estate is distributed. The Rheubottom children could not take the property, and, inasmuch as their interest was contingent, no one else could take it for them. The will required it to be invested by the executors. If the property had been invested in real-estate securities, as required, the question might have arisen whether this was not equivalent to such a compliance with the order of distribution as would have changed the nature of their holding. Upon this question we express no opinion. It is, at least, a doubtful proposition. But we think it is a dangerous and incorrect doctrine that executors can discharge themselves of their official responsibility without doing some act to change the character of their holding, and place the fund safely where it ought to be."

In a very recent case—*Wooden v. Kerr*, 91 Mich. 188,—the converse of the doctrine laid down in the foregoing authorities is apparent. Plaintiff commenced an equitable action for an accounting by defendant as trustee. The will gave, devised, and bequeathed to defendant and his son the residue and remainder of decedents' property, in trust to collect rents, make investments, educate children, and eventually to transfer the whole property. The executors filed a bond and an inventory, and one of them remained in possession for some years. Accounts were filed, but the last one, in 1896, was disallowed. The court held that the defendant was a trustee, and that he was estopped to assert that he was an executor merely, and not a trustee, and that, if they had considered themselves executors merely, it might be presumed that they would long ago have settled up the estate, and turned the property over to themselves as trustees, and that equity would not permit the defendant to refuse an accounting as trustee because the will which made him a trustee also made him an execu-

tor, in which latter capacity he neglected for several years to render an account; and the court takes care to say that a settlement between two administrators could neither bind the estate nor the complainant, and the probate court alone possesses the power to allow Kerr's account as executor and discharge his bond.

Text-writers have deduced from the declarations of the courts the rule that, if the same person is named as executor and also as trustee under a will, as executor he is chargeable until he gives bond as trustee (unless exempted from giving bond), and settles his account of his administration, and charges himself as trustee. Gary, Probate Law, § 741; Crosswell, Exrs. § 725. "If a testator in his will appoint his executor to be a trustee, it is as if different persons had been appointed to each office. A court of equity cannot remove him from the executorship, for courts of probate have exclusive jurisdiction over the appointment and removal of administrators and executors; but, if the office of trustee is separate from and independent of the office of executors, a court of equity may remove him from the office of trustee, and leave him to act as executor; or if he has completed his duties as executor, and is holding and administering the estate simply as trustee, a court of equity may remove him." Perry, Tr. 4th ed. § 281.

The quotations in the several cases quoted throughout this opinion proceed in part upon the premise that bonds are to be given by an executor, and that a liability must still exist upon such bonds until a trust bond is given. But the principle of preserving the distinction between the two relations is always noted, and, under the system of the probate laws of this state and the general legal doctrine to be applied, there can be no release from the executorial trust, except by the authority of the probate court.

Many of the cases relied upon by the appellants are suits for constructions of wills where estates are bequeathed or devised to testamentary trustees, recognized by the laws of such states, and in many instances, notably New York, from states where an executor has nothing to do with real estate. Realty, in New York, passes directly to the heirs, and is not subject generally to any right of possession by executors or administrators, as such. 2 N. Y. Rev. Stat. § 6. The case, therefore of *Conklin v. Egerton*, 21 Wend. 480, cannot control upon the necessity for an accounting, to the exclusion of our statutes, where executors have qualified.

Larned v. Bridge, 17 Pick. 389, was a bequest by the testator to his wife of the use and benefit of the estate, and, should the income be insufficient for her support, she could dispose of so much thereof as was necessary for that purpose, and at her death the remainder was to be equally divided among testator's children. An administrator with the will annexed was appointed. The widow died. Authority was given the administrator to sell and dispose of sufficient real estate to reimburse certain sums paid as debts for the comfortable support of the widow in her lifetime. Shaw, *Ch. J.*, regards the proposition

in the will as a gift to the widow of the use of the property, and that, although the widow had once been executrix, yet, as she never acted, the power granted under the terms of the will was one given to her personally, and was not to be considered as bestowed upon her as an executrix exclusively. The whole case is really favorable to the view we take of the authority of the executors under the Higgins will, as it is said: "There is no doubt that where a power is conferred upon an executor as such, and where the execution of such power is necessary to the purposes of the will which are to be accomplished by the officer, it is to be considered as a power to the officer as such, and not to the person named as executor exclusively, as where legacies are given, and the executor is bound and directed to raise money to pay them by sale of the real estate.

Simpson v. Cook, 24 Minn. 180, was an action to set aside a conveyance and construe a will. The court declined to consider whether the executor was properly discharged, because the point was raised by a collateral attack, and decided that, under the words of the will, the trusts to be executed by O. as executor were personal to him, and not part of his office.

In *Re Delaney's Estate*, 49 Cal. 78, a final distribution was ordered by the probate court. On an appeal from such order the court held that conveyances which had been made by the executors were not required to be confirmed. The necessity for an accounting by the executors as such was not passed upon, because they did account.

Regien v. Freeman, 75 Ind. 898, and several other cases cited, simply hold that an heir may sue a creditor where no administrator has been appointed, and where there are no debts. They are inapplicable to a case where jurisdiction has attached by the qualification of executors.

Taylor v. Phillips, 80 Vt. 238, was an action in assumpsit on a note given by defendant to the sons of the intestate in settlement of the mutual debts between the intestate and defendant. At the time the note was given, there was no administrator. The court held the suit could be maintained, but expressly decided that, if the defendant had been called upon by an administrator, "the case would have merited a different consideration."

In *Patterson v. Allen*, 50 Tex. 23, there was no administrator, and, under the statutes of that state, settlements between heirs are expressly recognized.

We proceed, finally, to inquire into a method by which the executors, after they have performed their duties as such, may be relieved of their trust, and qualify as trustees under the will. The court agrees with the position of appellants' counsel that there is no jurisdiction in the district court, sitting in probate matters, to require trustees, not executors, to account. A court of equity alone can do that. Under the rule recognized in the case of *Chadwick v. Chadwick*, 6 Mont. 566, the jurisdiction of the probate court is limited to the powers conferred upon it by statute; that is, to the control of the "administration of decedents' estates, the super-

vision of the guardianship of the infants, the control of their property, the allotment of dower, and other powers pertaining to the same general subject." What construction may be placed upon the powers conferred upon testamentary trustees where a trust has been created by a will to continue after distribution, as provided by section 1815, article 5, Code Civ. Proc., just adopted, is not material to the present inquiry. But, even under the strictest limitations of the jurisdiction over the estates of decedents and the control of the executors, we find that by our statutes the probate court may ordinarily exercise functions necessary to settle an estate, and to order a distribution thereof to those entitled to share therein under a will. The accounting by the executor, which must precede the settlement of his accounts, is guarded by strict statutes. Probate Practice Act, §§ 254, 256, 260, 263, *et seq.* The executor cannot profit by his trust except as provided by law (section 253); but, if he does wrong or commits serious mistakes, he may lose. The whole scope of the probate practice act of the state contemplates that an executor in the performance of his trust shall be subjected to legal checks and guards placed upon him "at each step he takes, and this from the beginning." There are provisions in some states, Michigan being one, which release a residuary legatee from filing an inventory, provided he give bond to pay the debts and the legacies; but, in the absence of such a statute, even a residuary legatee, if he be an executor, would be held to the same degree of care and the same accountability which are imposed upon other executors. *Hatheway v. Weeks*, 34 Mich. 237. By section 515 the title in a specified devise or legacy passes by the will, but in such cases possession can only be obtained from the personal representative. When considered with relation to our entire system of probate laws concerning the settlement of estates of deceased persons, this recognition that possession can only come from an executor of a will is but one of the demonstrations of the restrictions or qualifications which Chief Justice Shaw had in mind in the use of the words "*sub modo*," in *Newcomb v. Williams*, 9 Met. 525.

In *Clarke v. Clay*, 31 N. H. 398, where the court required an administrator to produce his accounts and vouchers, it was held that, although all parties interested could settle an estate without resorting to the forms of law, yet, where legal course was taken, it is for the judge to say whether he will be governed by what the parties do or do not; and where an administrator offered a certificate of the heir as conclusive of the correctness of a settlement, and the court declined to enter into a decree, such action of the court was sustained upon the ground that the judge "might very properly decline to pass the decree without an examination of the accounts and vouchers." The court may, *sua sponte*, require a periodical accounting at any time. *Woerner, Administration*, § 501; *Reynolds v. People*, 55 Ill. 328. Justice Harwood, in speaking for the court in *Re McFarland's Estate*, 10 Mont. 586, said: "The 28 L. R. A.

heirs of decedent, and all legatees, devisees, creditors, guardians, and others who may be in any way interested in an estate, and their counsel, have a right to presume that the requirements of the statutes will be fulfilled in the administration thereof; and they have a right to presume that no final distribution thereof will be made until such intermediate proceedings have been had, and the period fixed by statute for the distribution has arrived, and such interested parties have a right to the time provided by law for the orderly procedure in the administration of an estate or the execution of a will to appear and make a showing of their claims or interests."

In this particular estate, the executors, having qualified, must take charge of the estate, proceed with the inventory, and give the notices to creditors. They must also act upon any claim presented, as required by the statutes hereinbefore cited. If the court requires an exhibit for its information, by section 254, such a document must be filed, showing the amount of all claims presented, "and all other matters necessary to show the condition of the estate's affairs." Full account of the executors, with vouchers, must be rendered. If it is not, ample means of requiring it, even to issuing an attachment, and, it would seem, commit the delinquent executors, is provided for by sections 260-263 *et seq.* of the Probate Practice Act. Distribution is contemplated and fully provided for upon the final settlement of the accounts of the executors, but, until such final accounts have been settled and allowed, no authority is given to distribute the residue of the estate in the hands of the executors. The way seems clear and simple by which, under the law, the devisees, legatees, and trustees may become possessed of the estate of the decedent, devised and bequeathed to them under the terms of the will. There is one way only by which there may be even a partial distribution prior to such final accounts. That is under sections 284, 285, *et seq.*, where, after the lapse of four months, those entitled to share in the estate may, if it appears to the court that the estate is but little indebted and the creditors are safe, receive their shares, provided the requisite bond is given. The duties of the executors precedent to discharge are, plainly, to account, to obtain an order settling their accounts, to obtain an order of distribution, and to deliver up, under order of the court, to parties entitled to share under the will. Section 312.

After full consideration of the general and statutory law relating to this case, and the policy and the reason of our entire probate system, our conclusions, as applicable to large estates, may be summarized as follows:

First. Executors, when qualified as such, are subject to the jurisdiction of the district court, sitting in the exercise of its probate powers.

Second. The duties of such executors are to proceed with the performance of their executorial duties, as imposed upon them by the laws of the state, having due regard to the provisions of the will of the decedent.

Third. Executors must account, and executorial responsibilities can only terminate

after compliance with the statutes, and after a settlement, approved by the court, has been made, and after a distribution and a delivery up have been ordered by the court.

Fourth. Where trust duties are imposed upon trustees as devisees and legatees under a will, such duties cannot properly be assumed by the same persons who were named as executors under the will, and who have qualified as such executors, until the court has approved their accounts, and ordered a distribution of the estate, in which order the executors may be directed to credit their accounts as executors with so much of the estate as may be ordered transmuted to their accounts as trustees, or are otherwise authorized by the court to transfer the residue of the estate in their hands as executors to themselves as trustees.

The district court must have determined that the right of possession of the property of the intestate was in the appellants as executors, after they qualified as such. The decision of that question involved the further point of whether administration was necessary. It was decided it was. We therefore think that the order became final, as against these appellants, upon the questions necessarily involved in that proceeding, and could be appealed from. *Re McFarland's Estate*, 10 Mont. 446.

The order of the district court overruling the motion of the executors to quash and set aside the order made requiring said executors to prepare and file a full and complete inventory and appraisement of the estate of decedent, which has come into their hands as executors, is affirmed.

Judgment affirmed.

De Witt, J., concura.

STATE of Montana, *Appt.*,

v.

W. L. EVANS, *Resp't.*

(.....Mont.....)

A written request to pay a certain amount to the order of a person named therein "and charge to him at my office" is not the subject of forgery as it could do no possible damage if acted upon as genuine.

(March 25, 1895.)

APPEAL by the State from an order of the District Court for Gallatin County, arresting judgment after verdict finding defendant guilty of forgery. *Affirmed.*

Statement by De Witt, J.:

This is an appeal by the state from an order of the district court arresting judgment in a case where the defendant had been found guilty under an information charging him with forgery. The motion in arrest of judgment was made upon the two statutory grounds (1) that the information does not

state facts sufficient to constitute a crime of forgery, and (2) that the court had no jurisdiction of the action. The charging part of the information was: "That the above-named W. L. Evans is guilty of the crime of forgery, committed as follows, that is to say: That the said W. L. Evans, late of said county and state, on Tuesday, the 25th day of December, 1894, at the county of Gallatin, and state of Montana, then and there a certain false, forged, and counterfeited writing on paper, of the tenor following: 'Bozeman, December 25, '94. Schumacher, Esq.: Please pay to the order of W. L. Evans the amt. of twenty dollars (\$20.00), and charge to him at my office. Johnson & McCarthy,'—did falsely, feloniously, and designedly utter and pass as true and genuine; he, the said W. L. Evans, at the same time well knowing the said writing on paper to be false, forged, and counterfeit, with intent, then and there, one William Guy to prejudice and defraud."

Messrs. H. J. Haskell, Atty-Gen., W. L. Holloway, and Miss Ella L. Knowles, for appellant:

Where a forged instrument has been made available by the defendant by passing and uttering the same, as was done in this case with intent to work fraud and injury upon William Guy, it was a ground of defense for the defendant to show that Guy did not charge this money to the said Johnson & McCarthy, but to the said W. L. Evans.

State v. Gullette, 121 Mo. 447; Whart. Crim. L. 9th ed. § 895; *State v. Dennett*, 19 La. Ann. 895; *Costley v. State*, 14 Tex. App. 156; *Reg. v. Winterbottom*, 2 Car. & K. 87; *State v. Covington*, 94 N. C. 918, 55 Am. Rep. 650.

It does not lie in the mouth of the forger to claim immunity for his crime because, if the man he imposed upon had been vigilant he would not have been deceived.

Garmire v. State, 104 Ind. 444; 1 Bishop, Crim. L. § 572; 2 Greenl. Ev. § 103; *Raymond v. People*, 2 Colo. App. 329; *State v. Eades*, 68 Mo. 151.

An instrument falsely made with intent to defraud is a forgery although, if it had been genuine, other steps must have been taken before the instrument would have been perfected, and these steps are not taken.

Com. v. Costello, 120 Mass. 359; *People v. Krummer*, 4 Park. Crim. Rep. 217; *Garmire v. State*, 104 Ind. 446.

De Witt, J., delivered the opinion of the court:

This information is drawn under a statute similar to that which was in existence in California when the *Case of Ah Woo*, 28 Cal. 206, was decided. See also *State v. Malish* (Mont.) (this term) 89 Pac. Rep. 739. An information charging forgery by the uttering, etc., as does this one, is proper, for the uttering is, under our statute (Criminal Practice Act, § 96), one method by which forgery may be committed. See cases last cited. This question of criminal pleading was not considered in *State v. Hudson*, 13 Mont. 112, the case being decided on the question of jurisdiction only. See *State v. Malish* (this term) *supra*. The ground upon

NOTE.—For note on forgery of worthless instruments, see *People v. Munroe* (Cal.) 24 L. R. A. 28, 28 L. R. A.

which the motion in arrest of judgment was granted seems to be that the alleged forged instrument concluded with the words: "And charge to him at my office. Johnson & McCarthy." Counsel for the respondent argue that this writing is invalid on its face, in that, if it were used as genuine, it could not do any damage to the alleged signers of the same, namely, Johnson & McCarthy, for the reason that it requested Schumacher to charge the \$20 to Evans, instead of requesting him to charge it to Johnson & McCarthy. We are of opinion that the motion in arrest of judgment was properly granted.

Mr. Bishop says, in his work on Criminal Law (vol. 2, § 506), as follows: "When the writing is invalid on its face, it cannot be the subject of forgery, because it has no legal tendency to effect a fraud." Section 511 of the same work states as follows: "Therefore the general doctrine is that the invalidity of an instrument must appear on its face, if the defendant would avail himself of this defect on a charge of forgery. In still other words, the forged instrument, to be the foundation for an indictment, must appear on its face to be good and valid for the purpose for which it was created. It must be, in another aspect, such that, if it were genuine, it would be evidence of the fact it sets out." We find it stated in *People v. Tomlinson*, 85 Cal. 506, as follows: "Without much conflict, if any, it has been held from the outset that the indictment must show that the instrument in question can be made available in law to work the intended fraud or injury. If such appears to be the case on the face of the instrument, it will be sufficient to set it out in the indictment; but, if not, the extrinsic facts, in view of which it is claimed that the instrument is available for the fraudulent purpose alleged in the indictment, must be averred. If the indictment merely sets out an instrument which is a nullity upon its face, without any averment showing how it can be made to act injuriously or fraudulently, by reason of matter *aliunde*, no case is made. This rule is so well settled by the precedents that we do not feel called upon to discuss it upon principle. *Rea v. Knight*, 1 Salk. 875, 1 Ld. Raym. 527; *Reg. v. Marcus*, 2 Car. & K. 356; *People v. Shall*, 9 Cow. 778; *People v. Harrison*, 8 Barb. 560; *State v. Briggs*, 84 Vt. 501; *Com. v. Ray*, 3 Gray, 441; *Burnum v. State*, 15 Ohio, 717, 45 Am. Dec. 601; *Clarke v. State*, 8 Ohio St. 630. These cases establish the doctrine that, to constitute forgery, the forged instrument must be one which, if genuine, may injure another, and that it must appear from the indictment that such is its legal character, either from the recital or description of the instrument itself, or, if that does not show it to be so, then by the averment of matter *aliunde*, which will show it to be of that character." We take the following from the remarks of Judge Cowen in *People v. Shall*, *supra*: "In the principal case I have shown that the paper forged, if genuine, would be a mere nullity for any purpose; nor, to my mind, could it be made good by any possible averment. It could not be made the foundation of liability, like the letter of credit. It does not come within any

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of the cases sustaining indictments; but to me it appears to be directed within the cases cited holding that an instrument purporting to be void on its face, and not shown to be operative by averment, if genuine, is not the subject of forgery. How is it possible, in the nature of things, that it should be otherwise? 'Void things are as no things.' Was it ever heard of that the forgery of a *nudum pactum*, a thing which could not be declared on, or enforced in any way, is yet indictable? It is the forgery of a shadow." The following remarks were made by the Indiana supreme court in *Reed v. State*, 28 Ind. 396: "The certificate, so far as it purports to be an instrument entitling Allen to the bounty claimed therein, was, at the time charged, utterly void. There was no law authorizing the giving of bounties by the county commissioners. *Oliver v. Keightley*, 24 Ind. 514; *King v. Course*, 25 Ind. 203. The legalizing act was not passed until March 8, 1865. Every one is presumed to know the law. Officers acting under an official oath are presumed to do their duty. The order of the county commissioners referred to in the certificate was void. 'Void things are as no things.' The indictment must show the forgery of an instrument which appears on its face naturally calculated to have some effect, or, if it be not sufficient for that purpose, extrinsic matter must be averred, so that the court may judicially see its fraudulent tendency." The supreme court of Illinois takes the same view when that court says, in the case of *Waterman v. People*, 67 Ill. 92: "The indictment framed upon this writing contains not a single averment of any extrinsic matter which could give the instrument forged any force or effect beyond what appears on its face. No connection is averred between the party to whom the writing is addressed and the Chicago, Rock Island & Pacific Railroad Company, nor is it averred that the prisoner attempted to pass the writing on that company. The writing, if genuine, has no legal validity, as it affects no legal rights. It is a mere attempt to receive courtesies on a promise, of no legal obligation, to reciprocate them. We are satisfied the writing in question is not a subject of forgery, and no indictment can be sustained on it, and no averments can aid it." To the same effect, see *Com. v. Hinds*, 101 Mass. 211, where the court says: "If the fraudulent character of the forged instrument is not manifest on its face, this deficiency should be supplied by such averments as to extrinsic matter as would enable the court judicially to see that it has such a tendency. We find nothing of the kind in the present indictment, and therefore cannot say that the plea of guilty is a confession of any crime whatever." See also the learned note in *Arnold v. Cost*, 23 Am. Dec. 814. See also *Barnum v. State*, 15 Ohio, 717, 45 Am. Dec. 601; *Raymond v. People*, 2 Colo. App. 329; *State v. Wheeler*, 19 Minn. 98 (Gil. 70); *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427; 9 Bishop, New Crim. L. § 533. We are of opinion that the alleged forged instrument set out in the information in this case is such a one as comes within the doctrine of the decisions

quoted, and, as far as we know, generally held. The instrument in question, if genuine, and if acted upon as its terms suggest it might be, could do no possible damage. If the amount of \$20 dollars was advanced to Evans by Schumacher upon this order, and if that amount were charged to Evans himself, it would be nothing whatever but a transaction between Schumacher and Evans, which could be accomplished between those two persons with as much ease without the order as with it. The order, as it appeared on

its face, would not accomplish the advancing of the money by Schumacher to Evans on the credit of Johnson & McCarthy. Schumacher would as readily have advanced it without the order as with it. There were no extrinsic facts alleged in the information to show that the instrument was available for the fraudulent purpose alleged in the information.

The order of the District Court in arrest of judgment is affirmed.

Hunt, J., concurs.

ILLINOIS SUPREME COURT.

Paradine GALBRAITH *et al.*, Appts.,

v.

Silas TRACY *et al.*

(188 ILL 54.)

1. In equity the surviving partner is treated as a trustee of the representatives of the deceased partner.
2. The administrator of the last surviving partner stands in the shoes of his intestate as a trustee of the legal representatives of the partner first deceased.

3. In equity the real estate of the partnership is regarded as standing on the same footing with personal property no matter in whom the legal title may be vested.

4. Whatever of the real estate of the partnership remains after partnership debts are discharged is held in common by the heirs subject to dower, or goes to the devisees.

5. The purchase of partnership real estate, or of a certificate of sale thereof by a master in chancery, made by an administrator of the last surviving partner, at half its actual value, when he should have redeemed the lands for the

NOTE.—The position of surviving partners in partnership real estate.

I. The position of a surviving partner.

- a. At law.
- b. In equity.
- c. How affected by state statute.
- d. As creditor.
- e. Lien of surviving partner.

II. Powers of the surviving partner.

- a. Of disposition.
- b. To mortgage.
- c. To remove incumbrances.
- d. In property mortgaged to the firm.
- e. To continue the business.
- f. To bring ejectment.

III. With respect to leasehold property.

IV. Effect of conveyance by.

V. As between the survivor and personal representatives of a deceased partner.

VI. Infraction against survivor.

With respect to the position of tenants in dower and by the curtesy and of the heirs and personal representatives of a deceased partner in partnership real estate, see *note* to Woodward-Holmes Co. v. Nudd (Minn.) 27 L. R. A. 340.

As to the rights of partners *inter se*, see *note* to Yorks v. Tozer (Minn.) *ante*, 88, and Dyer v. Morse (Wash.) *ante*, 88.

Upon the rights of creditors and purchasers and other third parties in partnership real estate, see *note* to Goldthwaite v. Janney (Ala.) *post*, 161.

As to when real estate will be considered partnership property, see *note* to Robinson Bank v. Miller, Lampert v. Miller (Ill.) 27 L. R. A. 449, and National Union Bank of Maryland v. National Mechanic's Bank of Baltimore (Md.) 27 L. R. A. 476.

For questions relating to the position of the surviving partner and the heirs and the power of the heirs as against the surviving partner, see *note* to Woodward-Holmes Co. v. Nudd (Minn.) section II., subsections f, g, 27 L. R. A. 340, 360, 361.

I. The position of a surviving partner.

The right of survivorship does not exist in the case of a purchase by mercantile partners of lands with partnership funds, there being no pretense 28 L. R. A.

that the land in dispute in that case is held in joint tenancy for the purpose of carrying on and promoting trade or commerce, or other useful work or manufacture. Gaines v. Catron (1840) 1 Humph. 514.

a. At law.

When a partnership is dissolved by the death of one or more of the partners, the legal title in real estate descends to the heir-at-law of the deceased partner, and a court of law, looking to the legal title alone, cannot regard or protect the mere equities of others. Andrews v. Brown (1862) 21 Ala. 437, 56 Am. Dec. 252; Hanway v. Robertshaw (1874) 49 Miss. 758; Smith v. Jackson (1888) 2 Edw. Ch. 28, 6 L. ed. 295.

Yet he is considered as holding as tenant in common with the survivor. Loubat v. Nourse (1888) 5 Fla. 350.

The legal title vesting upon them as such. Clay v. Field (1888) 84 Fed. Rep. 373.

In his character as tenant in common with the heir of the deceased partner, holding the title subject to the demands of the trust, his account must be with his cotenant, in which case the probate court has no jurisdiction. Hartnett v. Fegan (1876) 3 Mo. App. 1.

But surviving partners are rather joint tenants than tenants in common. Needham v. Wright (Ind.) Jan. 17, 1895.

The fact of there being a surviving partner does not give him at law any additional rights to the lands held by both. Percifull v. Platt (1890) 38 Ark. 458.

b. In equity.

If the facts established show that the lands were purchased for partnership purposes and with partnership funds for the use of the partnership, such lands become partnership assets and pass to the survivor as personal estate, charged with the liability of the partnership property and with its debts. Leary v. Boggs (1886) 1 N. Y. S. R. 571, following Collumb v. Read (1862) 24 N. Y. 505; Hiscock v. Phelps (1872) 49 N. Y. 97; Fairchild v. Fairchild (1876) 64 N. Y. 471.

So if lands are purchased with partnership funds,

estate, will make him chargeable as a trustee for the estates of the partners.

6. The widow and heirs of a deceased partner, who recover the legal title to lands on the basis of a trust in the administrator of the surviving partner of their intestate, cannot deny that he was their trustee for the purpose of avoiding the duty to account to him for advances for the purchase and improvement of the property.

7. The refunding with interest of money advanced by a person from whom the legal title is taken in equity may be made a condition of the relief.

(October 29, 1894.)

APPPEAL by complainants from a decree of the Circuit Court for Henderson County denying their rights in certain real estate in reference to which they sought partition and an assignment of dower and homestead. *Affirm.*

used for partnership purposes, the title being taken in the name of one partner, the firm being debited with expenses, and otherwise treated as partnership property. *McKinnon v. McKinnon* (1893) 56 Fed. Rep. 409, reversing 46 Fed. Rep. 713.

The equitable title vesting in the surviving partner so far as necessary to pay the liabilities of the partnership, including the amount due the surviving partner upon the settlement of the partnership account. *Clay v. Field* (1898) 84 Fed. Rep. 875; *Weld v. Johnson Mfg. Co.* (1893) 86 Wis. 562.

To which extent he has an equitable lien upon such real estate for his indemnity. *Loubat v. Nourse* (1853) 5 Fla. 360; *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 697; *Howard v. Priest* (1848) 5 Met. 582; *Burnside v. Merrick* (1842) 4 Met. 537; *Sigourney v. Munn* (1828) 7 Conn. 11; *Pierce v. Trigg* (1839) 10 Leigh. 406; *Winslow v. Chiffelle* (1824) 1 Harp. Eq. 25; *Divine v. Mitchum* (1844) 4 B. Mon. 499, 41 Am. Dec. 241.

And the equitable lien attaches as against the grantee of partnership property for which one partner has taken a promissory note in his own name. *Houston v. Stanton* (1846) 11 Ala. 412.

He takes the title, not as assignee, but as survivor, with a right and control over the property for such purposes, which both partners had before the death. *Betts v. June* (1873) 51 N. Y. 274; *Tremper v. Conklin* (1870) 44 N. Y. 58.

This right is an equitable one accompanied by an equitable title. *Megibben v. Perin* (1892) 49 Fed. Rep. 188; *Shanks v. Klein* (1881) 104 U. S. 18, 26 L. ed. 636; *Roulston v. Washington* (1885) 79 Ala. 529.

Vested in him by reason of his being charged with the whole of the partnership debts. *Betts v. June, supra.*

The trust thereby reposed being to wind up the partnership matters in the best manner possible for all interested. *Gillett v. Gaffney* (1877) 3 Colo. 361; *Offutt v. Scott* (1872) 47 Ala. 104; *Holland v. Fuller* (1859) 13 Ind. 196; *Needham v. Wright* (Ind.) Jan. 17, 1895; *Russell v. McCall* (1894) 141 N. Y. 437; *Case v. Abeel* (1829) 1 Paige, 398, 2 L. ed. 689; *Williams v. Whedon* (1888) 109 N. Y. 833; *Preston v. Fitch* (1893) 137 N. Y. 41; *Martin v. Morris* (1885) 62 Wis. 418.

And such is his position under section 198 of the California Probate Act. *Smith v. Walker* (1890) 88 Cal. 385, 99 Am. Dec. 415.

In his character of trustee he must dispose of them for the best interests of the estate of the deceased partner, and keep the representatives fully informed of his proceedings. *Heath v. Waters* (1879) 40 Mich. 457.

And account for all the receipts and disburse-
32 L. R. A.

Statement by Baker, J.:

The original bill herein was filed by *Paradine Galbraith*, widow of *Franklin Galbraith*, deceased, and *Marcellus Galbraith*, *Mary E. Sells née Galbraith*, *Thomas M. Galbraith*, *Edward M. Galbraith*, *James T. Galbraith*, *George F. Galbraith*, *Frederick Galbraith*, and *Ralph Galbraith*, children and only heirs-at-law of said deceased. The bill was for the assignment of homestead and dower to the widow, and for the partition among the heirs of some twenty-seven different tracts of land that are not now in controversy, and also for the partition among said heirs of the five tracts of land hereinafter described. *Silas Tracy* and other tenants in possession of portions of the premises were made defendants, as were also the widow and heirs-at-law of *Jesse Kemp*, deceased, and the widow and heirs-at-law of *John J. Kemp*, deceased; the allegation in regard to such widows and heirs being that they "claim to

ments in his settlements before the probate court. *Hartnett v. Fegan* (1876) 3 Mo. App. 1.

To which trust he will be held to a strict performance. *Weld v. Johnson Mfg. Co.* (1893) 86 Wis. 562.

His title thereto lasting until such estate is converted into money and the partnership debts paid. *Betts v. June* (1873) 51 N. Y. 274.

He being required to account for the real estate as a part of the assets of the copartnership. *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 366, 7 L. ed. 627.

And for the purpose of being so appropriated it must pass under the control of the surviving partner, to be by him disposed of for the payment of the debts. *Breen v. Richardson* (1883) 6 Colo. 605; *Riddle v. Whitehill* (1890) 135 U. S. 621, 34 L. ed. 232.

Remaining partnership funds liable in the hands of the partners to the payment of the firm liabilities. *Shaw, Appellant* (1890) 81 Me. 207.

Not descending to the heirs in equity, but remaining partnership estates in the hands of the surviving partners. *Re Ransom* (1883) 17 Fed. Rep. 381.

The surviving partner has a right to the control of the partnership effects, including real estate, until the partnership affairs are settled and the debts paid. *Cobble v. Tomlinson* (1875) 50 Ind. 550; *Wilson v. Soper* (1852) 13 B. Mon. 411, 56 Am. Dec. 573.

And becomes entitled to the exclusive right of possession and management of the same for the purpose of closing up the partnership business and paying the partnership debts. *Offutt v. Scott* (1872) 47 Ala. 104; *Gillett v. Gaffney and Holton v. Guinn, supra.*

To which it is primarily liable in his hands. *Holton v. Guinn* (1895) 65 Fed. Rep. 460; *Gillett v. Gaffney* (1877) 3 Colo. 361.

And to which end he is entitled to its use. *Merritt v. Dickey* (1878) 38 Mich. 41.

With a right in equity to call for a conveyance of the legal estate. *Tillinghast v. Champlin* (1856) 4 R. L. 173, 67 Am. Dec. 510.

Having the real substantive interest. *Priest v. Choteau* (1884) 85 Mo. 398, 55 Am. Rep. 377; *Rossum v. Sinker* (1883) 12 Cent. L. J. 202.

The heirs not being necessary parties for such purposes. *Van Aken v. Clark* (1891) 82 Iowa, 256.

The legal title to the partnership assets vesting in the survivor. *Rice v. Merchant's & Planter's Nat. Bank of Montgomery* (1893) 100 Ala. 617; *Houston v. Stanton* (1846) 11 Ala. 412; *Hanway v. Robertshaw* (1874) 49 Miss. 758.

And no one else can be regarded as having any

have some interest in some portion of said premises herein described, but your orators allege that whatever interest they or either of them may have had is now owned by your orators." The two widows and the two sets of heirs answered the bill. Then two cross-bills were filed in the cause,—one by Martha J. Kemp, the widow, and the heirs of John J. Kemp, deceased, and the other by Louisa F. Kemp, the widow, and the heirs of Jesse Kemp, deceased. Each of said cross-bills claimed that by reason of the matters and things set forth in said cross-bills, respectively, Franklin Galbraith, at the time of his death, held the five tracts of land—*i. e.* 100 acres off the east side of S. E. $\frac{1}{4}$ section 33, the E. $\frac{1}{4}$ N. E. section 33, the N. W. of N. E. section 33, the E. $\frac{1}{4}$ S. W. of N. E. section 33, and the N. W. $\frac{1}{4}$ section 34, all in the township 10 N., range 5 W., in Henderson county, Illinois—one undivided one half in trust for the heirs-at-law of Jesse

Kemp, deceased, and the other undivided one half in trust for the heirs-at-law of John J. Kemp, deceased; that the heirs-at-law of Franklin Galbraith, deceased, hold said lands in like trust, and for the same purposes and parties; and that Martha J. Kemp and Louisa F. Kemp were each entitled to dower in an undivided one half of the premises. Issues were framed upon the original bill and upon the cross-bills. At the hearing the findings and decree of the circuit court, so far as it affected the matters here in controversy, are in substance that Franklin Galbraith, in his lifetime, and at his death, held, and the complainants in the original bill, since his death, hold, the five tracts of land above described in trust for the benefit of the heirs-at-law of Jesse Kemp and John J. Kemp, the undivided one half for each set of heirs; and that the complainants in the original bill, heirs of Galbraith, are entitled to be reimbursed for all proper outlay over and above rents,

legal interest in the assets. *Bassett v. Miller* (1873) 30 Mich. 133; *Barry v. Briggs* (1871) 22 Mich. 201; *Pfeffer v. Steiner* (1873) 27 Mich. 537; *Merritt v. Dickey* (1878) 38 Mich. 41.

The power and authority which the law confers upon a surviving partner being quite full and extensive for the performance of all the business necessary to a complete settlement of the concern. *Barton v. Lovejoy* (1894) 56 Minn. 380.

If, instead of applying the firm assets to the winding up of the business and the distribution of the surplus among those entitled, a surviving partner misappropriates and converts the same to his own use, a breach of trust ensues of which equity will take notice. *Russell v. McCall* (1894) 141 N. Y. 437.

His neglect to wind up the concern will not relieve the partnership assets in his hands from the lien of the partnership debts, nor permit the statute of limitations to run in favor of the heirs of the deceased partner, so as to enable them to obtain an interest in the property without paying off the indebtedness. *Allen v. Withrow* (1884) 110 U. S. 119, 22 L. ed. 90.

And the failure of a surviving partner, who is also the administrator of the estate of his deceased partner, to give the statutory bond, merely subjects him to displacement as administrator. *Easton v. Courtwright* (1894) 84 Mo. 27, following *Mathews v. Hunter* (1878) 37 Mo. 295; *Hartnett v. Fegan* (1876) 8 Mo. App. 1; *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 306, 7 L. ed. 627; *Andrews v. Brown* (1852) 21 Ala. 437, 56 Am. Dec. 252; *Murphy v. Abrams* (1874) 50 Ala. 293; *Cobble v. Tomlinson* (1875) 50 Ind. 350; *Merritt v. Dickey* (1878) 38 Mich. 44, 45; *Pierce v. Trigg* (1839) 10 Leigh, 422, 423; *Dyer v. Clark* (1843) 5 Met. 576, 577, 39 Am. Dec. 807; *Tillinghast v. Champlin* (1856) 4 R. I. 209, 37 Am. Dec. 510.

So if the surviving partner refuses to pay his own indebtedness to the firm the court will refuse him relief. *Ludlum v. Buchingham* (1882) 35 N. J. Eq. 71.

Mortgaged property purchased for the use of the partnership, and paid for out of the partnership fund, improved and cultivated, the income received by the partnership constituting part of the partnership assets, passes to the surviving partner who is entitled to the possession and control thereof. *Cilley v. Huse* (1860) 40 N. H. 353; *Benson v. Ela* (1857) 35 N. H. 420.

Land purchased with the funds of the partnership for the purpose of sale to pay the debts of the firm, and partially improved to enhance their value and give them ready sale, are to be considered *in R. A.*

ered as part of the stock in trade, and converted into personal estate, belonging to the surviving partner to enable him to pay the firm's debts. *Pugh v. Currie* (1843) 5 Ala. 446.

The right to recover damages by reason of the location of a railroad upon land originally purchased with partnership funds, for the use and occupation of the firm, vests in those who are the legal owners of the estate at the time the land is taken, and there being no joint debts of the partners and no equitable lien upon the damages in favor of the creditors, or of the surviving partner, the legal and equitable title to the damages is united and vested in the surviving member of the partnership, and the representatives of the deceased partner. *Whitman v. Boston & M. Railroad* (1861) 8 Allen, 133.

But in real estate purchased in the name of one partner, not intended or used for partnership purposes, the surviving partner takes no estate as survivor and consequently no interest therein passes to his assignee in bankruptcy; and there is no use or trust in his favor so far as his share of the purchase money is concerned, but his creditors can reach his proportion of it under the statute of trusts and uses. *Cox v. McBurney* (1849) 2 Sandf. 561.

In England, although an estate purchased by partners jointly for the purposes of their trade, will at law upon the death of one of them survive to the other, yet in equity it is considered as an estate in common, and if the representatives of a deceased partner claim his equity they must submit to the rule, that he who will have equity must do equity, and pay to the surviving partner whatever may be due to him on the partnership transactions; and in Virginia the *jus accrescendi* is abolished, the representatives of a deceased partner claiming the legal title can be put under no conditions, the surviving partner, if a creditor, having no other remedy against the real estate than any other creditor has. *Deloney v. Hutcheson* (1823) 3 Rand. (Va.) 183.

c. How affected by state statute.

A surviving partner is something more than a mere tenant in common, as to both the real and personal estate of the partnership, being in possession of the whole property by virtue of his right as surviving partner, under section 196 of the California Probate Act, and he is a trustee for the purposes of winding up the affairs of the firm, and accountable for the profits of the realty, as well as of the personality, or the value of the use

issues, and profits, made by their father or by themselves on account of said lands. The widow and heirs of Franklin Galbraith bring the case to this court by appeal, and assign various errors, and the appellees assign cross-errors.

The facts of the case in brief are substantially as follows: For a number of years prior to March 13, 1881, Jesse Kemp and John J. Kemp, brothers, were partners in farming and stock-raising and in dealing in stock. They do not seem to have had any fixed partnership name or designation. Most of the notes signed by them, so far as appears from the evidence, seem to have been signed with their individual names, thus: "Jesse Kemp. John J. Kemp." One is signed, "J. & J. J. Kemp." An account against them was made out against "Jesse and J. J. Kemp." The abstract of judgments shows six claims allowed "against the estate of John J. & Jesse Kemp." They owned a large amount of personal property, and, in their

joint names, the real estate above described. John J. Kemp died March 13, 1881. Jesse Kemp, as the surviving partner, filed in the county court of Henderson county, on September 29, 1881, a partnership inventory, dated September 29, 1881, which inventory contains a description of the lands hereinabove described, and states the incumbrance on 240 acres of it to be a mortgage of \$3,000 to I. J. Brook, and states that on the N. W. 84 there is a mortgage of \$1,000, and it inventories debts amounting to \$2,230. It also contains a long list of personal property. It purports to be "a true and correct inventory and exhibit of the real and personal estate belonging to the firm of Jesse and John J. Kemp at the time of the death of John J. Kemp." It was subscribed and sworn to by said Jesse Kemp. The appraisal of the partnership personal property amounted to \$3,115.35. On October 18, 1881, Jesse Kemp filed in the county court a sale bill of personal property of "said firm of J. & J. J.

and occupation. *Smith v. Walker* (1868) 38 Cal. 385, 99 Am. Dec. 415.

The Act of Assembly of North Carolina (Bat. Rev. Stat. chap. 42, § 2), destroying the survivorship in joint estates, whether real or personal, expressly provides that when such estates are held for purposes of trade, commerce, or manufacture, and one tenant dies, the estate shall be "vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the said joint business," and then he shall account to the parties entitled as heirs, administrators, and assigns of the deceased partner. *Mendenhall v. Benbow* (1881) 84 N. C. 644.

The Washington Statute of 1862, relating to the settlement of partnership affairs, does not terminate the common-law rights of the surviving partner, no method being pointed out whereby he can set the machinery thereby provided in motion, and unless set in motion by the representatives of a deceased partner it has no effect upon the partnership property. *Dyer v. Morse* (1896) (Wash.) *ante*, 80.

Such statute is in aid of the common law and not exclusive thereof, its object being to give representatives of a deceased partner the right to invoke its aid, either in having another person than such survivor close up the estate, or to have him pay security. *Ibid*.

And it cannot be presumed that the legislature intended thereby to destroy the common-law interest of a surviving partner. *Ibid*.

d. As creditor.

A surviving partner has a right to reimburse himself out of the proceeds of the sale of a deceased partner's share of real estate, the amount of moneys advanced by him, and the liabilities incurred by himself personally in the conduct of the business and the improvement of the property. *Mendenhall v. Benbow* (1881) 84 N. C. 644.

His claim constituting a prior incumbrance upon the partnership fund, including the real estate, is properly dischargeable therefrom, and the adjudication in favor of such obligation cannot be assailed in the absence of fraud or collusion. *Ibid*.

The rights, however, are only the same as those of any other creditor, no matter whether he holds the whole title or a part thereof or none. *Huston v. Neil* (1873) 41 Ind. 504.

Where real estate was purchased by a partner who held the share of one other partner, it was 28 L. R. A.

held that under the Vermont Statute of 1852 he was both in law and equity liable to the partnership claim, which the surviving partner had against the retiring one. *Kendrick v. Tarbell* (1855) 27 Vt. 513.

e. Lien of surviving partner.

The surviving partner has an equitable lien for his indemnity against the debts of the firm, and for the balance that may be due to him from the firm. *Gray v. Palmer* (1858) 9 Cal. 616; *Howard v. Priest* (1843) 5 Met. 582; *Burnside v. Merriok* (1842) 4 Met. 537.

For moneys advanced for the use and benefit of the partnership, or for the benefit of the estate, being a creditor of the estate therefor. *Holton v. Guinn* (1895) 65 Fed. Rep. 450; *Priest v. Chouteau* (1884) 85 Mo. 398, 55 Am. Rep. 373; *Willet v. Brown* (1877) 85 Mo. 133, 27 Am. Rep. 265.

Equity holding such estate in his hands as a lien for the payment of such balance upon a settlement of the partnership accounts. *Gillett v. Gaffney* (1877) 3 Colo. 351.

And the Washington Partnership Act of 1862 has not terminated the common-law rights of the surviving partner who is entitled as equitable owner, the common-law rights of the surviving partner having been changed by the statute only to the extent therein provided, the statute being held to be in addition to and regulative of such common-law rights. *Dyer v. Morse* (1896) (Wash.) *ante*, 80.

A surviving partner standing by and allowing a third person to purchase the deceased partner's interest in real estate, upon which he claims a lien, is not estopped, not being present at the time of the purchase and having no knowledge of the intention to buy, doing nothing to induce the purchase and therefore assuming no responsibility in regard to it. *Taylor v. Farmer* (1836) (Ill.) 6 West. Rep. 710.

Where a partner died subsequent to the passing of the Washington statute, relating to the settlement of partnership affairs (1862) and there was no attempt to pass the title to the real estate until the year 1863, when the surviving partner claimed it under a lien for money advanced by him in payment of partnership debts, it was held that although a subsequent act relating to such estate had been passed in the year 1873, yet the claim of such surviving partner accrued prior to the subsequent act, he was therefore entitled to his lien as at common law, the common-law rights not being affected by the Statute of 1862. *Dyer v. Morse* (1896) (Wash.) *ante*, 80.

Kemp, showing that he had sold personal property" of said firm to the amount of \$2,029.40. It does not appear from the record evidence or other testimony what disposition was made by Jesse Kemp of the \$2,029.40 received by him from the sale of partnership personal property. The claims against the firm seem to have been allowed, after the death of Jesse Kemp, against his estate, "as surviving partner of the firm of Jesse and John J. Kemp." Jesse Kemp died June 15, 1883, and on July 7, 1883, Franklin Galbraith was appointed administrator of his estate, and on July 9, 1883, Samuel Galbraith was appointed administrator of the estate of John J. Kemp. At the June term, 1883, of the county court Franklin Galbraith filed an appraisement bill of the estate of Jesse Kemp, which shows a widow's award set off to the widow of \$1,133, and property appraised at \$1,806.75. This appraisement bill was duly approved by the county court, July 25, 1883. On October 27, 1883, Franklin Galbraith filed

a sale bill in said estate, showing property sold to the value of \$1,341.12, which was duly approved by the court. On September 18, 1883, Franklin Galbraith filed a report as administrator of the estate of Jesse Kemp from his appointment to October, 1886, showing that he received from all sources \$1,341.12, and that he had paid out \$486.46. In November, 1890, Franklin Galbraith filed his other report as such administrator, said report bearing date August 8, 1889. It shows total received \$1,341.12, same as in his first report; shows the debts of Jesse Kemp, and of Jesse and John J. Kemp, partners, to be \$3,849.25, not including the claims of Peterson and of Moir, which it shows were paid by redemption of land. The claims of Peterson and of Moir at time of redemption amounted to \$1,434.41, making the total indebtedness of the estate of Jesse and of the firm, outside the mortgages, \$4,783.66. It seems impossible to determine just how much of this was partnership indebtedness. The report shows

II. Powers of the surviving partner.

His powers are commensurate with the trust, and whatever he may do in that behalf is valid, if honestly done and within the fair scope of the purpose of the trust. *Offutt v. Scott* (1872) 47 Ala. 104.

a. Of disposition.

The general rule as to the right of a surviving partner to sell and dispose of partnership real estate deducible from the cases is, that such a partner has the right to dispose of such estate when necessary for the purposes of paying and discharging the liabilities of the firm and settling the partnership accounts, including any balance due him, his deed conveying the equity to the purchaser who has a right to call upon and compel the heir to convey the legal title, his deed not passing the full title at law. *Boulston v. Washington* (1885) 79 Ala. 523; *Andrews v. Brown* (1882) 21 Ala. 437, 56 Am. Dec. 252; *Espy v. Comer* (1884) 76 Ala. 501; *Davis v. Smith* (1887) 82 Ala. 193; *Duryea v. Burt* (1865) 28 Cal. 509; *Dupuy v. Leavenworth* (1881) 17 Cal. 262; *Breen v. Richardson* (1883) 6 Colo. 605; *First Nat. Bank of Gainesville v. Cody* (Ga.) Jan. 27, 1894; *Kimball v. Lincoln* (1881) 99 Ill. 578; *Walling v. Burgess* (1889) 7 L. R. A. 431, 122 Ind. 239; *Van Staden v. Kline* (1884) 64 Iowa, 160; *Divine v. Mitohum* (1844) 4 B. Mon. 483, 41 Am. Dec. 241; *Bank of Louisville v. Hall* (1871) 8 Bush, 678; *Spalding v. Wilson* (1883) 80 Ky. 590; *Flanagan v. Shuck* (1885) 82 Ky. 620; *Buffum v. Buffum* (1861) 49 Me. 103, 77 Am. Dec. 249; *Riley v. Carter* (1898) 19 L. R. A. 439, 76 Md. 581; *Hanson v. Metcalf* (1891) 45 Minn. 26; *Barton v. Lovejoy* (1894) 56 Minn. 260; *Matthews v. Hunter* (1878) 67 Mo. 233; *Easton v. Courtwright* (1884) 84 Mo. 27; *Holman v. Nance* (1884) 84 Mo. 674; *Sullivan v. Smith* (1884) 15 Neb. 453, 48 Am. Rep. 358; *Deveney v. Mahoney* (1872) 23 N. J. Eq. 249; *Baldwin v. Johnson* (1881) 1 N. J. Eq. 441; *Mataack v. James* (1890) 18 N. J. Eq. 123; *Holdrege v. Gynne* (1886) 18 N. J. Eq. 26; *Uhler v. Semple* (1890) 20 N. J. Eq. 288; *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 367, 7 L. ed. 628; *Collumb v. Bead* (1832) 24 N. Y. 605; *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 199, 47 Am. Dec. 305; *Rammelsberg v. Mitchell* (1875) 29 Ohio St. 53; *Tillinghast v. Champlin* (1856) 4 R. L. 175, 67 Am. Dec. 510; *Mowry v. Bradley* (1876) 11 R. L. 370; *Griffey v. Northcutt* (1871) 5 Helsk. 746; *McAlister v. Montgomery* (1816) 3 Hayw. (Tenn.) 95; *Holladay v. Land & River Imp. Co.* (1893) 57 Fed. Rep. 774; *Megibben v. Perih* (1892) 49 Fed. Rep. 133; *Holton v. Guinn* (1895) 65 Fed. Rep. 450; *Shanks v. Klein* (1881) 104 U. S. 18, 26 L. ed. 635; *Allen v. Withrow* (1884) 110 U. S. 119, 28 L. ed. 90; *Fereday v. Wightwick* (1829) 1 Russ. & M. 45, Taml. 250; *Phillips* 23 L. R. A.

v. Phillips (1832) 1 Myl. & K. 649, 663, 1 L. J. Ch. N. S. 214, 7 Cond. Ch. Rep. 208; *Broom v. Broom* (1834) 3 Myl. & K. 443, 9 Cond. Ch. Rep. 118; *Cookson v. Cookson* (1837) 8 Sim. 529, 6 L. J. Ch. N. S. 337, 1 Jur. 621; *Townsend v. Devaynes*, cited in 11 Sim. 497.

Either publicly or privately. *Clay v. Field* (1888) 34 Fed. Rep. 375.

The court of chancery having power to entrust him with the discretion in that respect, under such circumstances as preclude the probability that fraud or wrong can be perpetrated. *Mauck v. Mauck* (1870) 54 Ill. 281.

And either to a stranger or to the representatives of the deceased partner. *Gaut v. Reed* (1859) 24 Tex. 46, 76 Am. Dec. 94.

So he may dispose of them as he pleases for such purposes, with power to compromise matters when necessary, and to turn the assets into a form available for distribution, and over such distribution the court will interfere to prevent any irreparable injury to the other beneficiaries. *Barry v. Briggs* (1871) 22 Mich. 201.

The transaction being free from fraud or collusion. *Griffey v. Northcutt* (1871) 5 Helsk. 746.

And the equitable title will pass, even though standing in the name of the deceased partner, the purchaser or assignee having power to compel the conveyance of the legal title from those in whom it is vested. *Hanson v. Metcalf* (1891) 45 Minn. 25.

Without an order from the court of probate for such purpose. *Easton v. Courtwright* (1884) 84 Mo. 27.

And without giving bond. *Ibid.*

If he makes such sale in good faith and for a valuable consideration. *Barton v. Lovejoy* (1894) 56 Minn. 260; *Holladay v. Land & River Imp. Co.* (1893) 57 Fed. Rep. 774; *Walling v. Burgess* (1889) 7 L. R. A. 431, 122 Ind. 239.

And the performance of the contract will be decreed as against the purchaser, the heir joining in the conveyance. *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 366, 7 L. ed. 627.

The residue remaining in his hands for distribution according to law. *Buffum v. Buffum* (1861) 49 Me. 103, 77 Am. Dec. 249.

And the mere fact that the surviving partners do not subscribe themselves as such in the deed is immaterial, the record showing that they are surviving partners and that they all execute it, the deed purporting to convey the whole property and containing covenants of warranty and seisin. *Solomon v. Fitzgerald* (1872) 7 Helsk. 552.

Where the property is admitted to have been partnership property, a deed executed by five sur-

school claims paid in full, \$834.70; fifth-class claims, \$160.21; costs and expenses, \$298.78; balance to distribute of seventh-class claims, \$547.44. This report was duly approved by the county court, November 28, 1890.

On the 17th day of December, 1878, Jesse Kemp and wife and John J. Kemp and wife executed a mortgage to I. J. Brook, to secure the sum of \$3,000, on 100 acres east side S. E. $\frac{1}{4}$ section 33; E. $\frac{1}{4}$ N. E. 33; N. W. N. E. 33, and E. $\frac{1}{4}$ S. W. N. E. 33, containing 240 acres. On January 21, 1884, a bill was filed by Robert Moir, owner of said mortgage, to foreclose the same. The widow, Martha J. Kemp, all the children, and Samuel Galbraith, administrator, of said John J. Kemp, were parties defendants; and the widow and children of Jesse Kemp and Franklin Galbraith, administrator of the estate of Jesse Kemp, were also made defendants in said bill. At the August term, 1884,

a decree was entered in the cause, finding the allegations in the bill true, and ordering the lands sold to pay the amount due. The master in chancery sold the lands on November 8, 1884, to Robert Moir, for the total sum of \$4,114. On November 9, 1885, several certificates of purchase were assigned to Franklin Galbraith, and on February 22, 1886, a deed was made to him for said lands by the master in chancery. At the August term, 1886, the sale and deed were approved by the court. Immediately after the deed was made to Galbraith he took possession of said land, and has been in possession of the same ever since. On February 1, 1876, Jesse Kemp and wife and John J. Kemp and wife gave a mortgage on the N. W. $\frac{1}{4}$ of section 34, township 10 N., range 5 W., to secure \$500, and on the same day gave a second mortgage on the same land to secure a like sum of \$500. On May 9, 1882, both of these mortgages were assigned to Pricilla Trim-

ming partners, without complaint, will convey a title valid as against ejectment. *Ibid.*

So where he sold to a purchaser who gave his bond for the purchase money, he conveyed a good title in fee to the whole lot in question. *McAllister v. Montgomery* (1816) 3 Hayw. (Tenn.) 94.

So the equitable title may be transferred to the surviving partner by proceedings in the probate court, had pursuant to the Ohio Statute of March 21, 1861, 58 Ohio Laws, 38. *Ramsberg v. Mitchell* (1875) 29 Ohio St. 22.

But he cannot sell the real estate in conjunction with the personality. *Foster's App.* (1873) 74 Pa. 391, 15 Am. Rep. 553.

The surviving or liquidating partner of a firm has no power of disposal over the interest of a deceased or retiring partner, in real estate owned by them jointly. *Bernard v. Dufour* (1841) 17 La. 596.

An assignment made by a surviving partner for any other purposes than those mentioned in the Tennessee Act of 1784, or in the prior cases decided in that state, would not come within the provisions of the act. *Barcroft v. Snodgrass* (1890) 1 Coldw. 445, in which case the assignment made to a trustee for creditors was declared void as not being a sale.

When real estate is held in partnership, upon the death of one partner, the survivors have the power to sell and convey the same without regard as to whether it is necessary to pay the debts of the firm or not, and in such a case the purchaser has a good title, no fraud or collusion being shown. *Solomon v. Fitzgerald* (1872) 7 Helsk. 552, following *Griffey v. Northcutt* (1871) 5 Helsk. 746; *McAllister v. Montgomery* (1816) 3 Hayw. (Tenn.) 97; *Yeatman v. Woods* (1834) 6 Yerg. 20, 27 Am. Dec. 452; *Barcroft v. Snodgrass*, *supra*.

The Tennessee Act of 1784, chap. 22, § 6, abolishing joint tenancy, providing that estates held in joint tenancy for the purposes of carrying on and promoting trade and commerce, or any other useful work or manufacture, established and pursued with a view of profit to the parties, shall be vested in the surviving partner or partners for the purpose of settling and adjusting the partnership business and paying the debts of the firm, has been construed as meaning that the property shall remain in the surviving partner till the partnership is settled, and that sales in the meantime for the purposes of the business are as valid as sales of personality under like circumstances. *McAllister v. Montgomery* (1816) 3 Hayw. (Tenn.) 94; *Barcroft v. Snodgrass* and *Yeatman v. Woods*, *supra*.

The court in *Griffey v. Northcutt* (1871) 5 Helsk. 747, 756, adopted the construction placed upon the 28 L. R. A.

statute in *McAllister v. Montgomery*, *supra*, to the effect that the word "heirs" therein made use of was inserted for the purpose of giving to such heir the surplus of such real estate remaining after payment of the partnership liabilities, and to save the produce, that is price if sold (not profits) for the heirs, which but for that word would go to the executor of a deceased partner.

b. To mortgage.

Whether or not new notes and a mortgage given by a surviving partner in which his wife joins, will bind the share of the deceased partner in such real estate yet the partnership estate will nevertheless be liable for the debt, being firm property, and such mortgage can be foreclosed as against the personal representative of the deceased partner. *Van Staden v. Kline* (1884) 64 Iowa, 180.

A surviving partner can give a valid charge of the property of the partnership, as security for a debt incurred by the partners during the life of a deceased partner. *Re Clough, Bradford Commercial Bkg. Co. v. Cure* (1885) L. R. 81 Ch. Div. 324, 55 L. J. Ch. 77, 53 L. J. N. S. 716, 34 Week. Rep. 96.

c. To remove incumbrances.

It is the right of the surviving partner to apply partnership funds for the liquidation of any obligation of the firm, and for a discharge of all liens upon the joint property. *Shearer v. Shearer* (1867) 98 Mass. 107.

Partnership funds may be applied by a surviving partner for the purpose of releasing incumbrances upon partnership real estate. *Ibid.*

d. In property mortgaged to the firm.

Surviving partners in possession as equitable mortgagees for advances made out of partnership funds are entitled to maintain their possession upon partnership real estate until payment of the advances, if the real estate were not strictly partnership property. *Rank v. Grote* (1884) 18 Jones & S. 275.

e. To continue the business.

The surviving partner may continue the partnership business where the deceased partner has by his will expressed a desire that it should be carried on until the debts are paid or until such time as it is desirable to discontinue it. *Tillotson v. Tillotson* (1867) 34 Conn. 335.

f. To bring ejectment.

Ejectment will lie by the surviving partner for premises owned by the firm as partnership property. *Robinson v. Roberts* (1862) 81 Conn. 145.

But lands which are conveyed to a firm but not

mer. On July 10, 1884, Pricilla Trimmer filed a bill to foreclose both of said mortgages, in the Henderson county circuit court, against Samuel Galbraith, administrator of the estate of John J. Kemp, and Franklin Galbraith, administrator of the estate of Jesse Kemp, and the widows and children of both John J. and Jesse Kemp. At the August term, 1884, a decree was entered foreclosing said mortgages, and ordering the land sold, and said land was sold under the decree the 8th of November, 1884, to Pricilla Trimmer, for \$1,241. This land was redeemed by Robert Moir and James Peterson on three judgments they obtained in the county court of Henderson county,—one in favor of James Peterson against the estate of Jesse and John J. Kemp for \$262.66; one in favor of Robert Moir, for the sum of \$847, against the estate of John J. and Jesse Kemp; and one in favor of said Moir against the estate of Jesse Kemp for \$244. A deed was

made to Moir and Peterson for the said land by the sheriff upon said redemption, and nine days thereafter Moir and Peterson made to Franklin Galbraith a deed for said land, he paying to Moir and Peterson the redemption money, \$1,340.28, and their judgments in full, \$1,484.41, making \$2,774.69. On July 7, 1883, when Franklin Galbraith was appointed administrator of the estate of Jesse Kemp, the personal property said Jesse Kemp had left—both in his individual right and as the surviving partner of Jesse and John J. Kemp—amounted, as shown by the appraisal bill filed July 25, 1883, to \$1,806.75. The sale bill dated October 27, 1883, foots up \$1,841.12.

Messrs. E. U. Overman and Sharp & Berry Bros., for appellants:

It was not the duty of the administrator to redeem this land. As such administrator he took no interest in the land, only a power to

used in the business are not the subject of an action in ejectment by the surviving partner, where the partnership is dissolved by the death of the partner, such surviving partner not having the right to administer, either as assets for the firm or the property of a deceased partner. *Baker v. Middlebrooks* (1888) 81 Ga. 491.

Where one partner died before the confirmation of the sale, and an order was made confirming the sale directing the administrator to make title to the firm the deed being made to the firm, although the deed is inoperative to convey the legal title to the deceased partner, it is not void as to the survivor and conveys to him the legal title of an undivided half interest in the lands, and upon parol proof that the party named in the deed is one of the partners he is entitled to maintain ejectment for his share in the lands, although such deed does not convey the legal title to any of the children of the deceased partner, and so far as it attempted to do so it is a nullity. *Blanchard v. Floyd* (1890) 93 Ala. 53.

III. With respect to leasehold property.

A surviving partner administering partnership debts stands upon the same footing, as to the partnership land, as an administrator of an intestate, with this difference, that he may make a lease as surviving partner, administering, etc., or he may do so as tenant in common with the heir of the deceased partner, the question in which capacity the lease is made being determined by the circumstances. *Hartnett v. Fegan* (1878) 8 Mo. App. 1.

If a surviving partner makes a lease without the order of the probate court, the partnership debts remaining unpaid require the application of the proceeds thereof for their liquidation; the trust will attach to the proceeds in his hands; they becoming assets chargeable against him because of the unsettled condition of the partnership estate, and of the trust attaching to the beneficial interest for the purposes of liquidation. *Ibid.*

When the partnership debts have all been satisfied out of the personal estate of the partnership, the surviving partner is answerable to his co-tenant for an account of the rents received by him from a lease of the premises. *Ibid.*

Whether leased under order of the probate court in his administrative capacity, or without such order in his capacity of surviving partner, he must report his rental receipts in settlement before the probate court, and must apply them as far as required in payment of the partnership debts. *Ibid.*

An order from the probate court for leasing the land of the partnership, stamps the whole trans-

action as pertaining to his administrative capacity, and not to his tenancy in common. *Ibid.*

If, after the death of a partner, it becomes necessary for the purpose of winding up the partnership estate, to renew or extend the lease of the partnership premises, it is the duty of the surviving partner to dispose of the same in some way and realize its value, and if he fails in this respect and occupies for his own private purposes, he will be liable for the value. *Betts v. June* (1873) 51 N. Y. 274.

And to account for it to the creditors of the firm and the representatives of the deceased partner for whom in a certain sense he acts as trustee. *Ibid.*; *Holridge v. Gillespie* (1816) 2 Johns. Ch. 33, 1 L. ed. 286.

A deceased partner contracted in his own name for a lease of the premises to be employed in a partnership trade. The court refused to restrain the landlord from granting a lease to his representatives, but restrained the representatives from disposing of the lease when granted, except for partnership purposes and with the assent of the surviving partner. *Alder v. Fouracre* (1818) 3 Swanst. 439.

IV. Effect of conveyance by.

A surviving partner cannot convey realty save his own interest in it, unless he could have done it pending the partnership, following the general rule that one partner, while all are living, can only pass his own interest by deed. *Baker v. Middlebrooks* (1888) 81 Ga. 491; *Coles v. Coles* (1818) 15 Johns. 159, 8 Am. Dec. 231; *Printup v. Turner* (1880) 65 Ga. 71.

Real estate being considered as personality for the purpose of paying the debts of a firm, with which the surviving partner is charged, he has the right in equity to dispose of the real estate for that purpose, and although he cannot by deed pass the legal title to the purchaser, yet the heir holding in trust, the deed of the surviving partner will convey the equity, and through it the purchaser may call on the heir for the legal title and compel him to convey. *Andrews v. Brown* (1852) 21 Ala. 437, 56 Am. Dec. 252; *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 366, 7 L. ed. 627; *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 697; *Davis v. Smith* (1887) 82 Ala. 116; *Easton v. Courtwright* (1884) 84 Mo. 27.

As all the owners must join in order to transfer the legal title to a purchaser, the surviving partner alone having no capacity to make any transfer such as a court of law will recognize. *Southern Cotton-Oil Co. v. Henshaw* (1890) 89 Ala. 443. To the same effect, *Espy v. Comer* (1884) 78 Ala. 501; *Lang v. Waring* (1854) 25 Ala. 625, 60 Am. Dec. 533; *Caldwell v. Parmer* (1876) 56 Ala. 406; *Yeatman v. Woods* (1834)

sell it for the payment of debts of the estate.

Smith v. McConnell, 17 Ill. 141, 68 Am. Dec. 340; 2 Woerner, Administration, §§ 887, 888.

The statute requires that an administrator shall inventory the real estate of the deceased together with the personal estate.

Starr & C. Stat. § 51.

Having done that he has no further interest in it, he only has a power to apply to the court and obtain a decree and sell it upon a proper showing.

Phelps v. Funkhouser, 89 Ill. 405.

The time for the widow and heirs of John J. Kemp as well as the widow and heirs of Jesse Kemp, had expired before Franklin Galbraith purchased the certificate of purchase to the land.

Massey v. Westcott, 40 Ill. 168; *Blair v. Chamblin*, 89 Ill. 521, 89 Am. Dec. 832.

An administrator cannot be held responsible for not redeeming land belonging to the estate of the deceased unless he has funds belonging to the estate with which to redeem, and even where he has means he is held only to the exercise of reasonable discretion as to redemption.

Whitney v. Paddicord, 68 Ill. 249.

Where redemption is allowed by law inadequacy of price is not ground for setting aside sale.

Davis v. Dresback, 81 Ill. 398.

Messrs. Kirkpatrick & Alexander, for appellees:

Jesse took the legal title to the personality in

trust for the discharge of the partnership liabilities.

Nelson v. Hayner, 66 Ill. 487; 17 Am. & Eng. Encyclop. Law, p. 1158.

The realty after the discharge of partnership liabilities is in equity considered as personalty.

Simpson v. Leach, 86 Ill. 286; *Alkire v. Kahle*, 128 Ill. 496; *Troubridge v. Cross*, 117 Ill. 109.

When realty is needed to pay off debts it is personalty, but when it is not so needed it is the individual real estate of the partners subject to dower, etc.

Strong v. Lord, 107 Ill. 96.

The legal estate of realty is held in trust by the survivor for the purposes of the partnership. In treating it as a trust, the rights of all parties will be preserved.

Dyer v. Clark, 5 Met. 562, 89 Am. Dec. 697.

Galbraith represented the interests of both partners, hence occupied the same relative position to the one set of heirs as he did to the other.

There is no evidence in the record upon which the heirs of John J. Kemp can be bound, showing a partnership or partnership interest in the lands. In order to subject real estate to the incidents of partnership assets, it must be bought with partnership funds for partnership purposes.

Washb. Real Prop. 668; *Coles v. Coles*, 15 Johns. 159, 8 Am. Dec. 231; Story, Partn. p. 148, note, § 98; Collyer, Partn. 145, 153, 154, et seq.; *Alkire v. Kahle*, supra; 1 Lindley,

6 Yerg. 20, 27 Am. Dec. 452; McCormick's App. (1868) 57 Pa. 54, 98 Am. Dec. 191.

So a deed conveying partnership real estate, made by a surviving partner for the purpose of reimbursing such partner's moneys advanced by him after paying the debts and liabilities of the firm, cannot in equity be construed as passing only his individual interest. *Dyer v. Morse* (1896) (Wash.) ante, 89.

But the conveyance of partnership real estate by a surviving partner not executed in settlement of the affairs of the copartnership, nor for such purposes, nor for the purpose of conveying the property in controversy as a surviving partner of the firm, will not pass the share of a deceased partner, but will convey a mere equity. *McNeil v. First Cong. Soc. of San Francisco* (1884) 66 Cal. 105.

In *Hart v. Hawkins* (1814) 3 Bibb, 502, 6 Am. Dec. 666, the title to land procured in the name of one of the partners, the other partner having died, was held, upon a sale made by him to a purchaser with notice, not to affect the right of the heirs of the other partner as the partnership right did not survive.

As to the right to call upon the heir to convey the legal title, see note to Woodward-Holmes Co. v. Nudd (Minn.) 27 L. R. A. 340.

V. As between the survivor and personal representatives of a deceased partner.

As between the administrator of a deceased partner and the surviving partner, the assets belong to the administrator, but as to all parties who have dealt or might deal with the partnership as such, especially where they have no notice of the terms of the partnership, the surviving partner holds the legal title and is entitled to the assets. *Rice v. Merchant's & Planter's Nat. Bank of Montgomery* (1893) 100 Ala. 617.

The right of a surviving partner to take all the property of the firm of which he is a member, for the purpose of holding and administering on the estate until the effects are reduced to money and 28 L. R. A.

the debts paid is a right incident to all partnerships, and one of which a surviving partner cannot be deprived by the personal representatives of the deceased partner, in the absence of any allegation of mismanagement or want of capacity. *Shearer v. Paine* (1866) 12 Allen, 289.

Yet after payment of the debts and liabilities of the firm and the adjustment of the accounts as between the partners themselves the survivor in equity holds for those entitled whether as heirs or personal representatives of the deceased partner. *Offutt v. Scott* (1872) 47 Ala. 104.

As between the surviving partner and the administrator of a deceased partner, the former is bound to pay over to the latter the profits of the realty, as well as the personalty belonging to the deceased estate, even though such survivor may have purchased the heir's interest or the community interest of the widow, the power of distribution being in the probate court. *Smith v. Walker* (1860) 38 Cal. 385, 99 Am. Dec. 415.

Equity will not interfere to counteract or modify the operation of the statute of descent or distribution on the estate of the deceased partner by converting into personalty and dividing as such any real estate which, after adjustment, remains to be divided between his representatives and the surviving partner, except as far as may be needful to secure their actual beneficial interests in such real estate, when those interests do not correspond with the legal title. *Shearer v. Shearer* (1867) 99 Mass. 117; *Tillinghast v. Champlin* (1856) 4 R. I. 173, 207, 67 Am. Dec. 510.

The executor of a deceased partner, if not a member of the firm, may agree with the survivor that the share of the deceased partner may be ascertained in a proper way or be taken at a certain valuation, and if the executor and the survivor in good faith come to an accounting respecting the partnership affairs and settle the same as a final account, such settlement cannot be overhauled except on the ground of fraud or such unfairness as

Partn. 59, note, 652; *Thompson v. Bowman*, 78 U. S. 6 Wall. 316, 18 L. ed. 786.

The legal effect of a redemption, by one having a right to redeem is simply to extinguish all rights under the purchase and places the creditor redeeming in the same position with regard to the land as if it had not previously been sold, but this is all.

Meyer v. Minton, 106 Ill. 414.

When a redemption was made by one who had no right to do so and the redemption was accepted and acted upon by the prior creditor, it was held that the acceptance of the money operated to extinguish the prior sale, the same as if the redemption had properly been made, and reinvested the heirs-at-law of the deceased debtor with the title to the land, and that they were not precluded from contesting the title claimed by the redeeming creditor by sale under his execution.

Clingman v. Hopkie, 78 Ill. 152; *Fischer v. Estaman*, 68 Ill. 78; *Freem. Executions*, 821.

One partner cannot mortgage his copartner's interest in lands.

Sedgw. Title to Lands, 221.

A judgment confessed by one partner is not good as to the others.

Freem. Judgm. 232, 545.

Moir and Peterson elected to treat the property as subject equally to the rights of supposed partnership creditors of the firm, and the personal creditors of Jesse, and having so elected they and their grantees are bound.

Bigelow, Estoppel, 563.

One who buys property as personally cannot repudiate the sale, in the absence of fraud or mistake, by asserting that the property is really.

Reed v. Peterson, 91 Ill. 288.

Where one having a legal and also an equitable remedy proceeds at law, he may estop himself from afterwards in equity pursuing a fund which, but for his having elected his legal remedy, he might have impressed with a trust in his favor.

Hanly v. Kelly, 62 Cal. 155. See also 2 Story, Eq. Jur. 763; *Benjamin v. Elmira, J. & C. R. Co.* 54 N. Y. 675; *Ewell, Fixtures*, 286, 346; *Hughes v. Carne*, 185 Ill. 519; *Smith v. Exchange Bank of Waynesburg*, 110 Pa. 508; *Mardis v. Heirs of Mardis*, 18 La. Ann. 236.

If it were shown that the realty was in fact all partnership property, no resort could be had to it for the payment of debts until it was shown that the personalty was insufficient for that purpose.

Strong v. Lord, 107 Ill. 26; *Diversey v. Johnson*, 93 Ill. 548; 5 Wait, Act. & Def. 12; *Sutherland v. Harrison*, 86 Ill. 363; *Freeman, Coten*, 118.

It is likely true that Moir and Peterson were under no obligation to see to the application of the personal assets, that it was enough for them to know that their claims were unsatisfied. But this claim cannot be successfully made by Galbraith, it was his duty to see the

is equivalent thereto, or mistake. *Sage v. Woodin* (1876) 66 N. Y. 573; *Boys v. Vilas* (1864) 13 Wis. 174; *Kimball v. Lincoln* (1881) 99 Ill. 578; *Ludlow v. Cooper* (1854) 4 Ohio St. 1; *Arnold v. Wainwright* (1861) 6 Minn. 368, 30 Am. Dec. 448.

The sale of a testator's share in partnership trade and property by his executor to his partner, for the purpose of resale to one of the other executors, will be set aside, and the estate held entitled to his aliquot share of the profits arising subsequent to the dissolution, as if the partnership continued. *Cook v. Collingridge* (1822) Jac. 607, 1 L. J. Ch. 74.

An agreement entered into by the articles of partnership, that upon the death of one partner the title to the property shall become vested in the survivor, and that he shall become indebted to the representatives of the deceased partner, if made bona fide and for a valuable consideration, is valid and effectual to transfer the title to the property. *Gaut v. Reed* (1869) 24 Tex. 48, 76 Am. Dec. 94.

If the agreement clearly shows that the partners intended that the property should be sold as partnership property, and thereby converted out and out into personalty, the surviving partner or the present representatives of the deceased partner can in a court of equity compel a sale and division of the profits. *Ludlow v. Cooper*, *supra*.

As to out and out conversion, see note to *Robinson Bank v. Miller*, *Lamport v. Miller*, 27 L. R. A. 449; *National Union Bank of Maryland v. National Mechanics Bank of Baltimore*, 27 L. R. A. 478.

The administrator of a surviving partner stands in his shoes with respect to the administration of the partnership estate, such estate being liable in his hands for the payment of the partnership debts and liabilities, the balance remaining in favor of a deceased surviving partner upon the taking of the partnership accounts, only falling into the hands of such administrator for administration as a part of the estate of the deceased. *Thomson v. Thomson* (1849) 1 Bradf. 35; *Dayton v. Bartlett* (1832) 38 Ohio St. 367; *Brooks v. Brooks* (1873) 12 Heisk. 12, 36 L. R. A.

The Alabama statutes conferring jurisdiction upon the probate court to order a sale of lands of an estate, when the same cannot be equitably divided among the heirs or devisees, whether the estate be legal or equitable, and whether held in severalty, or in common with others, does not apply to the sale of partnership real estate upon the death of one partner, even though the party applying to the court as administrator was himself the surviving partner of the firm. *Roulston v. Washington* (1885) 79 Ala. 620.

Equity will not, under the Washington statute relating to the winding up of partnership affairs, grant relief in favor of the representatives of a deceased partner against the survivor who has paid all the partnership debts and liabilities, and sold the real estate of the firm to reimburse himself for moneys owing to him. *Dyer v. Morse* (1895) (Wash.) ante, 89.

The purchase money paid by the surviving partner purchasing deceased's share and assuming the firm liabilities, is to be distributed as real estate. *Foster's App.* (1873) 74 Pa. 391, 15 Am. Rep. 553.

VI. Injunction against survivor.

In *Elliot v. Brown* (1791) 3 Swanst. 499, note, an injunction was granted against the surviving partner, proceeding by ejectment to obtain possession of a farm of which a joint lease had been made to himself and his deceased partner.

In *Jones' App.* (1871) 70 Pa. 169, an order was made by the orphans' court for payment of the debts of a deceased intestate partner in favor of his administrator, such debts being all those of the firm, the fund being subsequently claimed by the assignee in bankruptcy of the survivor; the proceeds were considered as belonging to the former and not to the latter, the court distinguishing the case from *Abbotts' App.* (1865) 50 Pa. 234, as in that case the land was sold by the sheriff under exemption against the partnership. E. W.

assets properly applied. And he being the original party to the wrong cannot shield himself under the innocent purchase of Moir and Peterson.

Wait, Fraud. Conv. 884.

It appearing that the partnership and individual liabilities were confused and by the acts of the administrator he should suffer the loss.

Diversey v. Johnson, 98 Ill. 549; *Pahlman v. Graves*, 26 Ill. 405; *Re Corrington*, 124 Ill. 368.

Galbraith occupied the position of a trustee of this estate, and whatever benefit he may have derived from the purchase of any of the property enured to the benefit of the heirs-at-law or the two Kemps, subject to any rights the creditors might have.

1 Story, Eq. Jur. 322; *Nelson v. Hayner*, 66 Ill. 487; *Horner, Probate Law*, 114; 1 Perry, Tr. 197, 205; *Fulton v. Whitney*, 66 N. Y. 548; *McCreedy v. Mier*, 64 Ill. 499.

Baker, J., delivered the opinion of the court:

For a number of years Jesse Kemp and John J. Kemp carried on the business of raising and dealing in live stock in partnership. The stock, machinery, implements, and other personal property employed in such business were partnership property. The 400 acres of land on which the business was conducted stood in their joint and joined names, and was presumably purchased for the purposes of the partnership business, and seems to have been used and regarded by them as partnership property. When John J. Kemp died, Jesse Kemp, the surviving partner, became a trustee in respect to the property and assets of the late partnership. In equity, a surviving partner is treated as a trustee, with the fiduciary relation of trustee and *cestuis que trustent* existing between him and the representatives of the deceased partner. There is a conflict in the authorities upon this point, but in this state the law is as stated. *Nelson v. Hayner*, 66 Ill. 487; 17 Am. & Eng. Encyclop. Law, pp. 1154, 1155, and cases cited in notes. Jesse Kemp, the surviving partner, filed in the county court an inventory of the real and personal estate of the late partnership under oath, and in it was a schedule of the lands here in question. Then Jesse Kemp died, and Franklin Galbraith became administrator of his estate, and assumed and undertook the administration of the trust in respect to the partnership property. Among other things, he reported to the county court that there was "property in his hands of the late firm of John J. and Jesse Kemp, of which partnership said Jesse Kemp was the survivor," and he applied for and obtained an order for the sale of all the personal property contained in the inventory and appraisal bill, stating it was the property "of said late firm;" and he realized from the sale thus made the sum of \$1,841.12.

In the event of the death of both the partners before the settlement of the partnership affairs, the administrator of the last survivor stands in the shoes of his intestate, and he is charged with the duty of completing the settlement as a trustee, the relation between him and the legal representatives of the partner first deceased being that of trustee and

cestuis que trustent. *Dayton v. Bartlett*, 38 Ohio St. 357; *Thomson v. Thomson*, 1 Bradf. 24; *Brooks v. Brooks*, 12 Heisk. 12; 17 Am. & Eng. Encyclop. Law, p. 1158. In equity the real estate of a partnership is regarded as, and stands on the same footing with, personal property, no matter in whom the legal title may be vested. *Bopp v. Fox*, 63 Ill. 540; *Simpson v. Leech*, 86 Ill. 286; *Troubridge v. Cross*, 117 Ill. 109; *Alkire v. Kahle*, 123 Ill. 498. But whatever remains of it after the partnership debts shall have been discharged is held in common by the heirs, subject to dower, or goes to the devisees. *Strong v. Lord*, 107 Ill. 25. It is urged that Franklin Galbraith administrator of Jesse Kemp, took no interest in the lands, only a power to sell them for the payment of debts, and that, therefore, no duty devolved upon him to redeem the lands from the sales made by the master in chancery, and that after the expiration of the time allowed by law for the redemption of the lands to the widows and children of Jesse Kemp and John J. Kemp, if not before, he had the right to purchase the certificate of sale or buy the lands. This claim is inconsistent with the position he occupied as trustee in respect to the partnership property. Besides this, it was expressly held in *McCreedy v. Mier*, 64 Ill. 495, that an administrator is not a stranger in all respects to the real estate of his intestate; that it is under some circumstances his duty to redeem from a sheriff's sale; and that under the facts of that case he became trustee for the heirs. This case was quite like the case at bar. The administrator procured an assignment of the certificate of purchase to be made to his brother. This court said: "It is plain that the same principle which forbids him to become a purchaser at a sale under order of court must forbid him to buy on his own account a certificate of purchase given by the sheriff or master on a sale made in the lifetime of the deceased."

It is urged that only \$1,841.12 came to the hands of Franklin Galbraith, the administrator, in money; that such sum was wholly insufficient to redeem from the \$3,000 mortgage, the two \$500 mortgages, and pay the claims against the estate, and costs and expenses of administration. The 160 acres in sections 84 sold for \$1,241; the other four tracts were sold separately,—one for \$1,780, one for \$324, one for \$670, and one for \$1,840; and in order to redeem one tract it was not necessary to redeem all. The total sum called for by the five certificates of purchase was \$4,907.69. Deducting therefrom the \$1,841.12 in money would leave only \$3,566.57, plus interest to time of redemption, to be arranged for in order to redeem all the land from the mortgage sales. The lands were worth from \$12,000 to \$14,000, a value more than three times, and almost four times, the amount of the required sum. It is almost certain that Galbraith, with the business and financial ability that this record indicates that he possessed, could readily have arranged through the unsecured creditors or otherwise to save the whole or some portion of the 400 acres of land to the two widows and their children, if he had felt so

inclined. As for the widows and children, they had no money or means or business capacity. Even if it should be said that the record does not justify these surmises and conclusions, yet that would make no difference in the decision of this case. A trustee is not allowed to put himself in a position in which to be honest must be a strain on him. *Staats v. Bergen*, 17 N. J. Eq. 554; *Tyler v. Sandorn*, 128 Ill. 186, 4 L. R. A. 218. The very next day after the right of the widows and heirs to redeem from the sales under the \$3,000 mortgage had expired, the trustee purchased the four certificates of purchase from Moir, and immediately upon the expiration of the statutory fifteen months he received a deed from the master in chancery, and at once took possession of the 240 acres of land. In the county court he waived process, and entered his appearance, and raised no objections, and allowed judgments to be entered on the Moir and Peterson claims. Then Moir and Peterson redeemed the 160 acres in section 84 from Pricilla Trimmer, and, there being no bid over and above the redemption money, they forthwith received the deed from the sheriff. That deed bears date December 5, 1885; and nine days thereafter, on December 14, 1885, they conveyed to Galbraith, the trustee, he paying the amount of the redemption money, and the amounts of their respective claims against the Kemps. As matter of course, this whole thing was prearranged. It cannot, in reason, be deemed otherwise. We forbear to enter into any discussion of the evidence tending to prove that Galbraith and others took steps to prevent any competition at the sale made by the sheriff, and other like matters. Galbraith, the trustee, got the whole of the lands at just half of their then actual value. It is unnecessary to consider much, if any, of the oral testimony that was taken at the hearing other than that in regard to values. The quiet records of the county and circuit courts, and those that rest in the recorder's office, though they are dumb, yet they speak; and they establish the cases of the complainants in the two cross-bills.

It is urged in behalf of the cross-errors assigned that there is no evidence in the record upon which the heirs of John J. Kemp can be bound, showing a partnership interest in

the lands; that Galbraith, at least so far as relates to the 160 acres in section 84, "was in no way connected with the widow and heirs of John J. Kemp or with his estate," and that, therefore, the circuit court erred in directing an account to be taken of any sum or sums of money that Galbraith may properly have laid out or expended for or on account of the respective undivided halves of said lands. We think that the evidence sufficiently establishes that the 400 acres of land were partnership lands. And we do not see upon what theory the equities of the widow and children of John J. Kemp can be worked out in respect to the whole of the 400 acres, as against the title of appellants, other than the theory that Franklin Galbraith, as administrator of Jesse Kemp, the surviving partner of John J. Kemp, stood in a fiduciary relationship to the widow and heirs of said John J. Kemp in respect to such land. How, otherwise, can they have any relief whatever in respect to the 240 acres? Counsel, in their brief, say: "So far, then, as any partnership property or liabilities were concerned, Galbraith represented the interests of both partners; hence occupied the same relative position to the one set of heirs as he did to the other. By his obligation as administrator of the estate of the survivor, he was bound to serve for the interests of all." And they make use of numerous other like arguments and expressions. It is not admissible that one should blow both hot and cold with reference to the same transactions. *Allegans contraria non est audiendus*. Where parties seek in a court of equity to divest others of the legal title to land, the court may impose equitable terms on which relief will be granted; and if it appears that the parties divested have advanced money for the purchase and improvement of the property, the court, in its decree finding it to belong to the parties making claim to the land, may properly require the money so advanced to be refunded, with legal interest. *St. Patrick's Catholic Church of Sterling v. Daly*, 116 Ill. 76. The decree of the circuit court in that behalf and in regard to all other matters, does justice and equity between the parties.

The decree is in all things affirmed.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan
v.

Stonewall J. DE FRANCE, *Plff. in Err.*

(.....Mich.)

1. To attack the credibility of a witness who has testified that he gave at a certain date a note to a person whose whereabouts on that day is in question, and paid the note on a certain day

NOTE.—As to the claim of dentists to be physicians or medical practitioners the above case and that of *State v. Fisher* (Mo.) 22 L. R. A. 799, which the court cites in the present case, are probably the only direct authorities.
28 L. R. A.

several months after, testimony is admissible that on the later date such person was at another distant place.

2. An objection cannot be first made on appeal to the fact that the name of a witness was not indorsed upon an information.
3. A dentist does not "practice medicine or surgery" within the meaning of a statute prohibiting the disclosure of information acquired in such practice so as to exclude testimony of false teeth furnished by him to a person whose identity is in question.
4. Instructions that the interest of witnesses for an accused person growing out of their relationship with him or otherwise may

be considered in passing upon the testimony, is not erroneous where the question of the credibility of the witnesses in general was fairly presented to the jury.

(April 2, 1895.)

ERROR to the Circuit Court of Kalamazoo County to review a judgment convicting defendant of forgery. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. M. Irish and A. J. Sawyer, with Messrs. Edwin F. Conely and Orla B. Taylor, for appellant:

The court erred in admitting the testimony as to offenses charged to have been committed by respondent at other places subsequent to the time of the offense charged in the information, and in no manner connected therewith.

In cases where it is necessary to show a particular intent, previous acts of the same kind connected with the specific charge have been permitted to be shown. But subsequent and entirely disconnected offenses have never been permitted to be shown.

People v. Jenness, 5 Mich. 805; Lightfoot v. People, 16 Mich. 507; People v. Schweitzer, 28 Mich. 810.

Whatever may be said upon the propriety of cross examination upon collateral and immaterial matters, under the law of this state no impeaching testimony is admissible as to these matters.

McDonald v. McDonald, 67 Mich. 122; Dunn v. Dunn, 11 Mich. 284; Fisher v. Hood, 14 Mich. 189; Leavitt v. Stansell, 44 Mich. 424; Hamilton v. People, 46 Mich. 187; People v. Hillhouse, 80 Mich. 585; People v. Deitz, 86 Mich. 419; Driscoll v. People, 47 Mich. 418; Dalman v. Koning, 54 Mich. 320; People v. Wolcott, 51 Mich. 612; People v. Whitson, 48 Mich. 419.

The names of all witnesses known to the prosecuting attorney must be indorsed on the information at the time of filing the same.

How. Anno. Stat. § 9549; *People v. Price, 74 Mich. 37; People v. Hall, 48 Mich. 487, 42 Am. Rep. 477; Hill v. People, 28 Mich. 496.*

The names of all witnesses unknown to the prosecuting attorney at the time of filing the information must be indorsed on the information as soon as known.

People v. Quick, 58 Mich. 821; People v. Hall, supra; People v. Moran, 48 Mich. 639.

The testimony of Dr. Land was inadmissible against the objection of respondent.

How. Anno. Stat. § 7516; *Campau v. North, 39 Mich. 608, 33 Am. Rep. 433; Briggs v. Briggs, 20 Mich. 41; Storrs v. Scougale, 43 Mich. 395.*

Messrs. Alfred S. Frost and F. E. Knappen, for the People:

No error would have been committed if the people had been permitted to have taken an answer to the question, "You have heard him accused of uttering forged papers at Minneapolis?"

Abbott, Trial Brief, ¶ 473; 1 Best, Ev. 261; Reg. v. Wood, 5 Jur. 225; Com. v. Sacket, 23 Pick. 394; People v. Mills, 94 Mich. 688; Montgomery v. Crosthwait, 12 L. R. A. 145, 90 Ala. 553; Annis v. People, 18 Mich. 511; People v. Coffman, 59 Mich. 1; Rex v. Martin, 6 28 L. R. A.

Car. & P. 562; State v. Crow, 107 Mo. 342; People v. Ah Les Doon, 97 Cal. 171; People v. Hite, 8 Utah, 461; Osburn v. State, 87 Ga. 173; Holmes v. State, 88 Ala. 26; State v. West, 43 La. Ann. 1006; Randall v. State, 182 Ind. 539.

The people were entitled on cross examination to go into the entire transaction for the purpose of showing that the Peabody note from its inception was a fictitious paper, made for the purpose of proving an alibi in the interest of DeFrance.

People v. Gibson, 58 Mich. 869.

The law of privilege cannot extend to physician and surgeon at common law, and as the statutes of this state do not extend the privilege to dentists, there is no possible basis in law for contention that the testimony of Land was privileged.

State v. Fisher, 23 L. R. A. 799, 119 Mo. 844.

Montgomery, J., delivered the opinion of the court:

The respondent was charged, in the circuit court for the county of Kalamazoo, with having, on 28d day of November, 1891, uttered a forged draft, purporting to have been drawn by the Pontiac National Bank, of Pontiac, Mich., on the Merchants' National Bank of New York, for the sum of \$12,500, and upon which he is claimed to have received from the First National Bank of Kalamazoo an advancement of \$5,000. The testimony on behalf of the people tended to show that the respondent came to Kalamazoo on the 10th of November, and registered at the Burdick House under the name of Louis Forrest; that he gave out that he was an agent of the Standard Oil Company, and desired to purchase some land in the vicinity of the city for that company; that he visited the bank in question on two or three occasions, and was introduced to the president by one Hammond, with whom he had become acquainted in his efforts to find land suitable for his alleged purposes. On Monday morning, the 28d, he presented the draft in question, and received \$5,000 in currency, and was credited on the books of the bank with the balance. He immediately left the city, and was not discovered to the bank officials until October 2, 1893, when he was arrested in Detroit, where he had been living since the time of the alleged offense. The defense consisted of a denial of the identity of respondent with the man Forrest, who committed the offense, and the chief question of fact was that of the identity of the respondent. The defendant offered testimony tending to show that during the time the man known as Forrest was in Kalamazoo, he, the respondent, was in the city of Detroit constantly. Among other witnesses called for the purpose of proving this fact respondent called as witnesses Thaddeas Galvin, John Galvin, and James Galvin, who testified that on the 21st of November, 1891, they entered into a contract with respondent, which contract was produced and introduced in evidence, and purported to have been executed on that date, and to have been signed by the Galvins and by defendant. Respondent also called as a witness

William Peabody, who testified that on the 23d of November, 1891, he borrowed \$300 in money of respondent, and executed his promissory note for the amount; that the note was afterwards paid, on the 11th of April, 1892, to Mr. De France personally, at the house of the witness, and that De France receipted for it on the back. This note purported to have been signed by Peabody, and was indorsed on the back: "Paid, April 11, '92. S. J. De France." It appeared by the testimony of the people that at the time the man known as Forrest appeared at Kalamazoo his teeth presented a different appearance than those of the respondent subsequently presented; that the two front incisors were separated distinctly, and that now this peculiarity does not appear. The people called as a witness Charles H. Land, a dentist, who testified that between the 30th of November and the 4th of December, 1891, he inserted three false teeth in the place of the two incisors for the respondent. The prosecution called as a witness one Cornelius W. Britt, an attorney, who testified that he prepared the contract purporting to have been executed by De France and the Galvins on the 21st of November, 1891, after respondent's arrest and imprisonment, and by the respondent's direction. They also called two witnesses whose testimony, tended to show that the indorsement purporting to have been made on the back of the note of William Peabody on April 11, 1892, and purporting to have been signed by De France, could not have been made at that time, as he, De France, was at that date, and for some days prior, in St. Paul, Minn. This statement of facts is sufficient to show the relevancy of the questions raised in the brief of counsel which we deem it necessary to discuss.

Respondent's counsel contend that error was committed in getting before the jury the claim that respondent had been guilty of similar offenses to those charged, and occurring at a later date. The prosecution called as a witness F. W. Anderson, of St. Paul, Minn., who testified that he was president of the St. Paul National Bank, and first met the respondent at St. Paul on April 11, 1892. He was then asked under what circumstances he met the respondent at that time, and counsel for the respondent objected, on the ground that it related to a separate and distinct offense. The jury was excluded during the discussion, and the court ruled the testimony inadmissible. The court did not depart from this ruling during the trial, but it is claimed that counsel, by putting questions to witnesses, sought to convey the impression to the jury that the respondent had been guilty of offenses at other times and places. This subject will be referred to later on. The prosecution, in rebuttal, called as a witness William B. Geery, who testified that on the 11th of April, 1892, the respondent was in St. Paul, and was seen by the witness in the St. Paul National Bank. This testimony was corroborated by F. W. Anderson, the president of the bank, and on the cross-examination of these witnesses facts were elicited which tended to show that he was guilty of some transaction which occasioned an attempt

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on the part of the bank officials to procure his arrest. It is strenuously insisted that this line of testimony was incompetent. Counsel invoke the rule that it is not competent to impeach a witness by contradicting him upon immaterial points, and it is said that the fact of the Peabody note having been indorsed as paid on the 11th of April was an immaterial or collateral fact, and that it was incompetent to dispute the testimony of the witness upon this point. The court received the testimony as bearing upon the credibility of the testimony of the witness Peabody, and in this we think no error was committed. Counsel contend that the falsity of the indorsement could not affect the authenticity of the note itself, and say, "Suppose the date of the indorsement were false for some reason, would the contents of the note be false for that reason also?" The witness Peabody, as before stated, produced this note for the purpose of corroborating his own testimony and, his testimony as a whole was that he borrowed, on the 23d of November, 1891, \$300 of respondent; that he gave this note; that the note was paid on the 11th of April, 1892, to Mr. De France personally, at his house in Detroit, and that De France receipted it on the back. This note was supposed to represent the transaction between the parties, the whole transaction, and nothing else. The witness told a connected story supported by one document, which was either true or false, and we cannot understand how it can be said that testimony showing that this instrument, which was produced for the purpose of corroborating his testimony, was false in one particular, might not be and ought not to be weighed by the jury in determining the question of whether the whole instrument was prepared for the especial occasion, and for the purpose of corroborating his testimony. Not only was the testimony competent upon this question, but to our mind it was persuasive evidence for this purpose, and it is not surprising that it should have had the effect of discrediting the witness with the jury. The court distinctly limited the application of this testimony by instructing the jury as follows: "Whether or not the respondent was in St. Paul on April 11, 1892, has no tendency to prove that he was in Kalamazoo in November, from the 11th to the 23d, 1891. You may, however, consider this testimony as bearing upon the credence to be given to the testimony of the witness Peabody as to the whereabouts of the respondent, November 23, 1891." This instruction was entirely proper. If the witness Peabody had produced a forgery for the purpose of supporting his testimony, and the prosecution was able to show that the instrument which he produced for that purpose was in part a forgery, it would be most extraordinary to hold that this fact might not be taken into account in determining the weight to be given to his testimony upon all points in the case.

Numerous objections were taken to the conduct of counsel with reference to the witness Britt. First it is said that his name was not indorsed upon the information, but, as this point was not made below, it cannot be con-

sidered here. If the objection had been there made it would have been incumbent upon the prosecution to have shown a sufficient reason for the failure to indorse his name upon the information, and sufficient grounds for leave to place it upon the information after the trial had commenced. But, no such objection being made, no opportunity was afforded the prosecution to make this showing, and there is no question before us for review, relating to it. The other questions raised bear rather upon the fairness of the testimony of the witness Britt than upon the question of the admissibility of his testimony. Counsel seek to show by references to testimony that Britt was a willing witness, and that counsel for the people were at pains to present him to the jury as an unwilling witness, and that this conduct was prejudicial, and was intended to be. At the best the record presents a question of fact as to whether the witness was a willing or unwilling witness, and there is no legal question involved in relation to the subject, so far as we can discover.

Counsel contend that the testimony of the witness Land was a privileged communication, under the provisions of section 7516, How. Stat., which provides that "no person duly authorized to practice medicine or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." The question presented is whether this language includes a dentist. At the common law, information gained by a physician or surgeon while in attendance upon his patient was not privileged. The purpose of this statute was to throw around such disclosures as the patient is bound to make for the information of his attending physician the cloak of secrecy, and the prime object of the act was to invite confidence in respect to ailments of a secret nature, and the spirit of the act would not include a case where the infirmity was apparent to every one on inspection. In practice, however, the statute has not been so limited in construction, for the reason that the words of the act are broad enough to include any information necessary to enable the physician to prescribe or the surgeon to act. Nevertheless, the purpose of the act is to be considered in determining whether the dentist was intended to be included within its terms. Certainly the terms "dentist" and "surgeon" are not interchangeable, and if a dentist is to be held to be a surgeon, within the meaning of this act, it must be because his business as a dentist is a branch of surgery. It is apparent that the act related to general practitioners, and to those whose business as a whole comes within the definition of "physician" or "surgeon." A dentist is one whose profession it is to clean and extract teeth, repair them when diseased, and replace them, when necessary, by artificial ones. The only case which we have found which bears directly upon this question is that of *State v. Fisher*, 119 Mo. 844, 22 L. R. A. 799, in which a majority of the supreme court of Missouri 28 L. R. A.

held that a dentist is not to be considered a surgeon. We think there was no error in admitting the testimony of this witness; that he is not within the terms or the spirit of the act.

Many of the errors assigned relate to the alleged misconduct of the counsel for the prosecution. We have given to the briefs of counsel and to the record very careful examination upon this branch of the case. It is contended that the counsel committed error in propounding questions to witnesses which he knew to be incompetent, and which implied facts which were not admissible, and the intimation of the existence of which was damaging to the respondent. It is true that counsel put numerous questions to witnesses which were excluded, but we are by no means convinced of the bad faith of counsel in this particular, and, on the contrary, consider that the counsel for the prosecution were acting in the utmost good faith. The trial extended over two weeks, as is stated. The respondent was ably defended. The counsel for the prosecution would have been derelict in their duty had they not sought to put before the jury all the facts which, in their judgment, were admissible as bearing upon the question of the respondent's guilt or innocence. That they were mistaken in some of the positions taken, and that the court below ruled against them upon their offers of certain testimony, by no means implies that they were guilty of any bad faith. In the concluding argument of counsel for the prosecution, this occurred: "Now, I asked to put *Judge Mills* on the stand. (Objected to.) He is not here, but I want to ask you if you believe from the testimony that you have got in this case so far——" Counsel was here interrupted with an exception. The reference to *Judge Mills* should not have been made, but the circuit judge, very properly, in charging the jury, said: "The testimony of *Judge Mills* was excluded by the court. Counsel for the people have no right to suggest to you what *Mills* would have sworn to had he been placed upon the stand. I do not remember, gentlemen, that there has been any suggestion made as to what *Mills* would have sworn to if placed upon the stand, but I give you this instruction out of abundance of caution. If any such suggestion was made, you should disregard it altogether. *Judge Mills* was not placed upon the stand. You are to decide this case according to the testimony which has been given, and nothing else." It is impossible to conceive that, after this very clear instruction, the jury could have been prejudiced by the remarks of counsel. As a matter of fact, the record does not show that he did state any fact that he could have proven by *Judge Mills*, or what the testimony of *Judge Mills* would have been if he could have been called. This was emphasized by the charge of the court, and it would be a reflection upon the intelligence of the jury to assume that after this very clear instruction they could have been influenced by this mistake of counsel in any way whatever.

Complaint is made of the instruction of the court to the effect that "in passing upon the

testimony of the witnesses for the respondent the jury had the right to take into consideration any interest which such witness might feel in the result of the suit, growing out of their relationship with respondent or otherwise, and give to the testimony of such witness or witnesses such weight as it was deemed entitled to under all the circumstances proved on the trial, and that in considering the testimony given by the respondent in his own behalf they might consider whether or not such testimony was affected in any manner by his interest in the result of the prosecution." We do not understand that counsel contend that these instructions were not proper enough in themselves, but it is said: "A general charge that the jury should consider the interest of all witnesses would not have been objectionable; but when nothing is said about the people's witnesses, and attention is directed to the respondent and his witnesses, and the jury is told that their interest is an important consideration, the rights of the accused are not properly protected." But upon turning to the record we find that the respondent's counsel asked and the court gave numerous instructions relating to the question of the weight to be attached to the testimony of various witnesses for the prosecution. Respondent's thirtieth request, as follows, was given by the court: "In considering the question of identification, you may consider the fact that the witness Wagner swore to a complaint for the arrest of the respondent before he had seen him, and also upon his visit to Detroit the respondent was brought into his presence alone, in such a manner that there could be no doubt as to the person charged with the crime," etc. And again: "If the jury believe from the evidence that the witness Hammond did in fact indorse the draft in controversy in this case, you may consider this fact as bearing upon the likelihood of his identifying

an innocent party instead of the guilty party." And again: "If you find that the witness Britt conspired to put up false testimony in the case, this would be a crime under the laws of the state. You may consider any temptations which are apparent from his testimony and the motives by which he is actuated." And again: "If you believe that the witness Britt willfully falsified in any single particular, you are at liberty to disregard his testimony altogether." And finally, on his own motion, the court charged the jury as follows: "You are the sole and exclusive judges of the credibility of each and every witness who has testified in this case. As to some of the witnesses, you have been told that you should receive their testimony with great caution. As to others, you have been instructed that you may consider any interest which they may have in the result of this case, and these instructions you should heed. But it is equally true that you are to give to the testimony of each and every witness who has been sworn upon his trial just so much or so little credit as you find it is entitled to. You are the sole judges of the credibility of the witnesses, as well as of the weight of the evidence in the case." It is apparent that the circuit judge fairly presented the question of the credibility of the witnesses to the jury, and that he gave all proper requests of respondent's counsel, and the jury could not have failed to understand that the question of the credibility of the witnesses was solely for them. The charge of the court, as a whole, was fair, and covered all the questions presented by the record. The respondent had a fair trial. We think his rights were fully protected, and that *the conviction should be affirmed.*

Grant, J., did not sit; the other Justices concurred.

CONNECTICUT SUPREME COURT OF ERRORS.

Lewis F. CURTIS

v.

Frederick H. BRADLEY.

(.....Conn.....)

1. An appeal does not lie in Connecticut on the ground that the evidence does not support the facts found by the court below but does support a state of fact which the court found not proved.
2. A written statement of relevant facts is admissible in evidence on testimony of a witness that he knew when it was made that

the facts were correctly stated therein but cannot now remember them.

3. Testimony of a witness that facts known to him to be true were stated by him to another who wrote them down, and testimony of the latter that he wrote them as they were stated by the former, may be given to justify the admission of the writing although neither of the witnesses can now remember the facts stated therein.
4. It is proper to mark as an exhibit a writing which is competent evidence when it can only be used for its legitimate purpose.
5. Evidence of persons who rendered bills to the effect that those which indicate that

NOTE.—The use as evidence of a writing proved by witnesses to have been made with the knowledge of facts therein stated, but which they cannot now remember, is a matter upon which the above decision is an important one and on which it shows a conflict of authorities. No reconciling of the authorities is possible, and as the courts in which the question remains open have nearly equal authority to sustain their choice on either

side the reasonableness of the doctrine of the above case will probably draw them to its support. We believe it ought to become in reality what it has sometimes been called, the "American doctrine," and that such a document proved to have been correct when made should be recognized as an independent witness like the plaster cast referred to in the opinion above or like a monument of boundary.

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See also 36 L. R. A. 693.

the items went to a specified house represent orders made for that house by a person named, is admissible where the fact that money was paid for materials ordered by him for that house is in issue.

(October 4, 1894.)

RESERVATION by the Superior Court for Fairfield County for the opinion of the Supreme Court of Errors of a motion for a new trial after verdict in favor of plaintiff in an action brought to recover money which plaintiff had paid out for the erection of a building at the defendant's request upon defendant's land. *Motion denied.*

The facts are stated in the opinion.

Messrs. J. C. Chamberlain and Elbert O. Hull for defendant in support of the motion.

Messrs. Allan W. Paige and George P. Carroll, for plaintiff, *contra*:

By construction of law, which controls even the express intention and understanding of the parties, Plumb became agent for the plaintiff, either in the whole work of building or else for the act of receiving the pay for it. Whatever was the scope of the agency the plaintiff could sue for the money.

Mechem, Agency, §§ 766, 769; 1 Am. & Eng. Encyclop. Law, p. 428; *Huntington v. Knox*, 7 Cush. 371; *Sutton v. Mansfield*, 47 Conn. 388.

He who did something in reliance upon a promise, being he from whom "the consideration moves," is the proper person to sue in *assumpsit*.

Hare, Cont. pp. 146-149; *The History of Assumpsit*, by J. B. James, 1 Harvard Law Rev. 1, 53; 1 Chitty, *Cont.* 11th Am. ed. pp. 74-78; 1 Parsons, *Cont.* pp. 466-468; *Steele v. Aylesworth*, 18 Conn. 252; *Crocker v. Higgins*, 7 Conn. 847; 3 Am. & Eng. Encyclop. Law, p. 863, *note 5*; *Bishop, Cont.* §§ 1219, 1220.

An account stated is a mutual adjustment of everything and operates by way of estoppel.

Anderson's Law Dict. 16, 17; *Abbott, Trial Ev.* 461; *Abbott, Brief on Mode of Proving Facts*, § 63; 1 Am. & Eng. Encyclop. Law, pp. 110-120; *Lockwood v. Thorne*, 11 N. Y. 170, 62 Am. Dec. 81; *Wiggins v. Burkman*, 77 U. S. 10 Wall. 129, 19 L. ed. 885.

If there had been previously any doubt, the effect of the transaction between the parties was to make the defendant debtor to the plaintiff in all events.

3 Am. & Eng. Encyclop. Law, p. 892, and *note*.

As witnesses Curtis and Plumb, by means of certain bills and slips, refreshed their recollections as to the amounts incurred by the plaintiff and paid out by the plaintiff in accordance with the defendant's request, by way of labor and material bills on this house. These bills were not themselves introduced in evidence. The defendant had no ground of objection. Unless such evidence was used how could there ever be any recovery under the second common count?

Republican F. Ins. Co. v. Weide, 81 U. S. 14 Wall. 375, 20 L. ed. 894; *Erie Preserving Co. v. Miller*, 52 Conn. 444, 52 Am. Rep. 607; *Card v. Foot*, 56 Conn. 369; *State v. Jerome*, 83 Conn. 266; *Platt v. Hubinger*, 58 Conn. 153; 1 Greenl. Ev. § 437.

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Plaintiff had grounds for exception in that, in connection with the oral testimony, the bills thus marked and designated were not themselves admitted as part of the *res gesta*.

Atna Ins. Co. v. Weide, 76 U. S. 9 Wall. 677, 19 L. ed. 810; *Abbott, Civil Trial Brief*, § 396; *Abbott, Trial Ev.* 320, 321; *Bridge-water v. Rosbury*, 54 Conn. 213.

The amount may be allowed to be proved by testimony of a witness that he once knew it and told it correctly to plaintiff, and testimony of plaintiff to what amount the witness told him.

Abbott, Civil Trial Brief, citing *Shear v. Van Dyke*, 10 Hun. 528; *Abbott, Brief on Mode of Proving Facts*, §§ 897, 898, citing *New York v. Second Ave. E. Co.* 102 N. Y. 572, 55 Am. Rep. 889; *Payne v. Hodge*, 7 Hun. 612, affirmed, 71 N. Y. 598; *Adams v. People*, 8 Hun. 654, affirmed, 63 N. Y. 621; *Green v. Cawthorn*, 15 N. C. 409.

Hamersley, J., delivered the opinion of the court:

In the summer of 1890 the plaintiff sold the defendant a building lot. In September of that year the defendant decided to have a house erected on the lot. It was then understood that one Simeon E. Plumb, a builder, should build the house, and that the plaintiff, a merchant, should advance the money for the cost of construction. The decision of this case depended on the actual terms of the agreement then made, the defendant subsequently claiming that his only agreement was with the plaintiff, and that by such agreement the plaintiff undertook to have the house built for the agreed price of \$1,700. Plumb built the house under the directions of the defendant. The plaintiff paid to Plumb the amount of all bills for labor and materials as they came due. The house was finished in March, 1891, and the defendant accepted and occupied it. At the time the house was completed, Plumb and the plaintiff went over the labor and other bills, and the account of money paid for the cost of construction as charged on the plaintiff's ledger, and at the foot of that account Plumb wrote the following: "I have examined the above account, and find it correct. S. Plumb."

The 14th of the same month, the plaintiff made a copy of this ledger account, and gave it to the defendant as the bill due from him to the plaintiff, in pursuance of their agreement. The defendant examined the bill, obtained the labor and material bills, made inquiries among the men who furnished materials whether the prices of the materials were correct, and found that they were correct. The defendant made no objection to the bill rendered as regards amount or price, except the claim that one item of 83 cents was charged twice; but the defendant did object to the total amount of the bill, and refused payment. Subsequently Plumb, as an original contractor, placed a mechanics' lien on the land upon which the house stood, to enforce payment for its construction, and brought an action against the defendant for the foreclosure of said lien. The plaintiff then brought an action against Plumb to recover the money paid for the cost of the house, and garnished the defendant as the

debtor of Plumb. Subsequently, Plumb assigned to the plaintiff his interest in said mechanics' lien, and in the sum due from the defendant to Plumb for the construction of the house; and the plaintiff then withdrew his action against Plumb, and became substituted as party plaintiff in the action to foreclose said lien. The action of foreclosure was tried, and in December, 1892, judgment was rendered in favor of Bradley, the present defendant. By the record of the judgment, it appeared that the court found that the lien had been made and recorded, and had been assigned to the plaintiff, who became sole owner, and was the actual and bona fide holder and owner of the chose in action; but that the contract for the building of the house had not been made with Simeon Plumb, as alleged in the complaint; and that neither he nor the plaintiff, as his assignee, was entitled to foreclose the same. After this judgment was rendered, the plaintiff brought the present action.

The complaint follows the form called the "common counts," authorized for the commencement of an action. The counts relied on are those for money paid, goods sold and delivered, goods bargained and sold, and work performed and materials furnished, under which counts a bill of particulars was filed, detailing each item that the plaintiff claimed entered into the cost of the house, and also the count for money due on account stated, under which count the bill rendered the defendant in March, 1891, was filed as the bill of particulars. The answer is a general denial. Upon the trial there appears to have been no contest as to the fact that the plaintiff had paid for the construction of the house, and no serious contest as to the accuracy of his account as rendered. The claim of the defendant appears to have been in the alternative,—either the defendant's contract was made with the plaintiff for a fixed price, or the contract was made only with Plumb, and therefore the plaintiff has no cause of action against the defendant; the position of the defendant under the latter claim, which was the one mainly relied on in argument, being that, having induced the court in the former action to hold that the contract was not with Plumb, he had escaped all liability on that ground, and, if he now induced the court to hold that the contract was made with Plumb, he would escape all liability whatever, and secure his house without any payment, obtaining judicial sanction for the practical theft, under two contradictory judgments. So far as the record shows, the main question at issue was: What agreement, if any, had the defendant made with the plaintiff? It was not claimed on the trial that any question of law was involved in the determination of this issue, and the court found from the evidence that there was an agreement between the plaintiff, Plumb, and the defendant "that Plumb should perform work in erecting a house for the defendant on this lot. Plumb, as carpenter, was to work by the day, under the defendant's directions, at twenty-five cents an hour, and was to employ other carpenters at the same rate. He was also to order materials and work other than

carpenter work for the house, and have the bills for the same charged to the plaintiff. The plaintiff, at the request of the defendant, agreed to be responsible and liable for all such materials and other work as Plumb should order for the house, and advance the money for the payment of them, and also to advance money to Plumb from time to time as he might require to meet his weekly pay rolls. The defendant agreed that on the completion of the house, in consideration of the money thus to be advanced by the plaintiff for the building of said house, and in consideration of the building of the same, he would repay the plaintiff the total amount of the moneys so paid out by the plaintiff." Upon these facts, the court rendered judgment that the plaintiff recover of the defendant the sum of \$2,974.51, such sum being, as the court found, the total amount paid by the plaintiff in pursuance of that agreement, with interest. From this judgment the defendant appeals.

The appeal contains two distinct grounds for an appeal from the judgment:

1. Because the evidence introduced on the trial, and printed in the record, does not support the facts found by the court below, but does support a different state of facts claimed by the defendant, and which the court below found were not proved by the evidence. The law does not authorize an appeal from the judgment of a trial court for such reasons, and this court will not take jurisdiction of such appeal. *Styles v. Tyler*, 64 Conn. 432. The record discloses no reason for the correction of the appeal on the ground that the finding of facts does not fairly present the questions of law actually raised and decided.

2. Because the defendant is entitled to a new trial on account of errors alleged to have been made in the admission of evidence. Under this ground of appeal four errors are assigned:

First. The plaintiff offered in evidence certain slips of paper, testifying that Plumb came to the store each Saturday during the building of the house, and gave him the names of the men employed by him during the week, and their time; that the plaintiff wrote down at the time, in the presence of Plumb, on these slips, these names, the hours of time, the amount due each man, the total amount due, and the date; that he paid Plumb the total amount of money called for by each slip, and filed the slip on a spindle; and that he had no personal knowledge of the facts so stated to him by Plumb, and so written by him on the slips, but that he made such memoranda correctly as Plumb then stated the facts to be. Plumb had already testified that he had employed these men on the Bradley house, and that the slips of paper were correct statements of the facts of each case as far as he could recollect; that he knew them to be correct when made; and that he had given the names, hours of time, and the amounts to the plaintiff, in the manner that the plaintiff subsequently testified; and that, after deducting his own wages, he paid each man the amount due him. This evidence was offered to prove that the plaintiff had incurred liabilities and paid out

moneys upon the order of and as required by Plumb, as agent for the defendant, in the manner agreed upon by the parties, and to prove the correctness of the items and prices. The defendant objected to the introduction of these slips, and to the testimony of the plaintiff and of Plumb as shown. The court admitted the slips, not as themselves evidence apart from the oral testimony, but as memoranda made at the time and in the manner shown, and to be used by the witnesses Plumb and Curtis in the manner indicated. The witnesses reading the contents of the slips, and admitted the testimony of Curtis and Plumb in connection with them as stated. Said slips were marked as exhibits.

Second. The plaintiff offered in evidence certain bills, testifying that they were rendered him from time to time, and that he went over the bills with Plumb, in the defendant's absence, at various times as they came due, while the house was building or upon its completion; that some of these bills were exclusively for materials and work for the defendant Bradley's house, and some contained other items not for that house, and Plumb picked out the items of material and work that went into the Bradley house, and stated that the items and prices were correct; that when the designation "Bradley house" was not in the body of the bill when rendered, as it was in many bills, he (the plaintiff) wrote it in at the time in Plumb's presence, and correctly as given to him, and that he also made the check marks appearing on the bills when offered in evidence, to indicate Plumb's assent to the correctness of the items and prices; that these check marks were made in Plumb's presence, and correctly, as then stated by him to the plaintiff; and that he could not recall those items or prices without referring to the bills and memoranda made on them at the time. Plumb had already testified that he had given the orders to the persons thus rendering bills to the plaintiff, and that he had gone over these bills in the manner that the plaintiff testified, and that he had stated to the plaintiff that the items and prices as picked out were correct, and that these items represented materials and labor that had gone into the house, and that he had no recollection of the details of those items independently of the bills and the memoranda upon them, which he had seen at the time, and which he then knew to be correct. This evidence was offered to prove that the plaintiff had incurred liabilities and paid out money as required and ordered by Plumb as agent for the defendant, in the manner agreed by the parties, the correctness of the items and prices, and that the materials went into the Bradley house. The defendant objected to the introduction of the bills, and to the testimony of the plaintiff and of Plumb as above set forth. The court did not admit the bills, marked and designated as stated, as themselves evidence apart from the oral testimony, but admitted them as memoranda made or seen by witnesses who at the time either had knowledge of their truth or made them upon the statements of one who had such knowledge at the time, and to be used by witnesses in

the manner shown, the witnesses reading their contents as marked, and their value depending upon the oral testimony accompanying them, and admitted the testimony of the plaintiff and Plumb as stated above.

There is no error in the above rulings. The court found that Plumb was authorized by the defendant to perform and to employ the labor on the house, and present his weekly pay rolls to the plaintiff; also, to order other work and materials for the house, and present the bills for such materials and work to the plaintiff; that the plaintiff was authorized by the defendant to pay to Plumb such weekly pay rolls, and to pay such bills for materials and work so ordered by Plumb, and charge the amounts of the pay rolls and bills so paid by him against the defendant. The court was bound to admit the testimony of the plaintiff and of Plumb as to the liabilities incurred and the payments made under such authority. The use of the slips and bills made at the time of the transaction, and known to the witnesses to have been correctly made, as memoranda to be used by them in connection with their oral testimony, comes within the settled rules of evidence. "A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if, when he read it, he knew it to be correct." Stephen, Dig. Ev. art. 186. "How far papers not evidence *per se*, but proved to have been true statements of fact at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry, and it has many times been decided that they are to be received. And why should they not be? Quantities and values are retained in the memory with great difficulty. If, at a time when an entry of aggregate quantities or values was made, the witness knew it was correct, it is hard to see why it is not at least as reliable as the memory of the witness." *Republican F. Ins. Co. v. Weide*, 81 U. S. 14 Wall. 380, 20 L. ed. 895; *Bridge-water v. Roxbury*, 54 Conn. 218.

The defendant also claims error in marking the slips as exhibits, on the ground that, if they might properly be read by the witness, they are not themselves admissible as evidence. Courts in other jurisdictions have made different rulings as to the admissibility of such a writing. In England it is excluded. In Massachusetts and some other states it is excluded. *Costello v. Crowell*, 183 Mass. 355; *Morrison v. Chapin*, 97 Mass. 72; *Dugan v. Mahoney*, 11 Allen, 572. In Vermont it seems to be treated as evidence. *Lapham v. Kelly*, 35 Vt. 195. In New York and some other states the writing is admitted as evidence. *Guy v. Mead*, 22 N. Y. 462, 465; *New York v. Second Ave. R. Co.* 102 N. Y. 572, 55 Am. Rep. 839; *Haven v. Wendell*, 11 N. H. 112; *Kelsea v. Fletcher*, 48 N. H.

262; *State v. Rawls*, 2 Nott & McC. 381; *Pearson v. Wightman*, 1 Mill, Const. 386, 12 Am. Dec. 636; *Owens v. State*, 67 Md. 307; *Anchor Mill. Co. v. Walsh*, 108 Mo. 277. In the federal jurisdiction the question is still open. In *Republican F. Ins. Co. v. Weiss*, *supra*, the court indicates the admissibility of the evidence; but the opinion in *Bates v. Preble*, 151 U. S. 155, 38 L. ed. 109, shows that the court is not committed to the general doctrine that such memoranda are admissible for any other purpose than to refresh the memory of the witness. We do not attempt to cite all the cases bearing on the question, or to weigh the conflicting authorities; for we are satisfied, on principle, that the evidence in question is admissible. The discussion would be endless, unless confined to the precise question presented, which may be stated as follows: The litigated question is, Did the plaintiff pay to the agent of the defendant a certain sum on a certain date, as wages due for labor performed by a certain man employed by the agent? The plaintiff and the agent testify that a sum was paid for such purpose; that at the time of payment the agent gave to the plaintiff the exact amount due, and the name of the employé entitled to the same, and the plaintiff then, in the presence of the agent, wrote on a piece of paper the date, the amount, and the name; that these items, as then written by the plaintiff, were correct; that the paper produced in court is the identical paper then written upon by the plaintiff, and since unchanged; that they have no recollection, either before or after examining the paper, of the date, the amount, or the name. Is that paper admissible as evidence? All courts concur in holding that the witness may read the statement of such paper to the jury, and that the jury may draw the conclusion that the statement so read to them is a true statement of the facts; but some courts hold that the paper is not evidence. It seems to us to be pressing the use of a legal fiction too far for a court to permit the statement made by such paper to be read as evidence, while holding that the law forbids the admission as evidence of the paper which is the original and only proof of the statement admitted. In other words, it would seem as if, in admitting the paper to be so read, the court, of necessity, admitted the paper as evidence, and therefore, by the concurrent authority of all courts, the paper is itself admissible. But, waiving the question whether, in admitting such paper to be read, the courts have gone so far as to make the denial of its admissibility no longer tenable, we will deal with the matter as if wholly undecided. Is the paper itself admissible as evidence? Its admissibility, in the first instance, depends on its relevancy. Of this there can be no doubt. Being relevant, it must be admitted, unless excluded under some legal principle or rule of public policy which forbids the admission of certain classes of evidence, no matter how relevant and material. It cannot be said that the paper is not capable in its nature of being treated as competent evidence. Legal evidence is not confined to the human voice or oral testimony; it in-

cludes every tangible object capable of making a truthful statement, such evidence being roughly classified as documentary evidence. In oral evidence the witness is the man who speaks; in documentary evidence the witness is the thing that speaks. In either case the witness must be competent,—i. e. must be deemed competent to make a truthful statement. And in either case the competency of the witness must be proved before the evidence is admitted; the difference being that in oral evidence the competency is proved by a legal presumption, and in documentary evidence the competency must be proved by actual testimony, and the further difference that in oral evidence the credit of the witness is tested by his own cross-examination, while in documentary evidence the credit of the witness is tested by the cross-examination of those who must be called to prove its competency.

The competency of this paper is clearly established by the testimony, and it would seem to follow, of necessity, that it should be admitted on the same ground that any relevant and material documentary evidence, proved to be competent, is admitted. The doubt has arisen from the complication of the admissibility of such paper with the right of a witness to refresh his memory. In fact, the two questions may be entirely distinct. The right of a witness to refresh his memory is a settled and necessary rule of evidence. The application of that rule is often difficult, involving delicate distinctions. We are not called upon now to draw the line which limits the right of a witness to the use of such aids as, under the subtle laws of association, serve to refresh his memory. All courts recognize that right, and rightly hold that the thing used to refresh the memory is not, by reason of such use, itself admissible as evidence. When, in the application of the rule, a document like the one in question was presented to the witness, and absolutely failed to refresh his memory, its exclusion as a means of refreshing his memory became imperative; but the evidence of the document was so clearly essential to a fair and just trial that its use in some form seemed also imperative. Instead of treating the paper as itself competent documentary evidence, resort was had to a palpable fiction. The paper is read by the witness, and the knowledge the witness once had of the facts stated by the paper is imputed to him as still existing, and the statement of the paper is received as the testimony of the witness, and the paper itself, the only witness capable of making the statement, is excluded. The use of such a fiction in the administration of justice can rarely, if ever, be justified. It is certainly uncalled for in this instance. The principles of law invoked to justify the fiction are amply sufficient to support, indeed to demand, the admission of the document as evidence. There is no occasion to sacrifice truth in order to secure justice. As regards its admissibility as evidence, there is no substantial difference between this paper and any other tangible object capable of making a truthful and relevant statement. It is true that a writing may be a mere declaration,

and practically equivalent to a spoken declaration, and so be excluded as hearsay evidence. This possibility has played a conspicuous part in the discussions that have finally resulted in the admission as evidence of account books, whether kept by a clerk or by a party to the suit (a subject closely related to the one in hand, but involving too large a field to justify an attempt to define that relation). But it is also true that a writing may, by reason of the circumstances under which it was made, be a documentary witness to the fact the paper itself tends to prove, and this, although the particular writing may also in a certain sense be a declaration. Indeed, nearly all documentary evidence is in a certain sense a declaration; yet it is admitted as a witness, not of a declaration, but of a fact. We think this paper is admissible as a documentary witness. Suppose the litigated question turns on the dimensions of a man's foot. A witness produces a plaster cast of the foot. The testimony conclusively shows that the cast was so taken that it can state accurately the dimensions of the foot. Another witness produces a paper on which the exact measurements are written. The testimony conclusively shows that the paper also was so made that it can state accurately the dimensions of the foot. Is it not evident that the paper and the cast is each a witness to the fact that each tends to prove? How does the paper now in question differ? Upon this paper was stamped an accurate delineation of existing facts. In the one case the fact stated by the document relates to a physical object, and in the other to a mental object; but in both cases the fact is clearly relevant and accurately stated by the document. It is immaterial whether or not a critical analysis may impute to these documents, to a greater or less degree, some element of a declaration; the controlling principle of law is not based on such refinements. If there is any element of a declaration, it does not make the document in a legal sense a declaration. The conditions required by law to make such documents legal evidence are: The substance offered as a witness must be proved to have been made or found and preserved in such manner that it states directly, accurately, and truly a fact relevant and material to the issue. The paper claimed as evidence in this case fulfills these conditions.

In the discussions on the admissibility of account books, it has often been assumed that such books are declarations, and are admitted as exceptions to the class of hearsay evidence. Without stopping to consider whether such ground for the admission of account books is logically accurate, and, if so, whether the same reasoning applies to this paper, we will assume that it may be classed as hearsay evidence. It should then be admitted as an exception to the rule excluding such evidence. The limits of the field covered by the term "hearsay evidence" are so uncertain, and the exceptions are so many and important, that it is often very difficult to draw the distinction between those matters that are admitted as not subject to the rule and those that are subject to the rule, but ex-

cepted from its operation. It is significant that most matters supposed to be covered by the rule, whose relevancy and materiality come to be recognized as so close and clear that their admission seems essential, come to be classed as exceptions to the rule. If this paper must be classed as a declaration and hearsay evidence, it must also be classed as an exception to the operation of the rule. The reasons on which the rule is founded plainly do not apply to such evidence, and the arguments adduced in support of the admissibility of this paper as original evidence are sufficient to demonstrate that it does not come within the reason of the rule excluding hearsay evidence. Whether this paper is not within the scope of hearsay evidence, or, being hearsay evidence, is excepted from the operation of the rule, as not within its reason, is immaterial so far as concerns the question of admissibility, though the distinction may be quite material as affecting the symmetry of the law of evidence, and the clear understanding of the underlying principles that must control the development of that law. It does not, however, necessarily follow from the admissibility of such evidence that the document should be sent to the jury room. Under the general rule of practice, the jury must depend on their memory in the case of oral testimony, but may take documentary evidence to their consultation. But there is a difference in documentary evidence. Some is not given to the jury, either because its possession is agreed to be of no consequence or is inconvenient, or the document is of such a nature that it testifies to facts not relevant, in addition to the relevant facts. It might be claimed in the case of some writings offered in proof of the facts stated by the writing that a jury would confuse the effect to be given such writing with the peculiar effect sometimes given to a record or a deed, and so give an illegal weight to the evidence. Possibly, some such consideration may have had influence in keeping such writings from the jury; but, whatever force such a consideration may once have had, it is entitled to little weight under the present policy of the law, which tends to submit to the jury all relevant and material evidence, and even trusts them to discriminate the allowance to be made for the interest of a party to the suit, or the character of a convicted felon. If the writing admitted in evidence clearly tends to prove nothing but the fact that it was admitted to prove, it should go to the jury. If, by reason of peculiar circumstances, it clearly may be treated by the jury as evidence of other facts not admissible, it should not go to the jury. Between the two extremes the question is largely one of discretion in the trial judge.

In the present case it is clear that the writing could only be used for its legitimate purpose, and that the court did not err in marking it as an exhibit. The conditions under which the general question we have discussed may arise are so various, and the different principles that may be involved in each case are so related, that there is special need to confine the application of the views

expressed strictly to the particular question presented in this case. The only point now decided is: A memorandum of details which are essential to the full proof of a transaction at issue, proved to have been made substantially at the time of the transaction, and under such circumstances that the memorandum can make a correct statement of such details as they were then known to the person who made the memorandum or saw it made, and who is himself a witness and testifies to the transaction, but has lost all recollection of such details, is, in connection with the testimony of such witness, admissible as evidence, because such memorandum is in itself evidence of a fact closely relevant, plainly material, and essential to a just trial, and because no principle of the law of evidence or rule of public policy justifies its exclusion; and such memorandum may properly be marked as an exhibit.

Third. The persons rendering the bills above mentioned testified that the bills as a whole were correct as regards amounts and prices, and that, when the body of the original bill indicated what items went to the Bradley house, those items of material and labor were ordered for that house by Plumb. The defendant excepted to the admission of the testimony of these persons. The error assigned by the defendant is that the court erred in allowing the evidence of the parties furnishing this material, to the effect "that, where the body of the original bill indicated what item went to the Bradley house, these items of materials and labor were ordered for that house by Plumb." The fact that the money paid by the plaintiff was paid for materials used in building the house, and ordered for that purpose by Plumb, as the agent of the defendant, was a fact in issue; and the testimony of the persons from whom it was claimed that Plumb had so or-

dered such materials, that he had in fact ordered the same, was relevant to that issue. The use by such witnesses in their testimony of the bills made by them at the time, in pursuance of such orders from Plumb, and of the written memoranda made by them at the time to the effect that Plumb, the agent of the defendant, ordered the materials specified for the defendant's house, is plainly authorized by law.

Fourth. The plaintiff offered the record of the judgment above mentioned, in the case of Curtis, assignee of Plumb, against Bradley, for the purpose of showing that in this case the defendant was estopped from claiming that the contract for the erection of the house was made with Plumb. The court admitted the record against the objection of the defendant. The fact that the contract for the construction of the house was not made with Plumb was one material fact at issue in this case, and the plaintiff was entitled to show that the defendant was estopped from claiming that the contract was made with Plumb. It is not claimed that the record of a judgment in a case between the same parties, which appears on its face to have adjudicated a matter in issue between them in a subsequent action, is not admissible in the latter suit in support of a claim of estoppel; but the claim is that in this case the parties to the record offered were not the same as the parties to the present suit. This claim has no foundation in fact. The plaintiff in this suit was the actual plaintiff in the former action, and, moreover, was substituted for the nominal plaintiff, and by such substitution became also the plaintiff of record. Gen. Stat. §§ 981, 987-989; *Buckingham's App.* 60 Conn. 143.

A new trial is denied.

The other Judges concur.

ILLINOIS SUPREME COURT.

Lucinda WHITCOMB *et al.*, *Plffs. in Err.*,
v.

Edward L. RODMAN *et al.*

(186 Ill. 116.)

1. In the construction of a will the important question always is to ascertain the intention of the testator.
2. A testator will be presumed to have intended to dispose of his whole estate unless the presumption is rebutted by the provisions of the will or evidence to the contrary.

3. Extrinsic evidence is admissible to determine as to the existence of latent ambiguity in a will and enable the court to look upon the will in the light of the facts and circumstances surrounding the testator at the time it was made for the purpose of determining his intention, although not to contradict or add to its terms.

4. In a will by which a testator owning 180 acres of land evidently intended to devise the whole in terms giving parcels amounting altogether to 180 acres, a devise of parcels described as certain quarters of a designated quarter section which the testator does not

NOTE.—In the case of *Bingel v. Volz*, 16 L. R. A. 321, the supreme court of Illinois denied the power to show by parol evidence that the "northwest" quarter of a certain section of land was by mistake named in a devise when the "southwest" quarter was intended. That case seems to be overruled in effect without being mentioned by the court in the present case. In *Bingel v. Volz*, as well as in the present case, the mistake was in describing land which the testator did not own while the land clearly intended to be devised was left entirely undisposed of by will in consequence of the mistake.

The only material difference in the circumstances
28 L. R. A.

of the two cases seems to be that in the present case the mistake in description also involves an overlapping of the descriptions of the devisees.

The manifest miscarriage of the testator's intent resulting from such decisions as that of *Bingel v. Volz*, makes them repugnant to the sense of justice even if conceded to be in accordance with strict legal rules. But we believe that the present decision not only works a more satisfactory result but is better supported by the authorities. See cases cited in note to *Bingel v. Volz*, 16 L. R. A. 321 and the later case of *Eckford v. Eckford* (Iowa) 38 L. R. A. 370.

own except as to a portion of one of such quarters devised by another clause to the devise of such quarter will be construed to cover two quarters of a quarter section owned by the testator lying adjacent to those described and which will otherwise be undisposed of, where, by eliminating the descriptive words applied to such quarters, sufficient is left in the devise to designate such parcels with the aid of extrinsic evidence.

(April 2, 1886.)

ERROR to the Circuit Court for McLean County to review a decree in favor of complainants in a proceeding instituted to obtain construction of the will of John Rodman, deceased, and to quiet complainant's title to certain lands alleged to have been devised by the will. *Affirmed.*

Statement by Craig, J.:

This was a bill brought by Edward L. Rodman, Joseph L. Rodman, and Mary J. Rodman against the heirs and other devisees of John Rodman, deceased, to construe the will of deceased and to quiet title to certain lands alleged to have been devised by the will.

John Rodman died testate July 30, 1889. At the time of his death he owned in fee: The northwest quarter of the northeast quarter of section 27; sixty acres off of the west side of the southeast quarter of section 22; the southwest quarter of the northeast quarter of section 22; and the southeast quarter of the northeast quarter of section 22,—all in township 23 north, range 8 east, in McLean county.

He left surviving him Mary Jane Rodman, his widow, and his only heirs-at-law, his children, Ann Eliza Boyce, Joseph L. Rodman, Edward L. Rodman, Lucinda Whitcomb, and his grandchild, Mary Eveline King, the sole heir and child of his deceased daughter, Margaret A. Craig.

The will was executed October 17, 1888,

No. 1.

	40 a	40 a
22		
	60 a	
	40 a	
27		

and admitted to probate July 19, 1889, and was as follows:

"First. I will to my daughter, Ann Eliza Boyce, forty (40) acres of land, being the northwest quarter of the northeast quarter of section twenty-seven (27).

"Second. To my son, Joseph L. Rodman I will and bequeath one hundred acres of land (100)—sixty acres (60) off of the west side of the southeast quarter of section twenty-two (22), forty acres (40) being the northwest quarter of the southeast quarter of section twenty-two (22).

"Third. To my son, Edward L. Rodman, I will and bequeath forty acres of land, being the northeast quarter of the southeast quarter of section twenty-two (22).

"Fourth. I give to my daughter, Lucinda Whitcomb, two thousand dollars (\$2,000).

"Fifth. To my granddaughter, Mary Eveline King, I give two hundred dollars (\$200).

"The above legacies to be paid out of moneys and credits on hand and proceeds of the sale of personal property. All of the above land being in town twenty-three (23) north, range three (8) east of the third principal meridian."

The will contained a sixth clause in which certain personal property was devised to the widow and she was also given the control of the above-described lands during her life.

It will be observed that the two forty-acre tracts S. W. N. E. 22 and S. E. N. E. 22, owned by the testator, are not mentioned in the will, and that the testator never owned the N. E. of S. E. 22 which is devised to Edward L. Rodman, and that the forty acres devised to Joseph L. Rodman laps on to the sixty acres devised to him and includes within it the north thirty acres of the sixty acres and that he did not own the east ten acres of the N. W. qr. of S. E. qr. which is devised to Joseph. The situation will be better understood by the following plats of the land, No. 1 being the land owned by the testator and No. 2 that specifically named in the will:

No. 2.

			not devised
22			
	Joseph L	L	Edward L
	Joseph L		
		Ann E. Boyce.	
27			

The testator when he executed the will and at the time of his death was in the possession of the lands owned by him; he owned no other lands.

The bill prayed for a construction of the will and that the lands he held to have vested under the will: The S. E. qr. of N. E. qr. of section 22 in Edward L. Rodman and the S. W. qr. of N. E. qr. in Joseph L. Rodman, and that the widow be held to have a life estate in all the lands. The answer practically admitted the facts set up in the bill but denied that it was the intention of the testator to devise the two forty-acre tracts in N. E. qr. of section 22, or that the will was capable of that construction, and claimed that said lands descended as intestate estate. The court on the hearing decreed substantially as prayed for in the bill.

Messrs. Kerrick, Lucas & Spencer for plaintiffs in error.

Messrs. Benjamin & Morrissey, for defendants in error:

In every case calling for construction, the question of first importance is, What was the testator's intention?

Decker v. Decker, 121 Ill. 354.

It is presumed that a testator, when he makes and publishes his will, intends to dispose of the whole of his estate, unless the presumption is rebutted by its provisions, or otherwise by evidence to the contrary.

Higgins v. Duen, 100 Ill. 554; *Womans Union Missionary Soc. of America v. Mead*, 131 Ill. 338.

Evidence *dhors* the will, as to facts and circumstances surrounding the testator, is admissible to correct, as to its effect, a mistake apparent on the face of the will, or to explain some latent ambiguity.

Snyder v. Warbasse, 11 N. J. Eq. 463; *Wood v. White*, 32 Me. 340, 52 Am. Dec. 654; *Pocock v. Reifinger*, 108 Ind. 573, 58 Am. Rep. 71; *Creasy v. Alverson*, 43 Mo. 13; *Patch v. White*, 117 U. S. 210, 29 L. ed. 860; *Decker v. Decker*, 121 Ill. 341; *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581; *Seebrook v. Fedawa*, 33 Neb. 413; *Colcord v. Alexander*, 67 Ill. 581; *Mason v. Merrill*, 129 Ill. 503.

The words of the will may be interchanged or transposed to carry into effect the general intent of the testator.

Jarman, Wills, 508; *Ferry's App.* 102 Pa. 310; *Ex parte Hornby*, 2 Bradf. 420.

Craig, J., delivered the opinion of the court:

In the construction of a will the important question always is, What was the intention of the testator? As was well said by Chief Justice Marshall in *Pinlay v. King*, 28 U. S. 3 Pet. 346, 7 L. ed. 701: "The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected, or so restrained in their application, as materially to change the literal meaning of the particular sentence." See also *Decker v. Decker*, 121 Ill. 354.

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It will be presumed that a person when he makes and publishes a will intends to dispose of his whole estate unless the presumption is rebutted by its provisions or evidence to the contrary. *Higgins v. Duen*, 100 Ill. 556; *Womans Union Missionary Soc. of America v. Mead*, 131 Ill. 358; 2 Redf. Wills, 35.

Upon an examination of the will in this case nothing will be found tending in the least to establish an intention on the part of the testator to leave any portion of his property to descend as intestate estate. On the other hand, in view of the property owned by the testator it is manifest from the language of the will that the testator intended to devise his entire estate. When the will was executed and at the time of the testator's death he owned 180 acres of land and no more. Of this the testator as is manifest from the will attempted to devise 100 acres to his son Joseph, 40 acres to his son Edward, and 40 acres to his daughter Ann Eliza Boyce, making 180 acres, all the land possessed by the testator. But while it is manifest that the testator intended to dispose of all the lands he possessed yet the language of the will as found in the second and third clauses if construed literally as written will defeat the plain intention of the testator. Shall that be done or shall resort be had to extrinsic evidence to ascertain the real intent of the testator. In the consideration of a question of this character in *Decker v. Decker*, *supra*, it was said: "While the general rule is that the intention of the testator is to be gathered from an inspection and consideration of the will and from no other source, yet in case of latent ambiguity courts do and must listen to extrinsic evidence, not for the purpose of contradicting or adding to the terms of the will, . . . but for the purpose of determining the existence or non-existence of latent ambiguity . . . and for the further purpose of enabling the court to look upon the will in the light of the facts and circumstances surrounding the testator at the time the will was made, whereby to determine the intention of the testator."

Wigram on Extrinsic Evidence in the Interpretation of Wills, after citing cases to prove that extrinsic evidence may be resorted to, says: "They may be multiplied without end," and adds: "They appear to justify the conclusion that every claimant under a will has a right to require that a court of construction, in the execution of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator the meaning of whose language it is called upon to declare." Quoted with approval in *Womans Union Missionary Soc. of America v. Mead*, 131 Ill. 362.

In *Patch v. White*, 117 U. S. 210-217, 29 L. ed. 860-864, it is said: "A latent ambiguity in a will, which may be removed by extrinsic evidence, may arise: (1) Either when it names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer such name or description; or (2) when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not

the one intended, or the thing does not belong to the testator."

After citing cases the court concludes: "By merely striking out the words 'six' and 'three' from the description of the will, as not applicable (unless interchanged) to any lot which the testator owned . . . the residue of the description in view of the context so exactly applies to the lot in question that we have no hesitation in saying that it was lawfully devised to Henry Walker." P. 220.

In *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581, in considering a question of this character, the court said: "We apprehend there can be no question of the admissibility of extraneous oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was in at the time he made the will in question. This, we think, is unquestionably the rule established by the decided cases. This being done, it appears that the testator had no such lots as those described as lots 1 and 2, in the particular block named. This renders it certain that the lots named were erroneous, and the words describing them can have no possible operation, and must be rejected."

In *Decker v. Decker*, *supra*, by the terms of the will the testator devised twenty acres off the west half of N. E. qr. of N. E. qr. of sec. 33 T. 18 N. R. 11 W. The evidence however, showed that the testator never owned N. E. of N. E. qr. of 33 or any part of it but he did own the N. W. qr. of N. E. qr. of the section. It was held that there was a latent ambiguity in the devise the descriptive words of the land devised being in part false, that the false description might be stricken out and the devise sustained as embracing the land owned by the testator. Keeping in view the foregoing rules of construction it seems plain that the testator did not intend to leave the two forty-acre tracts in N. E. qr. of sec. 22 to descend as intestate estate. He in plain words devised to Joseph 100 acres of land and then follows with a particular description—that is 60 acres off of the west side of the S. E. qr. of sec. 22 and 40 acres being the N. W. qr. of the S. E. qr. of sec. 22. Thereby the forty-acre tract was made to overlap the north 80 acres of the 60 acres which were to be a part of the 100 acres devised to Joseph. The east 10 acres of the 40 devised to Joseph the testator never owned, so that the general purpose to devise to Joseph 100 acres would be defeated and he would take but 60 acres under the devise and the adjoining 40 acres on the north of the 60 acres is left undevise and the general intent for the disposition of the entire tract would be defeated.

It is also apparent that the purpose of the testator as expressed in the will was to give his son Edward L. Rodman forty acres of land. Indeed the will says: "To my son Edward L. Rodman I will and bequeath forty acres of land." The land is then described as the N. E. qr. of the S. E. qr. of sec. 22, land which the testator never owned, 28 L. R. A.

but he did own 40 acres lying directly north of the 40-acre tract described which was known as S. E. qr. of N. E. qr. of sec. 22. If the will is to be construed as contended for by plaintiffs in error the devise of 40 acres of land to Edward will be defeated entirely and the intention of the testator will be disregarded. If therefore by any of the recognized rules of construction the will may be so construed as to give the language of the testator effect, and thus carry out the evident intention not only to dispose of his entire estate but to give to his sons Joseph and Edward the land intended to be devised to them it is the duty of the court to adopt that construction. Redf. Wills, *469, says: "Where the testator misdescribes his estate as being in different localities from the fact, putting one estate in the locality of another and *vice versa*, it was held that where sufficient appeared upon the face of the will as applied to the subject-matter to show that such misdescription was a mere mistake either in the testator or the person who drew up the will, that it would not have the effect to defeat the obvious intention of the testator." While words cannot be added to a will yet in arriving at the intention of the testator as has been shown by the authorities so much as is false in the description of the premises devised may be stricken out, and after striking out the false description if enough remains to identify the premises intended to be devised the will may be read and construed with the false words eliminated therefrom. Adopting that rule here the second and third clauses will read as follows:

"Second. To my son, Joseph L. Rodman, I will and bequeath one hundred acres of land (100)—sixty acres (60) off of the west side of the southeast quarter of section twenty-two (22), forty acres (40), being the . . . quarter of the . . . quarter of section twenty-two (22)."

"Third. To my son, Edward L. Rodman, I will and bequeath forty acres of land, being the . . . quarter of the . . . quarter of section twenty-two (22)."

Bearing in mind that the testator owned two forty-acre tracts in N. E. qr. of sec. 22, and reading the two clauses of the will in the light of surrounding circumstances, we think all difficulty is removed in regard to the lands devised by these two provisions of the will. The testator owning two quarters of a quarter of section 22 devised one quarter to his son Joseph and the other quarter to his son Edward and the two sons took and held the two tracts undivided. The circuit court in its decree held that the two 40-acre tracts were devised by the will, the S. W. 40 to Joseph, and the S. E. 40 to Edward; in this respect we think the court erred, but as the error was one which did not affect plaintiffs in error, they having no interest whatever in the premises, the error was one which did no harm and hence no ground for reversing the decree.

The decree of the Circuit Court will be affirmed.

ARKANSAS SUPREME COURT.

STATE of Arkansas, *ex rel.* E. B. KINSWORTHY, *Atty-Gen.*,
v.

Joseph W. MARTIN.

(30 Ark. 342.)

The power of the legislature to provide for more than one judge in a judicial circuit is not limited by the provision of Const., art. 7, § 13, that for each circuit "a judge" shall be elected.

(March 18, 1895.)

PETITION for a writ of quo warranto to determine by what authority respondent was exercising the office of judge of the Circuit Court and to oust him therefrom. *Writ discharged.*

Statement by Wood, J.:

On the 8th day of February, 1895, the legislature passed an act entitled "An act to provide for an additional circuit judge for the sixth judicial circuit, and to regulate the practice in the circuit court of Pulaski county." The act, commencing with the preamble, is as follows: "Whereas, the increase of population and of judicial business in the sixth judicial circuit of which Pulaski county is a part, is so great that the courts provided by law cannot protect the people in their constitutional right to obtain justice promptly and without delay, and in criminal prosecutions cannot afford the accused a speedy trial as guaranteed by the constitution; therefore, be it enacted by the general assembly of the state of Arkansas, that: Section 1. Hereafter there shall be an additional judge of the circuit court for the sixth judicial circuit. Sec. 2. The circuit court of Pulaski county shall be divided into two divisions, to be known as the first and second divisions. Sec. 3. The circuit judge now in office shall hold the court for the first division, the judge provided for by this act shall hold the court for the second division, and their successors shall severally do the like, and said judges shall be elected and appointed for each division separately. Where the dispatch of the business of the court shall render it expedient, either judge may hold the court of the other division." Acts 1895, chap. 7, p. 9. The remaining sections provide for the method of procedure in the respective divisions, the holding of court in Perry county by either judge, payment of salary, etc. It is unnecessary, for the purposes of this decision, to set them out. On the 12th day of February, 1895, the governor appointed Joseph W. Martin, Esq., "as judge of the circuit court for the second division of the sixth judicial

district." On the same day he received his commission from the governor, and qualified as the law provides, and entered upon the discharge of the duties of the office. The state, through her attorney-general, filed an information with the clerk of this court, and applied for a writ of quo warranto. The respondent waived the writ, entered his appearance, and filed his response setting up his authority to hold the office by virtue of the act above recited, and his appointment and commission by the governor. The state demurs to the response, and the question arises on the demurrer.

Messrs. E. B. Kinsworthy, Atty-Gen., John M. Rose, and Williams & Bradshaw, for petitioner.

Messrs. Rose, Hemingway & Rose, S. R. Cockrill, J. M. Moore, Ratcliffe & Fletcher, Blackwood & Williams, Jones & McCain, and Morris Cohn, for respondent.

A constitution is framed for ages to come, and is designed to approach immortality as near as mortality can approach it.

Cohens v. Virginia, 19 U. S. 6 Wheat. 387, 5 L. ed. 287.

The powers of the different departments are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects.

Martin v. Hunter, 14 U. S. 1 Wheat. 326, 4 L. ed. 102.

No court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious end, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.

Prigg v. Pennsylvania, 41 U. S. 16 Pet. 612, 10 L. ed. 1088.

It is apparent that the constitutional convention intended to provide adequate means to administer the law in all the counties in the state.

Re Groff, 21 Neb. 647, 59 Am. Rep. 859.

The constitution should receive a fair and liberal interpretation so that the true objects of the grant may be promoted.

State v. Scott, 9 Ark. 276.

Every presumption is in favor of the constitutionality of an act passed by the legislature.

Neal v. Shinn, 49 Ark. 232; *Dabbs v. State*, 39 Ark. 355, 43 Am. Rep. 275; *Ex parte Reynolds*, 52 Ark. 389; *Eason v. State*, 11 Ark. 481; *Ex parte Jones*, 27 Ark. 352.

The words "a circuit judge" do not imply that there may not be more than one if more than one should be needed.

National Union Bank of Boston v. Copeland, 141 Mass. 257; *Thompson v. Wesleyan Newspaper Assn.* 8 C. B. 849; *European Cent. R. Co. v. Westall*, 6 Best & S. 970; *Smith v. Allen*, 31 Ark. 271.

If the constitution should receive the strict construction contended for, the government under it would soon become so hampered by technical rules that a new constitution would be an imperative necessity every few years.

Whiting v. Beebe, 12 Ark. 563; *Hasle v.*

NOTE.—The constitutional construction made by the above case is so fully discussed therein as to need nothing further. The contention that the article "a" should be construed as equivalent to "one" raises a novel question of much practical importance in constitutional law, but which, in the light of the above opinion, can hardly be considered doubtful.

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State, 38 Ark. 564, 42 Am. Rep. 8; *Davis v. Gaines*, 48 Ark. 385; *Little Rock v. Little Rock Board of Improvements*, 43 Ark. 161; *State v. Nichols*, 26 Ark. 74, 7 Am. Rep. 600; *State v. Scott*, 9 Ark. 297; *State v. Crow*, 20 Ark. 212; *Neal v. Shinn*, 49 Ark. 227; *Vance v. Austell*, 45 Ark. 400; *Saunders v. Erwin*, 49 Ark. 870; *Scales v. State*, 47 Ark. 481, 58 Am. Rep. 768; *State v. Sorrells*, 15 Ark. 664; *Walker v. State*, 35 Ark. 390; *Danley v. Whiteley*, 14 Ark. 687; *St. Louis, I. M. & S. Railway v. State*, 47 Ark. 338; *Pulaski County Board of Equalization Cases*, 49 Ark. 519; *Williamson v. Mimms*, Id. 350.

The legislature may do anything not forbidden by the language of the constitution or by necessary implication from that language.

State v. Fairchild, 15 Ark. 623; *Lytle v. Half*, 75 Tex. 129; *Combs v. State*, 26 Ind. 98; *State v. Womack*, 4 Wash. 19; *Bone v. State*, 86 Ga. 108.

Wood, J., delivered the opinion of the court:

The state contends that the act is in conflict with section 13 of article 7 of the Constitution, which is as follows: "The state shall be divided into convenient circuits, each circuit to be made up of contiguous counties, for each of which circuits a judge shall be elected, who, during his continuance in office shall reside in and be a conservator of the peace within the circuit for which he shall have been elected." It is contended that the word or letter "a" before the word "judge" in the above section is a limitation upon the power of the legislature to provide for more than one judge in a judicial circuit. We must keep to the front certain familiar but unvarying rules when we come to interpret the provisions of any section of a constitution. (1) Unambiguous words need no interpretation. (2) Where construction is necessary, words must be given their obvious and natural meaning. (3) The words or provisions under consideration must be construed with reference to every other provision, so as to preserve harmony in the whole instrument. (4) The intent of the framers, gathered from both the letter and spirit of the instrument, is the law. *Potter's Dwarr. Stat.* 203, note 20; *Sedgw. Stat. & Const. L.* 195, 413; *Beavers v. State*, 60 Ark. 124; *State v. Scott*, 9 Ark. 271; *Hawkins v. Filkins*, 24 Ark. 288. Then, when we come to pass upon the constitutionality of an act of the legislature, we must remember that a state constitution is not a grant of enumerated powers. Its object is to outline the departments of government, and apportion its various powers among them. Having vested the lawmaking power in the legislature, it possesses that power in an absolute and unlimited degree, unless the restriction is found in the constitution itself. *Cooley, Const. Lim.* 200, 201, 206. Hence we always look to see, not whether the power is given, but whether, in express terms or by necessary implication, it is forbidden. *Cooley, Const. Lim.* 204, 206; *Neal v. Shinn*, 49 Ark. 227; *Scales v. State*, 47 Ark. 481, 58 Am. Rep. 768; *Sill v. Corning*, 15 N. Y. 297; *Sears v. Cottrell*, 5 Mich. 251. Judicial interposition to

avoid an act of the legislature is never justified unless it is clear, beyond rational controversy, that it has passed the bounds set by the fundamental law. *Com. v. McCloskey*, 3 Rawle, 374; *Weister v. Hade*, 52 Pa. 474; *People v. New York Cent. R. Co.* 24 N. Y. 504; *People v. Orange County Supra.* 27 Barb. 575; *Cochran v. Van Surlay*, 20 Wend. 365, 82 Am. Dec. 570, and other cases cited in *Cooley, Const. Lim.* 204, 205, 216, 217; *Carson v. St. Francis Levee Dist.* 59 Ark. 513. Now, the adjective "a," commonly called the "indefinite article," and so called, too, because it does not define any particular person or thing, is entirely too indefinite, in the connection used, to define or limit the number of judges which the legislative wisdom may provide for the judicial circuits of the state. And it is perfectly obvious that its office and meaning was well understood by the framers of our constitution, for nowhere in that instrument do we find it used as a numerical limitation. It is insisted that if "a" does not mean "one," and "but one," in the section quoted, then the way is open for a latitudinarian construction in the various other sections where it occurs; and that the number of governors, attorneys-general, secretaries of state, auditors, general assemblies, etc., we are to have depends only upon legislative caprice. Let us see. Section 1, article 6, of the Constitution provides: "The executive department of this state shall consist of a governor, secretary of state, treasurer of state, auditor of state, and attorney-general." No one would contend that there could be more than one of each of these functionaries, but the limitation is not found in the use of the letter "a." It is in the name of the office and officer created. The idea of two governors, secretaries of state, treasurers, etc., is unknown in the history of the formation of state governments in this republic. It would be utterly incompatible with the duties of these officers to have a divided department, and a head for each. Moreover, other sections may be looked to as defining the number as to the executive. For instance, section 2 provides: "The supreme executive power of this state shall be vested in a chief magistrate who shall be styled 'the Governor of the State of Arkansas.'" See also section 6. There can be but one chief magistrate, one commander in chief. Take the legislative department. Section 1, article 5, is as follows: "The legislative power of this state shall be vested in a general assembly which shall consist of the senate and house of representatives." Section 18: "Each house, at the beginning of every regular session of the general assembly and whenever a vacancy may occur shall elect from its members a presiding officer, to be styled respectively the president of the senate and the speaker of the house of representatives." Reference is made in the brief of counsel to these sections, and it is urged that unless "a" is a limitation to one, and but one, in section 13 of article 7, there is nothing to inhibit more than one general assembly, one president of the senate, and one speaker of the house. But again it is patent that the limitation to one general assembly is not in

the use of the letter "a," but is referable to the principle that there can be but one supreme legislative power in a state. That sovereign power being delegated by the constitution to a general assembly, it cannot create another general assembly, and delegate to it the same power. So far as the president of the senate and speaker of the house are concerned, they are presiding officers. There can be but one presiding officer. The limitation is in the word "presiding," not in the letter "a." Now, in other sections we find the word "one" used. Section 28, article 7, provides that "the county court shall be held by one judge except in cases otherwise herein provided." Section 39: "For every two hundred electors there shall be elected one justice of the peace, but every township however small shall have two justices of the peace." Section 46: "The qualified electors of each county shall elect one sheriff, . . . one assessor, one coroner, one treasurer." So the convention, when limiting the number, used the numerical adjective, or other terms which in themselves expressed affirmatively the idea of one, and hence excluded that of any more. This fact, when we consider that constitutions are framed for ages to come, affords the most plausible argument that the framers of our constitution purposely omitted limiting the number of circuit judges, in anticipation of any emergencies in the speedy administration of justice, occasioned by the increase of population and the accumulation of litigation. Especially is this argument strengthened by the fact that judicial circuits were to be composed of contiguous counties, many of which, like Pulaski, were already large, and contained cities that were rapidly increasing in business and inhabitants. It required no great amount of prescience to discover and provide for the very contingency which is revealed by the preamble to this act. But if, on the contrary, it could be said that the convention had no consideration for the future, and only intended to provide for existing conditions, and that one judge for a circuit was deemed sufficient to meet the requirements of justice at that time, then the conclusion is irresistible that they did not intend to prohibit what they did not contemplate would ever be demanded. *Lytle v. Haiff*, 75 Tex. 186. This is all that is necessary to maintain the validity of the act in controversy. It is undoubtedly true that the convention intended to provide for at least one judge for a judicial circuit. But, unless they also intended to prohibit the creation of more, the act must stand.

So the question recurs as to the significance of the letter "a," for the convention must be taken to have meant what they have plainly said. It performs precisely the same office here as in every other section where it occurs. Section 6 of article 7, says, "A judge of the supreme court shall be learned in the law," etc.; section 16 says, "A circuit judge shall be learned in the law," etc.; section 41, "A justice of the peace shall be a qualified elector and a resident of the township," etc. Does the word "a" in these sections mean one, and only one, judge or jus-

tice? If so, which one? In the same section in which "a judge" occurs we find, "He shall be 'a' conservator of the peace within the circuit." Does "a conservator" mean that he is to be the only conservator of the peace for the circuit? If so, this provision is plainly in conflict with others. See sections 4, 40. It is apparent that "a" was used before the word "judge" in the section under consideration because, according to our English idiom, the sentence could not have been euphoniously expressed without it. In some languages—the Latin and Russian, for instance—it would not have been used at all. It could have been omitted without in the least impairing the sense, and its use gave no additional force or meaning to the sentence. To use the illustration of the learned counsel for the state: If one orders "a sack of flour, a ham, a horse, a ton of coal," etc., it is understood he means but one. So it would be understood if he left off the "a," and said "sack of flour, ham, horse, ton of coal," the "a" being used before the words beginning with the consonant sound simply to preserve the euphony. If the limitation is not in the word "judge" without the "a," there is certainly no restriction with it. According to Mr. Webster, "a" means "one" or "any," but less "emphatically than either." It may mean one where only one is intended, or it may be any one of a great number. That is the trouble. Of itself, it is in no sense a term of limitation. If there were a dozen judges in any one circuit each would still be "a judge" for that circuit. Mr. Webster also says, "It is placed before nouns of the singular number, denoting an individual object, or quality individualized." "Quality" is defined as (1) "the condition of being of such a sort as distinguished from others; (2) special or temporary character; profession, occupation." Webster Dict. The "a" was so used here. The character, or profession, individualized, was that of a judge. The functions of the office to be performed were those of "a judge," not governor, sheriff, or constable. A review of the various other provisions of the constitution, *supra*, where the word "a" occurs, shows that no absurd consequences, such as filling the offices in other departments with a multitudinous array of incumbents could possibly result.

We have not been furnished with any case exactly parallel with the case at bar, but some of those cited in brief of counsel are strongly persuasive. The constitution of Georgia provided: "There shall be a judge of the superior courts for each judicial circuit whose term of office shall be four years and until his successor is qualified. He may act in other circuits when authorized by law." It also provided that "the superior courts shall sit in each county not less than twice in each year at such times as have been or may be appointed by law." The legislature made provision, in counties having 10,000 inhabitants, "that two or more judges of the superior court may preside in banc, or that said court may be held in two or more sections at the same time by different judges in any separate rooms in the court-

house or at the county site as may be convenient." The district courts of Georgia had both civil and criminal jurisdiction. In *Bons v. State*, 86 Ga. 108, the defendant was convicted of murder. In his motion for new trial he assigned as error, "that Richard H. Clarke, the presiding judge, had no authority to hold the superior court of Fulton county, for the reason that he was judge of another district, and for the further reason that Marshall J. Clark, the judge of the district, was at the same time holding and presiding over the superior court of Fulton county, then in session, and engaged in the trial of civil business in the room provided for the superior court." The supreme court of Georgia, in passing upon this assignment, said: "The constitution requires at least two sittings of the superior court in each county, but does not prohibit more sittings to be held, nor does it prohibit two or more sections of the superior court, presided over by different judges, sitting at the same time, where the interest of the public requires the same to be done, so that justice shall not be denied to any one. Nor is it unconstitutional because it provides for this scheme only for counties containing large cities, the legislature having power to classify in general terms." The court, it will be observed, was divided into two sections, and two judges were holding court at the same time in the district. The constitution (like ours) said there shall be "a judge," not two judges, for each circuit. And if the legislature had the power to divide the district into divisions and create a place to be filled by another judge, we think it can make but little difference whether he be called from another circuit, which was allowable, or whether he be elected especially for the place. The point, at last, is that there were two divisions of the court, and two judges holding court in the same circuit at the same time, and each performed all the duties of a circuit judge for that circuit while thus engaged in holding the court. See also, *Combs v. State*, 26 Ind. 98; *Ex parte Lloyd*, 78 Cal. 421; *Lytle v. Half*, 75 Tex. 129. But we need not go beyond our own decisions for authority to maintain the constitutionality of the present act. Our constitution provides that "no county seat shall be established without the consent of a majority of the qualified voters of the county." Section 3, article 13. In *Vance v. Austell*, 45 Ark. 400, this court held that this meant a majority of the votes of qualified voters at a legal election on that question, and that there must be such a majority, before the change could take place. But the court also held that there was nothing to prohibit the legislature from requiring "an additional or higher condition for removal." A majority in that case was the minimum. "A judge" in the present case is the minimum. The cases cannot be distinguished in principle. The constitution requires "a judge" for each circuit, and there must be at least one judge. But where is the limitation upon the legislature to provide for more if the necessity arises? See also,

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Carson v. St. Francis Levee Dist. 59 Ark. 513; *Neal v. Shinn*, 49 Ark. 227; *Saunders v. Erwin*, Id. 376; *Scales v. State*, 47 Ark. 481, 58 Ark. Rep. 768; *Walker v. State*, 35 Ark. 390; *Davis v. Gaines*, 48 Ark. 385; *Williamson v. Mimms*, 49 Ark. 350; *St. Louis, I. M. & S. R. Co. v. State*, 47 Ark. 323; *State v. Nichols*, 26 Ark. 74, 7 Am. Rep. 600; *Little Rock v. Little Rock Board of Improvements*, 43 Ark. 161. These cases, and others cited in brief of counsel, show that this court is thoroughly committed to the doctrine that the maxim "*Expressio unius est exclusio alterius*" is not to be applied with the same rigor in construing a state constitution as a statute; and that only those things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned will be considered as prohibiting the powers of the legislature. The first section of article 7 of the Constitution is: "The judicial power of the state shall be vested in one supreme court, in circuit courts, in county and probate courts and in justices of the peace." Here the constitution expressly creates the office of circuit court; so that the act under consideration creates no new office, and confers no new jurisdiction, nor does it in any manner change or take away any jurisdiction already conferred by the constitution. The jurisdiction of *Judge Martin* is just the same as that of any other circuit judge in the state, and the only difference between the sixth circuit and the other circuits is that the sixth has two divisions, and an incumbent for each division. The governor had the power to fill the vacancy in the second division by appointment. *State v. Askew*, 48 Ark. 82. Nowhere do we find any limitation upon the number of circuit judges for a circuit. Const. art. 7, §§ 13, 17, 18. The number is left to the sound judgment of the legislature, and it cannot be presumed that they will ever abuse their discretion.

In coming to this conclusion we have not overlooked the salutary doctrine that "in construing constitutions courts have nothing to do with the argument *ab inconvenienti*, and should not bend the constitution to suit the law of the hour." *Greencastle Twp. v. Black*, 5 Ind. 557, 565. And we agree fully with what is said by a distinguished judge of New York, that "if the legislature or the court undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal." *Oakley v. Aspinwall*, 3 N. Y. 547, 568.

But we are of the opinion that this grammatical particle "a," whose office is frequently only to preserve euphony in the use of words and structure of sentences, and whose force often depends upon the mere accident of accentuation, was not used, nor was it ever intended to be used, by the framers of our organic law, so as to obstruct and partially defeat the exalted purpose for which the circuit courts, the "great residuum of all jurisdiction," were created, namely, the speedy administration of public justice.

The demurrer is overruled, and the writ discharged.

Mary J. WOOD, *Appl.*,

v.

Henry WOOD.

(69 Ark. 441.)

1. Leave of court need not be obtained to file a bill of review for errors of law apparent on the face of the decree.
2. An erroneous order striking from the files a bill of review will not be reversed unless it was prejudicial.
3. An amendment to a bill for divorce, setting up an entirely new and distinct cause to which answer is made, is the beginning of a new suit for the purpose of determining the sufficiency of the residence of the plaintiff in the state to give jurisdiction.
4. The sufficiency of alimony cannot be considered on a bill of review, as the remedy, if the allowance is inadequate, is by appeal.
5. Acts of record by counsel consenting to the allowance of alimony in a gross sum, are binding on the client.
6. A divorce from the bonds of matrimony bars a claim of the divorced wife to dower, notwithstanding an implication from a statute denying dower in case of divorce for her misconduct, that the legislature supposed she would be entitled to dower after divorce not based on her misconduct.

(July 21, 1894.)

APPEAL by complainant from a decree of the Circuit Court for Pulaski County striking from the files a bill of review which sought to test the validity of a decree granting divorce and alimony. *Affirmed.*

The facts are stated in the opinion.

Messrs. Martin & Murphy, for appellant:

Bills of review for error in law on the face of the record or for fraud are matters of right; but for new matter require special leave of court.

2 Am. & Eng. Encyclop. Law, p. 285; *Perry v. Phelps*, 17 Ves. Jr. 178; *Denson v. Denson*, 83 Miss. 580; *Edmondson v. Moseby*, 4 J. J. Marsh. 500; *Bleight v. McIlroy*, 4 T. B. Mon. 145.

For a divorce prior residence in the state for one year is necessary.

Mansf. Dig. (Ark.) § 2562.

This requirement is jurisdictional.

Bradstreet v. Bradstreet, 7 Mackey, 229; *Richards v. Richards*, 8 Mackey, 431; *Watkins v. Watkins*, 125 Ind. 163; *Reed v. Reed*, 52 Mich. 117, 50 Am. Rep. 247.

Failure of pleadings and proof to show such residence is apparent upon the face of the record.

Whiting v. Bank of United States, 88 U. S. 13 Pet. 6, 10 L. ed. 83; *Dexter v. Arnold*, 5 Mason, 803; *Putnam v. Day*, 89 U. S. 22 Wall. 60, 22 L. ed. 764.

The parties could not by consent, or in any other way, confer jurisdiction.

Jacks v. Moore, 83 Ark. 81; *Lawrence v. Wilcox*, 11 Ad. & El. 941; *Wyatt v. Judge*, 7 Port. (Ala.) 87; *Jeffries v. Harbin*, 20 Ala. 887;

NOTE.—For effect of divorce to bar dower in general, see *Adams v. Storey* (Ill.) 11 L. R. A. 790, and for effect of divorce in other state, see *Van Cleef v. Burns* (N. Y.) 15 L. R. A. 543, 28 L. R. A.

Feillett v. Engler, 8 Cal. 76; *Doctor v. Hartman*, 74 Ind. 231.

The divorce not granted for the wife's misconduct should not bar her dotal right.

Mansf. Dig. (Ark.) § 2578; *Stilson v. Stilson*, 46 Conn. 15; *Hunt v. Thompson*, 61 Mo. 148; *Lamkin v. Knapp*, 20 Ohio St. 454; *Marvin v. Marvin*, 59 Iowa, 699; *Allen v. McCullough*, 2 Helsk. 174, 5 Am. Rep. 27.

To award a specific sum as alimony is improper.

Brown v. Brown, 88 Ark. 824.

The amendment relates back to the date of the suit as originally instituted.

Dwyer v. Dwyer, 26 Mo. App. 647; *Thompson v. Steam Mill Co.* 62 N. H. 803; *Wayne Pike Co. v. Hammons*, 129 Ind. 868; *Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. Rep. 602.

If, as regarded jurisdiction, it commenced the suit, it subverted and destroyed the original complaint.

Electrical Accumulator Co. v. Brush Electric Co. supra.

At common law, the date of the writ was, the commencement of the suit.

Chitty, Pl. 260.

The charge of adultery in the amendment was too vague to serve as the basis of a decree.

Miller v. Miller, 20 N. J. Eq. 216; *Scheffling v. Scheffling*, 44 N. J. Eq. 488; *Freeman v. Freeman*, 89 Minn. 370.

When section 2578 of Mansfield's Digest provision was enacted, the legislature was dealing with dower in all its features. In such cases a legislative mistake becomes law.

Postmaster General v. Early, 25 U. S. 19 Wheat. 186, 6 L. ed. 577; *Endlich*, Interpretation of Statutes, § 372.

Messrs. Rose, Hemingway & Rose and *J. M. Moore*, for appellee:

A bill of review will not lie by one estopped to bring error or prosecute an appeal.

Price v. Notrebe, 17 Ark. 55; *Herman, Estoppel*, §§ 285, 1065-1069; *Bradner v. Howard*, 75 N. Y. 417; *Norrell v. Garthwaite*, 25 Tex. 583; *Watkins v. Martin*, 24 Ark. 14, 81 Am. Dec. 59; *Dimukes v. Halpern*, 47 Ark. 819; *Stanley v. Deihough*, 50 Ark. 208; *Bolen v. Cumby*, 53 Ark. 514.

A wife who receives the amount decreed as alimony cannot afterwards question jurisdiction.

Arthur v. Israel, 10 L. R. A. 693, 15 Colo. 147; *Ellis v. White*, 61 Iowa, 644; *Denver City Irrigation & Water Co. v. Middaugh*, 12 Colo. 484; *Wiggins v. Atkins*, 186 Mass. 294; *Snow v. Winslow*, 54 Iowa, 201; *Faucher v. Grass*, 60 Iowa, 505; *Orwig v. Merrill*, 69 Iowa, 738; *Rivers v. Olmsted*, 66 Iowa, 186; *State v. Jones*, 22 Ark. 382; *State v. Hand*, 6 Ark. 169, 42 Am. Dec. 689; *Com. v. South*, 80 Ky. 582; *Singer v. Singer*, 41 Barb 189.

Non assent, mistake, or unfaithfulness of attorneys does not abrogate the rule.

Price v. Notrebe, supra; *Putnam v. Day*, 89 U. S. 22 Wall. 60, 22 L. ed. 764.

A bill of review will not lie for inadequacy of alimony. The remedy is by appeal.

Bauman v. Bauman, 18 Ark. 880, 68 Am. Dec. 171; *Fischli v. Fischli*, 1 Blackf. 860, 12 Am. Dec. 251.

Leave of court is necessary for new matter.

Jacks v. Adair, 33 Ark. 178.

Or for fraud and newly discovered evidence.

Webster v. Diamond, 36 Ark. 538; *Ricker v. Powell*, 100 U. S. 109, 25 L. ed. 528.

The amendment began a new suit.

Henderson v. Kissam, 8 Tex. 52; *Ayres v. Cayce*, 10 Tex. 106; *Holmes v. Trout*, 83 U. S. 7 Pet. 214, 8 L. ed. 662; *Miller v. McIntyre*, 81 U. S. 6 Pet. 61, 8 L. ed. 320; *Bennett, Lis Pendens*, § 32; *Curtis v. Hitchcock*, 10 Paige, 400, 4 L. ed. 1028; *Dudley v. Price*, 10 B. Mon. 88; *Merritt v. Jeffersonville County School Dist. No. 9*, 54 Ark. 468; *Greer v. Turner*, 47 Ark. 25; *Mansf. Dig. (Ark.)* § 5088; *Halliburton v. Nance*, 40 Ark. 162.

Parties can estop themselves from denying jurisdiction by accepting the benefits.

Disnukes v. Halpern, 47 Ark. 320; *Watkins v. Martin*, 24 Ark. 14, 81 Am. Dec. 59; *Stanley v. Deilough*, 50 Ark. 203; *Bolen v. Cumby*, 53 Ark. 514.

Dower is given only to widows.

Co. Litt. 32 A; 2 Bl. Com. 180.

Divorces a vinculo absolutely bar dower.

Frampton v. Stephens, L. R. 21 Ch. Div. 164; *Day v. West*, 2 Edw. Ch. 598, 6 L. ed. 517; *Reynolds v. Reynolds*, 24 Wend. 196; *Wait v. Wait*, 4 Barb. 192, 4 N. Y. 95; 2 Bishop, Mar. & Div. §§ 706, 1631; 4 Kent, Com. 54; *Whitell v. Mills*, 6 Ind. 281; *Chenoweth v. Chenoweth*, 14 Ind. 3; *Billan v. Hercklebruth*, 28 Ind. 71; *Levins v. Slector*, 2 G. Greene, 609; *McCraney v. McCraney*, 5 Iowa, 241, 68 Am. Dec. 702; *Calame v. Calame*, 24 N. J. Eq. 440; *Glenon v. Emerson*, 51 N. H. 406; *Barrett v. Failing*, 111 U. S. 525, 28 L. ed. 505; *Marvin v. Marvin*, 59 Iowa, 699; *Boyles v. Latham*, 61 Iowa, 174; *Postmaster General of United States v. Early*, 25 U. S. 12 Wheat. 148, 6 L. ed. 582; *Moore v. Hegeman*, 27 Hun, 70; *Price v. Price*, 12 L. R. A. 359, 124 N. Y. 589.

Battle, J., delivered the opinion of the court:

The chancery court erred in striking from its files appellant's bill of review, for the reason it was filed without leave first had and obtained. It was brought to procure an examination and reversal of a decree made on a bill for divorce on account of alleged errors of law apparent on the face of the record. It is not necessary to obtain leave of the court before a bill of this kind can be filed. *Perry v. Phelps*, 17 Ves. Jr. 178; *Story, Eq. Pl. §§ 404, 405*; *Mittf. Eq. Pl. 84*. In *Jacks v. Adair*, 33 Ark. 178, and *Webster v. Diamond*, 36 Ark. 538, this court held that a bill of review founded on newly discovered evidence cannot be lawfully filed without leave of the court first obtained, but this rule does not apply to bills of review for errors of law apparent on the face of the decree.

The order to strike the bill from the files of the court should not be reversed, notwithstanding it was erroneous, unless it was prejudicial to the appellant; and it was not if the bill fails to show that she was entitled to the relief asked for therein and should be affirmed. *Woodall v. Moore*, 55 Ark. 22; *Denson v. Denson*, 33 Miss. 560; *Bleight v. McIlroy*, 4 T. B. Mon. 142. Was it prejudicial?

Appellant assigns in her complaint three 28 L. R. A.

errors of law in the decree of divorce: First, the appellant had not resided in this state for the period of one year before she commenced the action in which the decree of divorce was rendered; second, the allowance of alimony was too small and inadequate; and, third, the alimony should not have been given her in bar of dower in the estate of appellee. The prayer of the bill was that the decree be so modified as to allow her reasonable alimony, and a divorce from bed and board instead of from the bonds of matrimony.

In an examination of the errors assigned we are confined to the pleadings, proceedings, and decree, as set out in the complaint. In an attack upon a decree by a bill of review for errors of law a court cannot look into the evidence, to see whether the decree is based upon a correct finding of the facts. That is the proper office of a court of competent jurisdiction upon an appeal. But assuming that the facts upon which the decree rests have been properly found, it is the sole duty of a court to inquire whether the record, exclusive of the evidence, contains any substantial error of law pointed out by the bill of review. *Story, Eq. Pl. § 407*; *Buffington v. Harvey*, 95 U. S. 99, 24 L. ed. 381.

1. Before any person can be entitled to a divorce under our statute he or she must allege and prove, in addition to a legal cause of divorce, a residence in this state for one year next before the commencement of the action. The appellant failed to comply with this statutory prerequisite in the beginning of her action as first instituted. She first became a resident of this state on the 17th of April, 1888, and brought suit for a divorce on the 26th of June next following; and was not, therefore, entitled to a decree for divorce in the action originally brought. But she amended her complaint by adding an entirely new and distinct cause of divorce, of which the cause on which her action was originally founded formed no part, and by stating that she had been a resident of this state for more than two years next before the filing of the amendment, and by asking for a divorce from the bonds of matrimony, and for alimony. This amendment was filed in June, 1891. Appellee answered it, and denied the allegations as to the grounds of divorce. Depositions were taken to show the residence of the appellant in this state for the one year before the filing of the amendment, and the new cause of divorce. Upon this evidence she obtained the decree which she now seeks to set aside by bill of review.

The filing of the amendment setting up an entirely separate and distinct cause of divorce, and the answer to it of appellee, were equivalent to, and not distinguishable from, the beginning of a new suit. In answering, the appellee entered his appearance, and waived summons. The same result was reached as would have been accomplished had a new and original complaint been filed. In that case the appellee could have entered his appearance, as he did, and waived summons, and the same end would have been obtained as was reached by the filing of the amendment. The legal effect of the two proceedings is the same. When a new cause of ac-

tion is introduced by amendment, a *lis pendens* is not created as to the subject-matter of the amendment, and the statute of limitations does not cease to run until the filing of the amendment. *Curtis v. Hitchcock*, 10 Paige, 400, 4 L. ed. 1028; *Holmes v. Trout*, 82 U. S. 7 Pet. 214, 8 L. ed. 662; *Siecard v. Davis*, 31 U. S. 6 Pet. 124, 8 L. ed. 842; *Wilkes v. Elliot*, 5 Cranch, C. C. 611, Fed. Cas. No. 17,660. Such has been held to be the effect of an amendment settling up a new cause of divorce in Kentucky. In *Logan v. Logan*, 2 B. Mon. 148, it was held that, "though an original bill for alimony and divorce may be prematurely filed, yet, if grounds for alimony occur before the hearing, and the facts are set out in an amended bill, and not answered, the court may give the appropriate decree for the complainant." And so, in *McCrocklin v. McCrocklin*, Id. 870, the same court held that, "though the time of an abandonment may not have authorized any decree when the original bill was filed, yet if, before the filing of an amended bill, the abandonment has been sufficiently long to authorize a decree of divorce and for alimony, it may be decreed."

2. As to the sufficiency of the alimony decreed to the appellant, no error of law appears upon the record. That is a fact which appears only in the evidence. Upon this point the decree says: "In the matter of alimony, the same having been heard by the court on proof and arguments of solicitors, and the parties consenting that alimony may be awarded in a gross sum, and the court being well and sufficiently advised in the premises, it is ordered and adjudged that out of the estate of the said defendant, Henry Wood, the plaintiff, Mary J. Wood, be, and she is hereby, allowed the sum of \$38,000 by way of alimony to be paid to her by the said Henry Wood (or to her solicitors of record, Caruth & Erb), together with the costs accrued in this cause. This is conclusive in this proceeding as to the sufficiency of the alimony, it being a matter which was determined by the court by hearing the evidence. If it was inadequate, the remedy of the appellant was by appeal from the decree by which it was allowed. *Bauman v. Bauman*, 18 Ark. 330, 68 Am. Dec. 171."

In allowing alimony in a gross sum the court departed from the course usually pursued in such matters, but this was done by consent. She was represented by solicitors, who were acting within the apparent scope of their authority. She has no right to repudiate her acts of record, done by them, but she must abide by them, and hold her solicitors responsible if they were derelict in their duties or unfaithful, to her injury. In rendering a decree in accordance with consent of parties, given by their respective solicitors, no error of law was committed by the court. *Coster v. Clarke*, 8 Edw. Ch. 405, 6 L. ed. 705; *Price v. Notrebe*, 17 Ark. 56; *Beck v. Bellamy*, 93 N. C. 129; *Shattuck v. Bill*, 142 Mass. 56; *Brockley v. Brockley*, 123 Pa. 1-6.

3. In allowing alimony the court decreed that it should be a "bar of all the plaintiff's right of dower in the estate of the said Henry Wood," her former husband. She insists

that, the divorce not having been granted on account of their misconduct, the court erred in barring her total rights. But this is not true, unless she could have retained her right to dower after her divorce from the bonds of matrimony. She could not at common law. To entitle a party to dower, she must be the wife at the death of the husband. A divorce from the bonds of matrimony barred the claim of dower. *Frampton v. Stephens*, L. R. 21 Ch. Div. 164; *McCraney v. McCraney*, 5 Iowa, 241, 68 Am. Dec. 702; *Gleason v. Emerson*, 51 N. H. 405; *Barrett v. Failing*, 111 U. S. 525, 28 L. ed. 505; *Day v. West*, 2 Edw. Ch. 596, 6 L. ed. 517; *Reynolds v. Reynolds*, 24 Wend. 196; *Wait v. Wait*, 4 N. Y. 95; 1 Co. Litt. chap. 5, §§ 36, 32a; 3 Bl. Com. 180; 4 Kent, Com. 54; 2 Bishop, Mar., Div. & Sep. § 1631.

But section 2578 of Mansfield's Digest provides: "In case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." This is a peculiar statute. Without undertaking to declare the rights of a divorced wife, the legislature declared by this section in what event she shall not be endowed. It is a copy of a New York statute without the enactment of the statutes of the state from which it was borrowed, which explained, and gave it vitality and effect in that state.

In *Reynolds v. Reynolds*, 24 Wend. 198, the origin and effect of this statute in New York is explained as follows: "By the statute, Westm. II. (18 Edw. I. chap. 34), it was enacted that 'if a wife willingly leave her husband, and go away, and continue with her advouter, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him, in which case she shall be restored to her action.' 2 Co. Inst. 488. This statute was, in substance, re-enacted in this state in 1787 (1 Greenl. Stat. 294, § 7), and it remained in force down to the revision of the laws in 1880. . . . In 1880 the Act of 1787 was repealed, and, after declaring that a widow shall be entitled to dower, a new provision was made in the following words: 'In case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.' 1 Rev. Stat. 741, § 8. Under this statute the adultery is not enough. It must be followed by a divorce dissolving the marriage contract. This has brought us back to the common law as it stood before the Statute of 18 Edw. I., for, as we have already seen, adultery did not work a forfeiture at the common law. And as to a divorce *a vinculo*, that always put an end to the claim of dower; for, although it was not necessary that the seisin of the husband should continue during the coverture, it was necessary that the marriage should continue until the death of the husband. Co. Litt. 32a; 2 Bl. Com. 180; 2 Kent, Com. p. 52c, and Id. p. 54. The statute based for the mere act of adultery, which had existed for more than five centuries and a half,

was blotted out by the repeal of the Act of 1787, the British statutes not being in force in this state; and the eighth section of the Act of 1830 has added nothing to the law as it would have stood had the legislature stopped with a simple repeal of the Act of 1787."

In *Wait v. Wait*, 4 N. Y. 95, the court, overlooking *Day v. West*, 2 Edw. Ch. 592, 6 L. ed. 518, and *Reynolds v. Reynolds*, 24 Wend. 198, "held that a judgment dissolving a valid marriage for the adultery of the husband did not cut off the wife's inchoate right to dower in lands of which he was at the date of the judgment, or theretofore had been, seised." In speaking of the decree dissolving the marriage in that case, the court said: "The statutory divorce is limited in its operation, and only affects the rights and obligations of the parties, to the extent declared by statute. . . . It is true that the decree is that the marriage be dissolved, and that each party be freed from the obligations thereof. This dissolution and release, however, is not absolute. The wife, when the husband is the guilty party, is still entitled to her support; and the obligation of the marriage still rests upon the husband so far as to render it unlawful for him again to marry. When the wife is the guilty party, the marriage still continues in force so far as to give the husband a title to her property, and to render it unlawful for her to marry. As a further penalty for the offense, the legislature have declared that when the wife is convicted of adultery she shall not be entitled to dower in her husband's real estate.

Holding that a decree of divorce had no other effect than that declared by the statute, and finding that the dissolution of marriage by the decree was not absolute, but that the obligation of marriage, according to the statutes of New York, still rested upon the husband so far as to render it unlawful for him again to marry, the court rested its decisions in *Wait v. Wait* on the ground that the section which provided that, "in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed," by denying a wife's right to dower when divorced for adultery, by fair implication saved it when a divorce was granted for the adultery of the husband. This decision, even under the peculiar laws of New York, has been questioned. *Moore v. Hegeman*, 27 Hun, 70, affirmed 92 N. Y. 521, 44 Am. Rep. 408; *Price v. Price*, 124 N. Y. 599, 13 L. R. A. 359; 2 Bishop, Mar., Div. & Sep. § 1635.

But there is no statute in this state limiting the dissolution of the marital ties to either party. Under the statutes the courts can impose on the husband the obligation to support the divorced wife by way of alimony, but in a divorce *a vinculo* the dissolution of the marriage is absolute. The common law in this respect is unrepealed. Here no quasi marital relation or condition exists, after a divorce from the bonds of matrimony has been granted, upon which the right to dower

can attach. Under the statutes of this state the widow is only entitled to dower. It is true that the language of section 2578 of Mansfield's Digest indicates the opinion that the wife would be entitled to dower if the divorce should be granted on account of the misconduct of the husband, but, as said by Chief Justice Marshall in *Postmaster General of United States v. Early*, 25 U. S. 12 Wheat. 14, 86 L. ed. 583, "a mistaken opinion of the legislature concerning the law does not make law." Endlich, *Interpretation of Statutes*, § 372.

At the time appellant was granted a divorce, a statute of this state, enacted on the 2d of March, 1891, provided that a wife who has been granted a divorce from the bonds of matrimony "shall be entitled to one third of her husband's personal property absolutely, and one-third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, for her life, unless the same shall have been relinquished by her in legal form," and the final order or judgment of divorce "shall designate the specific property, both real and personal, to which such wife is entitled." It is contended by appellant that, if the filing of the amendment to her complaint was the beginning of a new action, the Act of March 2 was in force at its commencement, and the one-third part of the estate of her divorced husband should have been set apart to her according to its terms. But she did not assign the failure to do so as an error in her bill of review, and seek to have it corrected. On the contrary, she sought to have the decree of divorce from the bonds of matrimony set aside, and thereby to surrender the right to one third of her husband's estate, if she was entitled to it, and for a divorce from bed and board, and for alimony against appellee. She therefore has no right to complain in this court that she did not recover that which she neither asked for nor desired.

Appellant did not undertake to show in her original or amended bill for divorce that she was entitled to the benefits of the Act of March 2, 1891. Her original bill was filed before it was passed, and it was not amended thereafter in that respect. For the purpose of showing that she was entitled to considerable alimony, she alleged in the original bill that the defendant was not worth less than \$200,000, but did not say in what his estate consisted, or that it was within the jurisdiction of the court. No information is given to show that the court had the jurisdiction, by reason of the quality and location of the property, to set apart to her one third of it under the act. It might have been real estate situate in another state. Nothing appears in the record outside of the evidence to show that the court committed an error of law in failing to divide the estate of the husband in accordance with the act.

Decree affirmed.

Rehearing denied.

ALABAMA SUPREME COURT.

Robert GOLDTHWAITE *et al.*, *Appts.*,
v.
JANNEY & Cheney, Insolvency Trustees of
Moses Broa.

Adolph ABRAHAM *et al.*, *Appts.*,
v.
SAME.

(.....Ala.....)

I. Whether land standing in the individual name of one member of a partnership concern belongs to him or to the firm will be governed by the intention of the partners as indicated by all the circumstances attending the transaction, which may be shown by parol in the absence of written evidence.

2. Permitting real estate purchased

NOTE.—The rights and position of creditors, purchasers, and other third parties in partnership real estate.

I. Rights of creditors of the firm.

a. In general.

b. The nature of the creditors' rights.

II. Preference of firm over individual creditors.

III. The position of the individual creditors of a partner.

a. In general.

b. Where property held prior to partnership.

IV. The position of mortgagees.

V. The position of judgment creditors.

VI. The position of purchasers.

a. From the firm.

b. From partner holding the legal title.

c. Of partner's interest.

d. Of deceased partner's share.

e. Under execution against firm.

f. Under execution against partner.

g. The liability to see to the application of purchase money.

VII. The question of notice.

The decision in *GOLDTHWAITE v. JANNEY*, as to the intention of the parties governing the question, whether or not real estate standing in the individual name of one member of a firm is partnership property is in keeping with the prior cases, for a discussion and collection of which, see *note* to *Robinson Bank v. Miller, Lampport v. Miller* (III.) 27 L. R. A. 449, head II., p. 455.

So the holding that the partners are not estopped from claiming it as such is within the principles illustrated in the same *note*, head IV., p. 463, and also in conformity with the doctrine declared in head V., p. 464.

I. Rights of creditors of the firm.

a. In general.

The general principles by virtue of which real estate is considered partnership property and which render it liable to the payment of the firm debts in the same manner as the personal estate of the firm when the latter is not sufficient, and authorities in support thereof, will be found collected in the *note* to *Robinson Bank v. Miller, Lampport v. Miller* (III.) *supra*, and *National Union Bank of Maryland v. National Mechanics' Bank of Baltimore* (Md.) 27 L. R. A. 449, 476.

The authorities holding such property to be personally are collected in *note* to *Robinson Bank v. Miller* (III.), and *National Union Bank of Maryland v. National Mechanics' Bank of Baltimore*, *supra*.

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with partnership money to stand in the name of one of the partners will not estop the partnership from claiming the title as against one giving the partner credit on the faith of his apparent title to the property.

3. That a member of a partnership concern who is also a trustee for a third person commits a breach of trust by loaning the trust fund to the partnership, in which the co-partners participate, will not create a lien for the amount in favor of the *cestui que trust* either on the firm assets or on real estate of the partnership which stands in the individual name of the trustee.

(February 13, 1894.)

A PPEAL by Robert Goldthwaite as receiver appointed in the case of Paul v. Knox as successor of H. C. Moses, from a decree of the

The questions of equitable conversion, out and out conversion, and reconversion will be found treated of in *note* to *Robinson Bank v. Miller, Lampport v. Miller*, (III.) *supra*, and *National Union Bank of Maryland v. National Mechanics' Bank of Baltimore* (Md.) 27 L. R. A. 473-477.

As to the priority of firm creditors over the claim of the widow of a deceased partner to dower; and as to the rights of heirs, see *note* to *Woodward-Holmes Co. v. Nudd* (1894) (Minn.) 27 L. R. A. 340, 344, 348.

There is some uncertainty as to what must be shown in order to establish the fact that the property is to be considered a portion of the firm assets; but the rule which has the support of the best authority, and which rests upon sound principle, is that which makes the intention of the parties at the time of taking the conveyance the proper test. *Page v. Thomas* (1885) 43 Ohio St. 38, 54 Am. Rep. 738; *Ludlow v. Cooper* (1854) 4 Ohio St. 1; *Rank v. Grote* (1884) 18 Jones & S. 275; *Ware v. Owens* (1868) 42 Ala. 212, 94 Am. Dec. 642; *Buckley v. Buckley* (1850) 11 Barb. 74; *Fairchild v. Fairchild* (1876) 64 N. Y. 471; *Providence v. Bullock* (1884) 14 R. L. 365; *Shafer's App.* (1884) 106 Pa. 49; *Holmes v. Self* (1881) 79 Ky. 297; *Collumb v. Read* (1862) 24 N. Y. 505.

The question as to the intention of the parties to make real estate partnership property and therefore assets of the firm will be found fully discussed in *note* to *Robinson Bank v. Miller, Lampport v. Miller* (III.) 27 L. R. A. 449, head II.

Third parties dealing with such partners are not affected by any private arrangements between the partners unknown to them, and if the partners hold themselves out to the public as partners, those who deal with them have a right to regard them as such and they will be bound as partners. *Re Warren* (1847) 2 Ware (2 Davels) 322.

The American decisions in respect to real estate purchased with partnership funds or for the use of the firm, establish the principle, that such real estate is in equity chargeable with the debts of the copartnership, and with any balance which may be due from one partner to another upon the winding up of the affairs of the firm. *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305.

The current of authority undoubtedly is that generally, on clear proof of the fact, such real estate will be held in equity to be subject to the partnership debts between the partners and their creditors, as against their separate creditors and subsequent purchasers with notice. *Murphy v. Abrams* (1874) 50 Ala. 293.

Chancery Court for Montgomery County denying his right to reach certain property of the firm of Moses Bros., which stood in the individual name of H. C. Moses and which the plaintiff claimed because of a breach by H. C. Moses of his duty as receiver in loaning trust funds to the partnership in which the partnership participated. *Affirmed.*

A PPEAL by petitioners Abrahams from a decree of the Chancery Court for Montgomery County denying relief under a petition which sought to subject certain real estate standing in the name of H. C. Moses, one of the firm of Moses Bros., to the payment of his individual debts. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. W. A. Gunter, for appellant Goldthwaite:

Under the general assignment in question of the individual and partnership property, the individual property goes first to individual

creditors and the partnership property to partnership creditors.

For this to be done there must be a separation of the individual and partnership property.

Neither the individual creditors, nor the partnership creditors, have any lien of their own on the property of either class, but each class of creditors succeeds only to the respective rights of its debtor, and works out for its benefit the lien held by such debtor.

Goldsmith v. Eichold, 84 Ala. 116.

In such adjustment, and, in fact, in every contention about property in a court of equity, while the legal title imports a right of property in the holder, every equity against the legal title, not cut off by some rule creating a superior equity, is respected and treated as a property right superior to the mere legal title, which will be made to yield to such equity. But the legal title is never made to yield to an equity or right contradictory to the import of

Where a partnership is insolvent, the rule is to give the creditors all the notes of the partnership, if necessary, for the payment of the debts, leaving only the surplus, if any, to private creditors, and to give the private creditors the private assets of the several partners applying only the surplus of such assets to the payment of the partnership debts. *Bowen v. Billings* (1882) 13 Neb. 439.

So far as creditors are concerned, a conveyance to partners fixes the status of the property which cannot be altered by parol. *Second Nat. Bank of Titusville's App.* (1887) 83 Pa. 203; *Greene v. Greene* (1824) 1 Ohio, 535, 18 Am. Dec. 642.

Although the conveyance in the firm name vests the legal title in the individual partners at law as tenants in common, still it is charged with an equity when the land is wanted to discharge partnership liabilities or to obtain equalization among the partners. *Lyons v. McCurdy* (1890) 90 Ala. 497, following *Powers v. Robinson*, Id. 235; *National Union Bank of Maryland v. National Mechanics Bank of Baltimore (Md.)* 27 L. R. A. 476.

If such estate be held for their support, it will be considered and treated in equity as vesting in them in their partnership capacity, clothed with an implied trust that they shall hold it for such purposes. *Loubat v. Nourse* (1853) 5 Fla. 350; *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 697.

To the same effect: *Trowbridge v. Cross* (1886) 117 Ill. 109; *Bopp v. Fox* (1872) 63 Ill. 540; *Shanks v. Klein* (1881) 11 Fed. Rep. 767; *Burnside v. Merrick* (1842) 4 Met. 537; *Hiscock v. Phelps* (1872) 49 N. Y. 97; *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 509, 47 Am. Dec. 305; *Whitney v. Cotten* (1876) 53 Miss. 639; *Platt v. Oliver* (1842) 3 McLean, 27; *Erwin's App.* (1861) 39 Pa. 535, 30 Am. Dec. 542; *Holton v. Guinn* (1895) 65 Fed. Rep. 450.

For which purposes it will be treated as personal property. *Taylor v. Farmer* (1886) (Ill.) 6 West. Rep. 710; *Childs v. Pellett* (Mich.) Dec. 7, 1894; *Way v. Stebbins* (1882) 47 Mich. 296, following *Merritt v. Dickey* (1878) 38 Mich. 41; *Wood v. Montgomery* (1877) 60 Ala. 500; *Lang v. Waring* (1854) 25 Ala. 625, 60 Am. Dec. 533; *Morgan v. Olvey* (1876) 53 Ind. 6; *First Nat. Bank of Gainesville v. Cody* (Ga.) Jan. 27, 1894; *Smith v. Tarlton* (1847) 2 Barb. Ch. 338, 5 L. ed. 636; *Loubat v. Nourse*, *supra*; *Price v. Hicks* (1874) 14 Fla. 665.

And in the winding up of a partnership firm, such estate forms no exception to the rule as to the application of the partnership property to the payment of debts, but stands on the same footing as personal property, no matter in whom the legal title may be vested. *Taylor v. Farmer*, *supra*.

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And in such case must be sold and applied to their payment. *Shearer v. Paine* (1866) 12 Allen, 239, following *Burnside v. Merrick* (1842) 4 Met. 537; *Fitch v. Harrington* (1859) 13 Gray, 468, 74 Am. Dec. 641.

As far as it will go for that purpose. *Burnside v. Merrick*, *supra*.

Notwithstanding the paper title may be in one partner or appear to be in all as tenants in common. *Batty v. Adams County Comrs.* (1884) 16 Neb. 44; *Fowler v. Bailey* (1861) 14 Wis. 130; *Fairchild v. Fairchild* (1876) 64 N. Y. 471; *Pepper v. Thomas* (1897) 85 Ky. 539; *Deming v. Colt* (1850) 8 Sandf. 284.

So far as the rights of joint creditors of a copartnership are concerned it is immaterial whether lands assume the character of real or personal estate in the coming partnership property, as in either case they are liable to the partnership debts. *Smith v. Jackson* (1833) 2 Edw. Ch. 23, 6 L. ed. 235.

Upon the insolvency of the firm the whole property must be brought into the partnership fund in order to satisfy the partnership creditors. *Parker v. Bowles* (1876) 57 N. H. 481.

And there is no need of any other agreement than that necessarily implied by the law, from the fact of an investment of partnership funds by the firm in real estate for partnership purposes, in order to render such property liable for the partnership debts. *Willet v. Brown* (1877) 65 Mo. 133, 27 Am. Rep. 265.

The whole partnership estate being regarded in the view of a court of equity as a consolidated fund, to be appropriated primarily and exclusively to the satisfaction of all the partnership engagements. *Goodburn v. Stevens* (1847) 5 Gill, 1.

The possession of real estate, whether in the hands of one partner or the other, and without regard to their dealings with the firm or with one or other, not limiting or affecting the rights of a creditor of the firm, but subjecting the property to his claim. *Van Staden v. Kline* (1884) 64 Iowa, 180.

And a partner cannot hold it exempt therefrom, and the same rights and liabilities exist between the partners themselves. *Ibid.*

So the equitable interest is attachable. *Jarvis v. Brooks* (1853) 27 N. H. 37, 59 Am. Dec. 359.

And upon the death of a partner it cannot be used for the payment of his private debts, but remains partnership funds liable in the hands of the partners to the payment of the firm's liabilities. *Shaw, Appellant* (1889) 81 Me. 207.

Unless the debts can be otherwise paid out of the assets of the partnership. *Cunningham v. Ward* (1888) 30 W. Va. 572.

such legal title, except upon the strictest principles of equity and right.

Lang v. Waring, 25 Ala. 640, 60 Am. Dec. 533.

When a rule of law, following the dictates of a refined policy, give an equity or right in or to property, absolutely or qualifiedly, as between the partnership and its members, those who succeed only to the rights, liens, and equities of the partnership and of its respective members are subject to such equity to all intents and purposes. Equities are never displaced merely to satisfy equal or inferior equities.

One of the partners held the legal title to real estate which in equity only belonged to the firm. While so holding it he became individually liable for a large amount of money which the firm received from him and used for its own purposes. The firm has never in any manner whatever reimbursed him for, or protected him against, this liability, and at the

time of the assignment it stood and now stands indebted to him for the full amount thereof.

If one of the partners sells individual property to the firm and takes back a mortgage, upon assignment the mortgage will be distributed to his individual creditors.

Niagara County Nat. Bank v. Lord, 33 Hun, 557.

Suppose when the partner turns over money to the firm, he already has the legal title to the land instead of taking a mortgage, and that the firm calls his attention to the fact, and it is agreed that the title in A. shall in consideration of the loan, be fortified and enlarged "by being united with an equity," to hold it as security for the money (*Lang v. Waring*, 25 Ala. 640, 60 Am. Dec. 533),—could in this case the firm ever claim the land held by the partner for any purpose without satisfying the superior equity of A. to have his money out of it, as a condition to its being classed or called partnership property?

But where the personal effects of the firm are more than sufficient to pay its debts, the creditors of the firm have no claim upon the partnership real estate. *Colgate v. Colgate* (1873) 23 N. J. Eq. 372.

So if the property has ceased to belong to the partnership, as if it has been transferred bona fide and has become the property either of one partner or of a third person, the equities of the partners are extinguished and the derivative equities of the creditors also end. *Case v. Beauregard* (1879) 99 U. S. 119, 25 L. ed. 370.

Where a firm creditor has exhausted his remedy at law against the firm, his only remedy is in equity to subject the real estate of the firm to the payment of his judgment. *Offutt v. Scott* (1872) 47 Ala. 104.

Equity alone being able to appropriate it to the payment of the debts of the firm. *Ibid.*; *Hanway v. Robertshaw* (1874) 49 Miss. 758; *Caldwell v. Parmer* (1876) 56 Ala. 405.

It is a trust fund for the payment of the firm's debts out of which equity will decree payment, whether it be in the possession of the surviving partner, or in that of the personal representative, or the heirs of the deceased partner. *Offutt v. Scott*, *supra*.

To be regarded and treated as personal property in the hands of the partnership, to the extent it may be needed for partnership liabilities. *Rammlenberg v. Mitchell* (1875) 20 Ohio St. 22.

The equitable conversion into personality being complete, the doctrine being founded, not upon any actual or presumed intention of the parties, but upon the equities between the partners, that all the joint stock or fund shall be applied to the purposes of the partnership. *Loubat v. Nourse* (1853) 5 Fla. 350.

To which end it is liable to be sold and appropriated as partnership property. *Parker v. Parker* (1873) 65 Barb. 705.

In *National Union Bank of Maryland v. National Mechanics' Bank of Baltimore* (Md.) 27 L. R. A. 473, the question was whether real estate held by the members of the firm was to be treated as partnership or individual property, so far as the individual creditors of the firm were concerned, the facts showing that part of the property was derived by the partners under a will, the face of which indicated no intention on the part of the testator to vest the property in the devisees as partners, but on the contrary as individual owners, and that the partners acquired other real estate conveyed to them as individuals, the records disclosing nothing to

transfer the property to the firm or business interest in it in the partnership, although there were entries in the books treating it as such, but it did not appear that such property was incident to the firm business. The court held that as to such property which was not purchased with partnership funds for partnership purposes, but was the separate property of the individual members, and as such not incident to the business of the firm, the mere fact that the partners entered it on the firm books and treated it as firm property was not sufficient to change it into partnership property, and the proceeds of the sale thereof were to be applied to the payment of the claims of individual creditors prior to those of the partnership creditors.

In *Forde v. Herron* (1814) 4 Munf. 216, it was held that although real property purchased with the effects and used for the purposes of a mercantile firm, or copartnership, may in equity be liable to discharge the balance due him from the firm to any partner in preference to a private and individual debt of any other partner, it was nevertheless competent for the members of the firm to acquire such property jointly as individuals, or to lose the lien by acts tending to mislead or deceive creditors, or purchasers, in this particular.

In *Franklyn v. Sprague* (1887) 121 U. S. 215, 30 L. ed. 335, the guardian of minor heirs conveyed under proper legislative authority their interest in the property of a copartnership to a corporation, which assumed all the debts of the partnership, the business of which it was organized to continue. It was held that a debt due the minors from the partnership became a general debt of the corporation, and did not continue to be a lien upon the property, the Rhode Island act authorizing such a transfer being as efficacious in relation to the estate of the minor, subsequently declared of unsound mind, as it was in relation to the estate of any other child.

b. The nature of the creditors' rights.

It is the equity of each of the partners that the partnership assets shall be first applied in the payment of partnership debts in order that they may be relieved from their individual liability therefor which gives partnership creditors a right to priority of payment. *Foster v. Barnes* (1876) 81 Pa. 377.

And the firm creditors have a right to be substituted to the lien of the partner in the application and ratable distribution of the firm funds among them upon terms of equality, especially when the firm is insolvent and the whole subject is under the

In the latter case there was no use in the partners conveying the property to the firm in order that it might reconvey back to him by way of mortgage. "The transaction as it took place amounted to the same thing."

Markham v. Jaudon, 41 N. Y. 241.

Henry C. Moses held the legal title to land, which, in equity only, belonged to the firm of which he was a member. He advanced individually money to the firm, and which the firm owes him for. The firm and individuals, when matters stood thus, assigned for the benefit of their creditors, and the petition in this case insists that the property to which Henry C. Moses had the title individually, is individual property to the extent of said liability incurred by the firm to him.

A person having the legal title to land may retain it to secure any indebtedness due to him from the equitable owner, or those claiming under him, even if the indebtedness did not grow out of the land.

Williams v. Love, 2 Head, 80, 73 Am. Dec. 191.

The law, if there be no express agreement, raises an implied agreement that the title shall so be retained.

In an implied contract the law only supplies that which, although not stated, must be presumed to have been the agreement intended by the parties.

Story, Cont. § 11.

If A's land will go to A's individual creditors, then A's mortgage will likewise go; and if A's mortgage will go, then A's individual legal estate, fortified and enlarged by the express or implied agreement operating as a mortgage, will certainly so go to the extent, at least, of A's equity, which, besides having the legal estate at its back, is superior to that of the partnership to which alone the partnership creditors succeed.

Goldsmith v. Eichold, 94 Ala. 121.

Appellant does not seek to lay his hands on

control of the court of chancery. *Black v. Bush* (1846) 7 B. Mon. 210.

Whenever a particular partnership subsists, and partnership debts impose a lien upon the partnership property, both as between the partners themselves and the creditors and partners, or their representatives. *Sumner v. Hampson* (1838) 8 Ohio, 323, 365, 32 Am. Dec. 722.

But where the reason for the equitable rule ceases, in the absence of creditors of the firm, or others having like equities, the rule itself no longer applies. *Hewitt v. Rankin* (1876) 41 Ohio, 85.

Though the creditors of a firm have no lien as such upon the partnership property, yet they have a right in equity to follow it, as a trust, into the possession of all persons who have not a superior title. *Sands v. Kimbark* (1868) 27 N. Y. 149, following *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 560, 47 Am. Dec. 306.

Such estate being equitably pledged to the creditors like all other assets of the firm and liable to be absorbed and disposed of in the process of liquidating the firm debts, and satisfying the claims of the respective partners as against each other so long as the partnership affairs are unsettled. *Greenwood v. Marvin* (1888) 111 N. Y. 423.

The trust in favor of partnership creditors is worked out in equity through the medium of the trust existing between the partners. *Jones v. Parsons* (1864) 25 Cal. 100; *Guyton v. Flack* (1855) 7 Md. 398; *Shearer v. Shearer* (1867) 96 Mass. 107; *Parker v. Bowles* (1876) 87 N. H. 491; *Wilcox v. Kellogg* (1842) 11 Ohio, 304; *Lefevre's App.* (1871) 69 Pa. 122, 8 Am. Rep. 229; *Re Farmer, Ex parte Griffin* (1878) 18 Nat. Bankr. Reg. 207.

It does not spring from the sessions but exists with or without it. *Calder v. Their Creditors* (1896) 47 La. Ann. 346.

And as long as the partners continue to have an interest in the partnership, so long do the equities of the firm creditors continue. *Richard v. Allen* (1867) 117 Pa. 199; *Gallagher's App.* (1886) 114 Pa. 353, 60 Am. Rep. 350.

Real estate which is partnership property is subject to prior liens of partnership debts, even though the legal title may remain in the one partner and the other have only a title bond, equity treating that as done which is agreed to be done upon sufficient consideration. *Griffey v. Northcutt* (1871) 5 Heisk. 744.

Yet they have no lien, as such, upon the partnership property, their right being in equity to follow it as a trust into the possession of all persons who

have not a superior title. *Sands v. Kimbark* (1868) 27 N. Y. 149.

Creating no specific lien. *Beecher v. Stevens* (1876) 43 Conn. 587.

It is but a quasi lien, which, as a derivative subordinate right through the lien and equities of the partners, may be enforced in equity. *Guyton v. Flack* (1855) 7 Md. 398; *Pearson v. Keedy* (1845) 6 B. Mon. 128, 43 Am. Dec. 160; *Calder v. Their Creditors* (1896) 47 La. Ann. 346.

And practically a subrogation to the equity of the individual partner to be made effective only through him. *Case v. Beauregard* (1879) 99 U. S. 119, 25 L. ed. 370; *Reese v. Bradford* (1848) 13 Ala. 837.

Worked out through the partner's rights. *Hoxie v. Carr* (1832) 1 Sumn. 173.

The lien arising from the relation of the partners, being liable to be defeated only by a bona fide sale. *Sumner v. Hampson* (1838) 8 Ohio 323, 365, 32 Am. Dec. 722.

Not enforceable except by obtaining judgment and execution thereon. *Mayer v. Clark* (1866) 40 Ala. 259; *Ex parte Ruffin* (1801) 6 Ves. Jr. 119; *Burwell v. Springfield* (1849) 15 Ala. 273; *Nall v. McIntyre* (1858) 31 Ala. 583.

Standing in respect to partnership property as individual creditors do to the property of individual debtors, no lien existing until their debt is reduced to judgment which will create a lien on real estate; a lien being created by execution. *Reese v. Bradford, supra*.

The joint creditors of a firm being preferred in the distribution of firm estates, wholly by virtue of the equities of the partners, and not on account of any equities of their own, as they have no lien upon the partnership fund. *Re Codding & Russell* (1881) 9 Fed. Rep. 849.

So long as a partner retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity and enforce it through the application of those assets primarily to the payment of the debts due them. *Case v. Beauregard* (1879) 99 U. S. 119, 25 L. ed. 370.

In case of insolvency, its property is a trust fund for the benefit of all its creditors. *Smith v. Jones* (1885) 18 Neb. 481; *Murray v. Murray* (1821) 5 Johns. Ch. 60, 1 L. ed. 1009; *West v. Skip* (1749) 1 Ves. Sr. 239; *Ex parte Ruffin* (1801) 6 Ves. Jr. 119; *Campbell v. Mullett* (1818) 2 Swanst. 551; *Young v. Frier* (1858) 9 N. J. Eq. 465; *Robbins v. Cooper* (1822) 6 Johns. Ch. 186, 2 L. ed. 95; *Ex parte Crowder* (1715) 2 Vern. 706; *Ex parte Cook* (1728) 2 P. Wms. 500.

the "partner's interest in the firm," but only to have subjected to his debt property to which the firm has no legal or equitable claim, to the extent it is sought to be applied to the individual debts.

Henry C. Moses held the legal title by the consent of the firm; the firm thus parted with that title reserving the whole equity, and afterwards, on Henry C. Moses incurring a large personal liability for the firm, it agreed, expressly or impliedly (it makes no difference whether it be one or the other), that an equity to the amount of the advance should, in the language of *Lang v. Waring*, 25 Ala. 641, 60 Am. Dec. 533, "be united with the legal title," thereby cutting down the partnership interest or assets of the firm in that property to an equity to have the balance after discharging this liability.

A partner holding a legal title belonging in equity to the firm has an unqualified right on

making an advance to the firm, or incurring a personal liability for it, to claim in connection with his legal title an equity in the land to the extent of such advance.

Williams v. Love, 2 Head, 80, 77 Am. Dec. 191; *Pearl v. Pearl*, 1 Tenn. Ch. 206.

When a firm permits its real property to be recorded and stand as the property of one of its members for twenty years or more, well knowing that as an individual he was dealing on his general credit commercially, and the firm and their individual assigns for their creditors, this estoppel operates to prevent the firm, and thus the firm creditors, to insist until individual creditors are paid that the property is not individual property.

Kelly v. Scott, 49 N. Y. 595; *Preston v. McMillan*, 58 Ala. 91; *Bigelow, Estoppel*, 4th ed. 543, et seq.; *Putnam v. Reynolds*, 44 Mich. 118.

Section 1846 of the Code, referring to trusts in lands not apparent in the legal title pro-

While, however, the partnership is solvent and continuous, the creditors have no equity, strictly speaking, against the partnership effects, neither have they any lien upon the partnership effects for their debts; all that they can do is to proceed by an action at law for their debts against the partners. *White v. Parish* (1858) 20 Tex. 688, 78 Am. Dec. 204.

Therefore sales on separate executions of a firm property which destroy the dominion of the partners over it destroy also the equities of creditors whose liens are not actually attached. *McNutt v. Strayhorn* (1861) 39 Pa. 290.

So where there is no proof of the joint ownership, or of representations or conduct on the part of an individual partner, which are likely to mislead creditors such as would work an estoppel upon the partner, the rights of the firm creditors are dependent upon the rights of the partners *inter se*, with respect to property held by an individual partner. *Goepper v. Kinsinger* (1853) 39 Ohio St. 420.

Partnership creditors have no equity to prevent partners from transferring their property to each other, or of changing its character from joint to separate property, providing it is done in good faith. *Richards v. Manson* (1869) 101 Mass. 484; *Howe v. Lawrence* (1852) 9 Cush. 553, 57 Am. Dec. 68; *Harmon v. Clark* (1859) 13 Gray, 114.

Therefore where, prior to the death of a partner, a disposition of the real estate had been made under agreement between the partners with a third person, and with a corporation as successor to the firm, the partners consenting to the fulfillment of the agreement, a creditor has no right to have the funds in the hands of an executor distributed among the creditors of the firm, the equity of a creditor being of a dependent and subordinate character and enforceable only through the medium of the equities of the partners. *Singer v. Carpenter* (1866) 26 Ill. App. 23, following *Williams v. Adams* (1865) 16 Ill. App. 568; *Allen v. Center Valley Co.* (1861) 21 Conn. 130, 54 Am. Dec. 383; *Sigler v. Knox County Bank* (1858) 8 Ohio St. 514.

II. Preference of firm over individual creditors.

For all the purposes of a firm in paying off firm liabilities, and reimbursing the individual partners any advance they may have made, real estate purchased by the firm on the firm account must be held as firm assets, and each partner, even as to realty so purchased, must be held a trustee holding his interest in such property in trust for those purposes, all of which must be discharged before the individual creditors of any partner will be let in 28 L. R. A.

upon it. *Bryant v. Hunter* (1869) 6 Bush, 76; *Galbraith v. Geddes* (1855) 16 B. Mon. 631; *Conant v. Frary* (1875) 49 Ind. 580; *McMillan v. Hadley* (1861) 78 Ind. 590; *Boother v. Perrill* (Ind.) March 13, 1896; *Evans v. Hawley* (1872) 35 Iowa, 83; *Stadler v. Allen* (1876) 44 Iowa, 198; *Fall River Whaling Co. v. Borden* (1862) 10 Cush. 458; *Smith v. Jones* (1865) 18 Neb. 481; *Matlack v. James* (1860) 13 N. J. Eq. 122; *Hiscock v. Phelps* (1872) 48 N. Y. 97; *Schenck v. Ingraham* (1875) 5 Hun, 402; *Buchan v. Sumner* (1847) 3 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305; *Sands v. Kimbark* (1868) 27 N. Y. 149; *Everett v. Schepmoes* (1876) 6 Hun, 479; *Collumb v. Read* (1862) 24 N. Y. 510; *Hiscock v. Phelps* (1872) 49 N. Y. 97; *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 306, 7 L. ed. 627; *Ross v. Henderson* (1877) 77 N. C. 170; *Mendenhall v. Benbow* (1881) 84 N. C. 648; *Marvin v. Trumbull* (1833) *Wright* (Ohio) 386; *Diggs v. Brown* (1884) 78 Va. 226; *Re Warren* (1847) 2 Ware (2 Daves) 322.

Whether such individual creditor claims by judgment liens, by a deed of trust executed to secure his individual debts or in any other manner. *Cunningham v. Ward* (1868) 30 W. Va. 573.

And so it is under section 2794 of the Louisiana Civil Code. *Dunbar v. Bullard* (1847) 2 La. Ann. 810.

Provided it is so used as to give notice to the general creditors of the individual partners that it is treated as partnership property and is subsequently involved in the firm business. *National Union Bank of Maryland v. National Mechanics Bank of Baltimore* (Md.) 27 L. R. A. 478.

The equity of the firm creditors in the partnership lands being superior to that of the creditors of the individual partners. *Reeves v. Ayers* (1865) 38 Ill. 418.

Whether such property is real or personal estate. *Scudder v. Delashmut* (1853) 7 Iowa, 29, 71 Am. Dec. 423.

In the order of the seniority of their judgments, which are liens upon the land out of the sale of which the fund has been realized. *Gordon v. Kennedy* (1872) 36 Iowa, 167.

However the legal estate may stand. *Re Farmer, Ex parte Griffin* (1873) 18 Nat. Bankr. Reg. 207.

Still if he hold it in trust for the partnership, it must be considered subject to all equities existing in favor of the creditors of the firm. *Fowler v. Bailey* (1861) 14 Wis. 128; *Diggs v. Brown* (1884) 78 Va. 226; *Pierce v. Trigg* (1839) 10 Leigh, 408; *Wheatley v. Calhoun* (1841) 12 Leigh, 264, 37 Am. Dec. 654; *Christian v. Ellis* (1845) 1 Gratt. 402.

As against the individual creditors of the partner in whose name the title appears, and upon a winding up of the firm it must be used in payment of the firm debts and liabilities as against those of

vides that "no such trusts . . . can defeat the title of creditors or purchaser for a valuable consideration without notice."

There is no reason either in the nature of the thing, or the words of the statute, in confining the protection to judgment creditors with a lien, in excluding other creditors who have become invested with a similar or more efficacious lien on property for the payment of their debts.

Hatchett v. Blanton, 72 Ala. 428; *Kilbourne v. Fay*, 29 Ohio St. 279, 23 Am. Rep. 741; *Walker v. Miller*, 11 Ala. 1067; 20 Am. & Eng. Encyclop. Law, p. 578; *Ayres v. Duprey*, 27 Tex. 598, 86 Am. Dec. 657.

The spirit and words of the statute must include all creditors who have acquired any character of lien upon the land before notice of the trust.

Putnam v. Reynolds, *supra*; *Hanes v. Tiffany*, 25 Ohio St. 649; *Lindemann v. Ingham*, 86 Ohio St. 11.

Messrs. Tompkins & Troy and Horace Stringfellow for appellees.

Haralson, J., delivered the opinion of the court:

The sole question for decision in this case, as respects the rights of the Abraham petitioners, is whether the property in question belonged to the individuals composing the firm of Moses Bros., or to the firm itself; and Goldthwaite, receiver, has, also, an equal interest in the determination of that question. If it was individual property, it must be distributed among the individual creditors of that insolvent firm; but, if in equity it belonged to the partnership, it is to be distributed, with the other property belonging to the firm, to its creditors. There was real estate, the title to which stood in the names of the individual members, and stocks standing on the books in the names of one or another of the individuals, sched-

the creditors individually. *Riedeburg v. Schmitt* (1889) 71 Wis. 644.

Even though it may be in the name of one partner, except as against bona fide purchasers for value without notice of the partnership. Page v. Thomas (1886) 43 Ohio St. 33, 54 Am. Rep. 738.

Extending to the case of one partner, for the purpose of securing his individual debt, mortgaging to his creditor an undivided third of such property, the whole partnership property being afterwards sold by the three partners for the purpose of paying the firm debts, the individual creditor subsequently seeking to foreclose in equity his mortgage, the property not exceeding the value of the firm assets. *Jones v. Parsons* (1864) 26 Cal. 100; *Everett v. Schepmoes* (1876) 6 Hun. 479; *Tarbell v. West* (1881) 86 N. Y. 280; *Henry v. Anderson* (1881) 77 Ind. 361; *Lovejoy v. Bowers* (1840) 11 N. H. 404; *Sumner v. Hampson* (1838) 8 Ohio, 323, 32 Am. Dec. 722; *Marvin v. Trumbull* (1833) *Wright* (Ohio) 336; *Rammelsberg v. Mitchell* (1875) 29 Ohio St. 52; *Ludlow v. Cooper* (1854) 4 Ohio St. 1; *Baird v. Baird* (1897) 21 N. C. 524, 31 Am. Dec. 399.

The application of the general rule as to the primary liability of the partnership estate for the partnership debts not being altered thereby and the interest mortgaged remaining subject to the prior lien for such debts. *Priest v. Chouteau* (1864) 65 Mo. 396, 55 Am. Rep. 377.

So a creditor, whose debt against the partnership arose subsequently to the execution of such mortgage, has the same right to assert his lien as against such mortgage that would exist in favor of a prior creditor. *Norwalk Nat. Bank v. Sawyer* (1882) 38 Ohio St. 339.

And to the case of real estate, purchased by a partner out of his own moneys, improved by the firm, the firm creditors having a right in equity to the improvements over the separate creditors of such partner. *Averill v. Loucks* (1849) 6 Barb. 19.

Even though the separate creditors may have recovered judgments. *Harney v. First Nat. Bank of Jersey City* (N. J.) May 15, 1894.

And though such judgment is recorded against it before the execution of a mortgage by the firm when the judgment is affected with notice that such property is partnership stock. *Lancaster Bank v. Myley* (1850) 13 Pa. 544.

So he has precedence over a private creditor claiming by reason of a conveyance by a partner of his share of partnership real estate, even though the title may be in the individual names of the partners, such a creditor taking with notice of the 28 L. R. A.

equitable rights of the partners. *Matlack v. James* (1860) 13 N. J. Eq. 126.

And an attachment by firm creditors upon partnership real estate will have precedence over one issued by the creditor of an individual partner of a firm, even though subsequent in date to the latter. *Jarvis v. Brooks* (1853) 27 N. H. 37, 59 Am. Dec. 359, (1851) 23 N. H. 136; *Tappan v. Blaisdell* (1830) 5 N. H. 190.

A subsequent assignment under the Massachusetts Statute of 1838, chapter 238, has no validity against such attachment lien, but under the statute of 1838, chapter 163, the effect would be different. *Allen v. Wells* (1839) 22 Pick. 450, 38 Am. Dec. 737.

And the members of the partnership will not be permitted fraudulently to convert it into private property for the purpose of depriving the joint creditors of their rights, and in contemplation of insolvency. *Richards v. Manson* (1899) 101 Mass. 484.

The fact that real estate is paid for after the death of the partner with partnership funds, and conveyed to the surviving partner and the heirs of the deceased partner, does not change its character as partnership property, nor relieve it from liability to be subject to the payment of the debts of the firm. *Matthews v. Hunter* (1878) 37 Mo. 238.

Yet it is only partnership effects which are first responsible for partnership debts. *Skillman v. Purcell* (1832) 3 La. 497.

Real estate originally conveyed to a firm, the deed being taken in the name of one partner, and sold upon the failure of the firm and conveyed to a creditor who for valuable consideration sold to the wife of one of the partners, the property being subsequently seized upon two executions issued on judgments recovered against the husband and advertised for sale, is not a lien for the individual debts of the partner, as it does not become liable for his debts until those of the firm have been discharged. *Bowen v. Billings* (1882) 13 Neb. 439.

In *Cunningham v. Ward* (1888) 30 W. Va. 572, the court presumed that when the individual creditor of a partner claimed by a deed of trust executed by one partner, that if the trustee knew that the real estate was partnership property when the deed of trust was executed to him, though the creditors secured by it did not, such real estate would have to be applied first to the payment of all partnership debts and liabilities as other partnership property, before any of it could be applied to their prejudice to the individual creditors secured by such deed of trust, upon the principle that when a trustee ac-

ules of which real estate and stocks are attached to the petitions. These lands and stocks were included in the general assignment of Moses Bros., and came into the possession of the appellees, as assignees, and they claim them as the property of said firm, subject to distribution among its creditors, and not to the creditors of the individuals composing the said firm, whereas, the petitioners claim said property as belonging to the individuals in whose names the bills appear, and not to the firm of which they were members. It is a rule of universal recognition, that real estate acquired with partnership funds, or on partnership credit and for partnership purposes, is regarded in a court of equity as partnership property, and is subject to the payment of partnership debts, in preference and priority to the separate debts of the several parties; and it is wholly immaterial, says *Judge Story*, in the view of a court of equity, in whose name or names the purchase is made and the convey-

ance taken, whether in the name of one or of all the parties, or in the name of a stranger, alone, or jointly with a partner. In all these cases, let the legal title be where it may, it is in equity deemed partnership property, not subject to survivorship, and the partners are deemed the *cestui que trust* therefor. 2 Story, Eq. Jur. § 1207; *Hatchett v. Blanton*, 73 Ala. 435; *Little v. Snedecor*, 52 Ala. 167; *Offutt v. Scott*, 47 Ala. 104; *Coles v. Coles*, 1 Am. Lead. Cas. Hare & W. notes, 492, note; and *Dyer v. Clark*, Id. 495, note. Whether the land belongs to a firm or to one of the individuals composing it,—when the title is in his name, and not in that of his firm,—it must be solved by what appears to have been the intention of the parties. *Prima facie*, ownership is where the muniment of title places it; but if by all the circumstances attending the transaction,—which may be shown by parol, if there is no written evidence,—it is made to appear that, in the intention of the parties,

cepts such a deed of trust, with notice of certain facts invalidating it, or affecting it with a prior trust in favor of others, the creditors secured by it are presumed to assent to the deed for their benefit, such presumption involving the further presumption that they had notice of such facts as the trustee had notice of, when he accepted the deed of trust for them, which invalidate or subject the land to some prior equitable trust.

Where one member of a partnership gave his individual judgment to the vendors of partnership property for his proportionate share of the purchase money, and subsequently sold out his interest to the other partners who conveyed to a third party, and five years thereafter it was sought to continue the lien by means of a *scire facias*, the purchasers being summoned, it was held that the individual interest of such partner was real estate and bound in the hands of the tenants by the judgment, subject, however, to the equitable lien of the partnership creditors. *Wood v. Witherow* (1871) 8 Phila. 517.

If satisfaction has been already obtained by him, who has the double security, out of the fund to which alone the other can resort, the court will allow the latter claimant to stand in the place of the former *pro tanto*. *Keogh v. McManus* (1885) 84 Hun, 824; *Eddy v. Traver* (1837) 6 Paige, 521, 3 L. ed. 1183, 31 Am. Dec. 251; *Couch v. Delaplaine* (1849) 2 N. Y. 307; *Slade v. Van Vechten* (1844) 11 Paige, 21, 23, 5 L. ed. 42, 43.

Whenever it becomes necessary to resort to real estate held for partnership purposes for the payment of debts, a bill in chancery should be brought against the heirs and the surviving partners as tenants in common. *Hanway v. Robertshaw* (1874) 49 Miss. 758.

III. The position of the individual creditors of a partner.

a. In general.

The individual creditors having notice of a partnership existing, will be compelled in equity to respect the trust in favor of the partnership creditors, no matter whether the deed of trust executed in favor of the individual creditors be recorded or unrecorded. *Cunningham v. Ward* (1888) 30 W. Va. 572.

The interest of one partner in partnership property is his share in the surplus remaining after the payment of the claims against the partnership, and that surplus alone is liable to his individual debts, and an appropriation by him of the partnership real estate to the payment of his individual debts, 38 L. R. A.

without the knowledge or consent of his partners, would be a violation of his duty, and a fraud upon his partners. *Filley v. Phelps* (1847) 18 Conn. 294.

Therefore where the land is levied upon as the property of the firm, being bought by the firm and paid for with the firm's money, the property being thus bought, an individual creditor of one of the parties can only acquire by execution sale and purchase, the interest of the debtor after the settlement of the partnership affairs. *Cheek v. Anderson* (1879) 2 Lea, 198, following *Hunt v. Benson* (1841) 2 Humph. 459; *Williams v. Love* (1858) 2 Head, 81, 73 Am. Dec. 191; *Baker v. Hardin* (1872) 10 Helsk. 300; *Thomas v. Walker* (1845) 6 Humph. 95; *Taylor v. Fields* (1799) 4 Ves. Jr. 306; *Cammack v. Johnson* (1839) 2 N. J. Eq. 163.

The above principles are declared in the following cases: *Little v. Snedecor* (1875) 52 Ala. 167; *Lang v. Waring* (1854) 25 Ala. 625, 60 Am. Dec. 533; *Dupuy v. Leavenworth* (1861) 17 Cal. 292; *Preece v. Hicks* (1874) 14 Fla. 555; *Mauck v. Mauck* (1870) 54 Ill. 231; *Bopp v. Fox* (1872) 63 Ill. 540; *Matlock v. Matlock* (1854) 5 Ind. 403; *Booher v. Perrill* (Ind.) March 13, 1895; *Evans v. Hawley* (1872) 85 Iowa, 83; *York v. Clemens* (1875) 41 Iowa, 96; *Divine v. Mitchum* (1844) 4 B. Mon. 458, 41 Am. Dec. 241; *Bank of Louisville v. Hall* (1871) 8 Bush, 672; *Blake v. Nutter* (1841) 19 Me. 16; *Peck v. Fisher* (1851) 7 Cush. 339; *Goodwin v. Richardson* (1814) 11 Mass. 496; *Burnside v. Merrick* (1842) 4 Met. 537; *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 697; *Howard v. Priest* (1843) 5 Met. 533; *Russell v. Miller* (1872) 26 Mich. 1; *Scruggs v. Blair* (1870) 44 Miss. 406; *Duhring v. Duhring* (1854) 20 Mo. 174; *Priest v. Chouteau* (1884) 85 Mo. 396, 55 Am. Rep. 377; *Caldwell v. Bloomington Mfg. Co.* (1885) 17 Neb. 499; *Koop v. Herron* (1888) 15 Neb. 73; *Jarvis v. Brooks* (1853) 27 N. H. 87, 59 Am. Dec. 359; *Messer v. Messer* (1879) 59 N. H. 375; *Matlack v. James* (1860) 13 N. J. Eq. 126; *Uhler v. Semple* (1869) 20 N. J. Eq. 238; *Everett v. Schepmoes* (1876) 6 Hun, 490; *Delmonico v. Guillaume* (1845) 2 Sandf. Ch. 386, 7 L. ed. 627; *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305; *Garrett v. Scheffer* (1872) 47 N. Y. 656; *Collumb v. Read* (1862) 24 N. Y. 510; *Hiscock v. Phelps* (1872) 49 N. Y. 97; *Ross v. Henderson* (1877) 77 N. C. 176; *Norwalk Nat. Bank v. Sawyer* (1882) 39 Ohio St. 339; *Page v. Thomas* (1885) 49 Ohio St. 38, 54 Am. Rep. 799; *Melly v. Wood* (1872) 71 Pa. 483, 10 Am. Rep. 710; *Lime Rock Bank v. Phetteplace* (1864) 6 R. I. 56; *Willis v. Freeman* (1861) 85 Vt. 44, 82 Am. Dec. 619; *Davis v. Christian* (1859) 15 Gratt. 11; *Diggs v. Brown* (1884) 78 Va. 232; *Cunningham v. Ward* (1888) 30 W. Va. 572; *Fowler v. Bailey* (1861) 14 Wis. 124; *Re Warren* (1847) 2 Ware (3 Daves) 223.

It was purchased for and was treated as partnership property, that presumption of ownership arising from the face of the deed will be overcome, and the property will be treated as belonging to the partnership. Authorities *supra*. It has been insisted that when a partner buys real estate for his firm with its money, and takes the title in his own name, which title is spread upon the records of the county, those who have financial dealings with him are presumed to have done so on the faith and credit of that property, and the partnership is estopped afterwards to claim the property against the claims of the creditors of such partner. This doctrine is true, certainly, in cases of bona fide purchasers of such property, for value and with out notice, that it belonged to the partnership. But it cannot be extended further, without overthrowing all our adjudications

on the subject, as well as the general current of authorities, everywhere. No man has a lien on the property of another, with whom he deals, whether he is a member of a partnership or not, unless it is conferred by contract or by some rule of law. A creditor of one who is a member of a partnership can never put his hand on such a partner's interest in the firm, until the assets of the firm have been applied to the full payment and discharge of all debts and liabilities of the partnership, and after discharging these, the residuum is still held in trust for distribution among the several partners, according to their several interests. A lien exists in favor of each partner on the partnership effects to secure these results, and for the one as well as the other. This lien, as a general thing, exists only in favor of the several partners. They may sell the firm's property,

So under a judgment against one partner of the firm only his portion can be sold on execution. *Price v. Hunt* (1849) 38 N. C. 42.

For where statutory enactments do not interfere, the creditor can never get by his judgment more than his debtor really owns, and to this he will be confined by courts of equity. *Borst v. Nalle* (1877) 28 Gratt. 438; *Lounsbury v. Purdy* (1851) 11 Barb. 490; *Towsley v. McDonald* (1890) 32 Barb. 604; *Sieman v. Austin* (1859) 33 Barb. 9; *Sieman v. Schurck* (1864) 29 N. Y. 598; *Smith v. Gare* (1863) 41 Barb. 60; *Schlaefter v. Corson* (1868) 53 Barb. 510; *Robinson v. Robinson* (1867) 23 Iowa, 427; *Thomas v. Kennedy* (1868) 24 Iowa, 397, 95 Am. Dec. 740; *Pierce v. Brown* (1869) 74 U. S. 7 Wall. 205, 19 L. ed. 134; *Baker v. Morton* (1871) 79 U. S. 12 Wall. 150, 20 L. ed. 262.

Namely, the right to an account and to a distributive share of what may remain after the payment of the firm debts on final settlement. *Oliver's Estate* (1890) 9 L. R. A. 421, 136 Pa. 43; *Ebbert's App.* (1871) 70 Pa. 79; *West Hickory Min. Asso. v. Reed* (1875) 80 Pa. 38; *Melly v. Wood* (1872) 71 Pa. 458, 10 Am. Rep. 719.

Such real estate being treated as personality, is not subject to be sold as real estate to satisfy the personal debt of one of the partners, during the continuance of the partnership and not until the partnership debts are paid. *Morgan v. Olvey* (1876) 63 Ind. 6.

An execution may be levied on the joint property with the view of reaching the individual interest of the debtors, but in such a case the levy is not upon the individual share of the partner, as if there were no debts of the partnership or lien on the same for the balance due to the other partners, but is upon the interest only of the judgment debtor, if any, in the property after payment of all the partnership debts and other charges thereon. *Claggett v. Kilbourne* (1862) 66 U. S. 1 Black, 346, 12 L. ed. 213.

Yet it has been held that conversion into personality is not necessary to enable creditors of the individual partner to secure payment for their debts out of the share of their debtor in real estate held in partnership. *Shearer v. Shearer* (1867) 98 Mass. 107.

So a creditor of an individual partner can only attach or levy his execution upon the common property in such a manner as to take that partner's interest in the property, subject to the claims of the partnership creditors. *Filley v. Phelps* (1847) 18 Conn. 294; *Hill v. Beach* (1858) 12 N. J. Eq. 31.

And the same is the position of a partner advancing money to his copartner on account of partnership interests, the latter being the debtor to such partner and not the firm, and as between the two the partner loaning the money may have a lien in 23 L. R. A.

equity upon the share of such partner, but such equitable lien will give him no priority over the separate creditors of his debtor. *Hill v. Beach*, *supra*.

His lien upon such partner's share being subject to the equities existing in the firm creditors. *Johnson v. Rogers* (1876) 15 Nat. Bank. Reg. 1.

An attachment issued against the surplus of such real estate held in trust for the partnership firm under a mortgage, while in the hands of the sheriff on behalf of the separate creditor, is valid. *Hill v. Beach*, *supra*.

Before, however, a joint creditor can take the property from an individual creditor, who has an attachment or other lien upon it, it must be ascertained that the property is wanted for the purpose of settling up the partnership affairs, that is, that there is not more than sufficient means for the payment of the partnership creditors. *Scudder v. Delashmut* (1858) 7 Iowa, 39, 71 Am. Dec. 428.

But when such property belongs to the firm members as cotenants, it is subject to the individual debts of the partners. *Blake v. Nutter* (1841) 19 Me. 16.

A creditor cannot be affected by knowledge that the property was purchased with partnership funds or used for partnership purposes, where the title to property is taken to the partners themselves as tenants in common, instead of partners, such partners having the right to determine whether such property shall bear the character of partnership or individual property, and it matters not whether their creditors knew or did not know that the property was purchased with partnership funds, the deeds as to them being matters of record determining its character unalterably. *Second Nat. Bank of Titusville's App.* (1877) 83 Pa. 203.

And in such a case it does not constitute a fund which the firm creditors can take in preference to the individual creditors, without proceeding supplementary or auxiliary to a judgment against the firm. *Stadler v. Allen* (1876) 44 Iowa, 198.

Yet it seems that by the decisions in some courts the separate creditors of each partner have no claim thereon until the firm creditors are paid, even though the conveyance might show that the partners held as tenants in common. *Fall River Whaling Co. v. Borden* (1852) 10 Cush. 458.

It must have been purchased for the purposes of the partnership, to be exempt from the claims of the personal creditors of a partner. *Morgan v. Olvey* (1876) 63 Ind. 6.

The individual share or interest of a partner in real estate forms a fund in the hands of his copartners liable to the claims of all his creditors without distinction, the partnership creditors having no preference over the separate creditors on the sep-

may convey it to one of their own number, may partition or divide, and the lien will thereby be destroyed. Creditors as such cannot be said to have any lien on the partnership effects. There are conditions in which a creditor has been allowed to avail himself of this quasi lien of a partner, but it is derivative only, and not of original existence. But, in no event can a creditor of an individual partner acquire any greater interest in the assets of the firm of which the partner is a member, than the partner himself is entitled to, which is nothing, if the partnership is insolvent. The stream in law, no more than in nature, can rise higher than its source. Lindley, in his work on Partnership, states the principles so aptly, we quote what he says on the subject. Subject to certain exceptions, within which this case does not fall, he says: "It is an established

rule that a partner in a bankrupt firm shall not prove in competition with the creditors of the firm. They are, in fact, his own creditors, and he cannot be permitted to diminish the partnership assets to the prejudice of those who are not only creditors of the firm, but also of himself. If, therefore, a partner is a creditor of a firm, neither he nor his separate creditors (for they are in no better position than himself) can compete with the joint creditors as against the joint estate. *Lord Hardwicke*, it is true, in *Ex parte Hunter*, 1 Atk. 223, allowed this to be done; but that case has not, in this respect, been followed, and has long been considered as overruled." 2 Lindley, Partn. p. 720, § 721, and authorities cited; *Hart v. Clark*, 54 Ala. 490; *Warren v. Taylor*, 60 Ala. 218; *Farley v. Moog*, 79 Ala. 153, 58 Am. Rep. 585; *Goldsmith v. Eichold*, 94 Ala. 116; *Buchan*

arate and individual property surrendered by an insolvent member of a firm. *Bernard v. Dufour* (1849) 17 La. 596.

The interest of a partner purchasing real estate out of his own moneys, although the same is improved by the partnership firm, is subject to execution for his individual debt. *Averill v. Loucks* (1849) 6 Barb. 19.

So a creditor of an individual member of the partnership is entitled to preference, as regards the separate property of such partner, over a creditor of the firm. *Kirby v. Carpenter* (1849) 7 Barb. 373.

The creditor of a separate partner, purchasing under an execution the legal title in the real estate held by his debtor, takes such title, subject to the liens and trusts with which it stands chargeable in favor of the partnership creditors and the partners themselves. *Jones v. Parsons* (1864) 25 Cal. 100.

And an insolvent copartner, unable to pay the debts which the firm owed, is guilty of a fraud upon the joint creditors, if he authorizes his share of the firm property to be applied to the payment of a debt for which neither he nor his property are liable, at law or in equity. *Wilson v. Robertson* (1880) 21 N. Y. 502, 19 How. Pr. 365.

A provision in an assignment for the benefit of creditors, that partnership effects of an insolvent firm may be applied for payment of the individual debts of a partner, is a violation of the statute and furnishes conclusive evidence of a fraudulent intent. *Ruhl v. Phillips* (1890) 2 Daly, 49.

If an assignment executed by partners in trade is fraudulent, a judgment creditor of an individual partner may secure a lien upon the real estate, and such lien will be effectual as against the assignee in bankruptcy when obtained prior to the bankruptcy proceedings. *Johnson v. Rogers* (1876) 15 Nat. Bankr. Reg. 1.

The creditors of an individual member of a co-partnership have preference over those of another member, and one member to the creditor of another and to another member, for any amount paid in in excess of the share he was bound to contribute, or in excess of his proportion of the debts of the concern. *Hiscock v. Phelps* (1872) 49 N. Y. 97.

Where payments are made out of the firm property and funds, for the purchase or improvement of real estate, not purchased or used for partnership purposes, the title being taken in the names of the individual partners, or of others on their account, the sums so paid being by the act of payment withdrawn from the firm's assets, as between them and the firm, such property becomes the individual property of the partners or of the grantee, the share or interest of a partner being 28 L. R. A.

subject to his individual debts. *Chandler v. Jessup* (1892) 133 Ind. 351.

A deed executed by a copartner, of one undivided moiety of copartnership real estate to pay his individual creditors, after the dissolution of a firm, conveying the legal title of one moiety thereof, is subject to the implied trust that the creditors of the firm and the other partners shall be first paid out of the partnership amounts, and operates only to give to the individual creditors named in it a lien on the interest of such partner in the land, after payment of all the partnership debts with interest. *Cunningham v. Ward* (1888) 30 W. Va. 572.

In the case of a mortgage by a partner of his individual property to secure a firm debt the property being sold and the partnership debt paid thereunder, the partnership owning a part of the real estate the title to which was in the two partners as tenants in common, a partnership right growing out of the expending of partnership funds on the buildings and machinery, the proceeds of the sale being in the hands of an assignee, the individual creditors of the partner are not entitled in equity to have the partnership fund in priority to the creditors of the partnership, and the assignment giving preferences with partnership interests must go to the partnership assignee. *Kendall v. Rider* (1861) 25 Barb. 100.

b. Where property held prior to partnership.

Partners cannot so change the character of real estate originally owned by them as individuals, not derived by them in any way from the partnership so as to give priority to firm over separate creditors by simply making entries in the books and treating it between themselves as partnership property without giving some notice or doing some acts equivalent to notice, to their individual creditors. *National Union Bank of Maryland v. National Mechanics Bank of Baltimore (Md.)* (1894) 27 L. R. A. 476.

Tenants in common of real estate, conveyed to them by separate deeds, each paying for the portion conveyed to him and owning an undivided half, afterwards entering into a parol partnership under which such property is to be considered as belonging to the firm and using it for firm purposes, do not in equity render it liable as firm property for the payment of the partnership debts, as against separate creditors who have given credit to the partners individually upon the strength of the partners being owners as tenants in common. *Parker v. Bowles* (1876) 57 N. H. 491.

Where the parties put into the common stock every particle of property, both real and personal,

v. *Sumner*, 2 Barb. Ch. 167, 5 L. ed. 601, 47 Am. Dec. 305; *Jones v. Fletcher*, 43 Ark. 422; *Paige v. Paige*, 71 Iowa, 318, 60 Am. Rep. 799; *Story*, Partn. §§ 97, 360, 361; 13 Am. & Eng. Encyclop. Law, p. 611; 17 Am. & Eng. Encyclop. Law, p. 1195.

The written agreement executed between the partners on the 17th May, 1879, recites, that in the course of their business, the three

brothers composing the firm of Moses Bros. had acquired titles to real estate in the individual names of the one or the other of said parties, and it was provided by that agreement, that all real estate or interest therein then held by either of the members of that firm, in his individual name, was the property of the partnership, having been brought into the firm, or bought with it

except household furniture and apparel, together with the liabilities, without any express provision with regard to future acquisitions or liabilities, each divesting himself of all present possessions and binding himself to apply himself faithfully and diligently to the management of the partnership, there being no ground for supposing that the parties expected any such thing as the individual property or liabilities, such a transaction cannot strictly be called a partnership, but rather a universal hotchpot of all their properties and liabilities, present and prospective, so that the partnership creditors can claim no priority over the private creditors of such parties, such parties strictly speaking being tenants in common. *Rice v. Barnard* (1848) 20 Vt. 479, 50 Am. Dec. 54.

IV. The position of mortgagees.

Upon the question of mortgages of partnership real estate and the powers of the partners in respect thereto, see *notes* to *Yorks v. Tozer* (Minn.) ante, 86, and *Galbraith v. Tracy* (Ill.) ante, 129.

A mortgagee is a purchaser, and where acting bona fide is entitled to the rights of such. *Norwalk Nat. Bank v. Sawyer* (1882) 33 Ohio St. 339; *Williams v. Sprigg* (1856) 6 Ohio St. 538; *Williams v. Englebrecht* (1881) 37 Ohio St. 333.

And so is the mortgagee of an individual partner's share where he acts without notice of the fact that it is partnership property. *Page v. Thomas* (1885) 43 Ohio St. 33, 54 Am. Rep. 788; *Norwalk Nat. Bank v. Sawyer*, *supra*.

Although a mortgagee without notice, finding the legal title in the name of the individual partners, who lends money and takes a mortgage on the premises, will be protected as a bona fide purchaser, yet the judgment creditor can make no such claim. *Page v. Thomas*, *supra*.

If in the firm name partners make a promissory note with a mortgage upon real estate, use the firm name in the body but execute it in their individual names, it is a legal conveyance from the partnership, as also from the partners themselves, and may be foreclosed against one, more, or all of the partners. *Printup Bros. v. Turner* (1880) 65 Ga. 71.

Where four out of five partners mortgage partnership real estate and the mortgage is foreclosed and the land sold, the proceedings being otherwise regular, the sale will operate to convey the interest of all the partners who join in the mortgage. *Cottle v. Harrold* (1884) 72 Ga. 890; *Printup Bros. v. Turner*, *supra*.

Although the legal title under a contract between a retiring and continuing partner for the purchase by the latter may still be vested in the partners yet the continuing partner being the equitable owner, has power to mortgage the same, and the mortgagee is entitled to decree in foreclosure. *Seaman v. Huffaker* (1878) 21 Kan. 254.

Under an oral agreement between parties for the purchase of real estate each to contribute his share with the title taken in the name of one who gave a bond and mortgage for the unpaid purchase money, a judgment in foreclosure proceedings cannot be rendered upon the bond as against the others, as there is nothing to show that the name of the party whose name appeared in the deed is used as the firm name or that any other person is

indicated. *Williams v. Gillies* (1878) 75 N. Y. 197, reversing 13 Hun. 422.

A mortgage by a partner of his interest in partnership real estate, which is known by the mortgagee to be partnership property, is not a mortgage of a specific part of the real estate, but of his interest in the portion mortgaged, after the payment of the firm debts and liabilities, and the settlement of the accounts as between the partners. *Beecher v. Stevens* (1876) 43 Conn. 587.

Such a mortgagee takes his interest subject to the equities in favor of the firm creditors and of the partners *inter se*. *Smith v. Evans* (1871) 37 Ind. 526; *Kelly v. Hutton* (1868) L. R. 3 Ch. 703, 37 L. J. Ch. 917, 19 L. T. N. S. 223, 16 Week. Rep. 1182.

And has no priority over a creditor of the partnership attaching the partnership property, and it matters not whether such creditors are prior or subsequent to the mortgage in point of time. *Lovejoy v. Bowers* (1840) 11 N. H. 404.

It is not until the interest of a partner has been definitely ascertained and set apart as his share, that his mortgagee has any claim under the mortgage available against such specific property. *Tarbel v. Bradley* (1878) 7 Abb. N. C. 279.

Such mortgagee cannot foreclose as against a purchaser under a sheriff's sale of the firm property to satisfy the judgment creditor of the firm. *Kistner v. Sindlinger* (1870) 33 Ind. 114.

Yet a mortgagee of one partner of his interest in partnership real estate, bona fide without notice of partnership liabilities has been held entitled to hold as against partnership creditors. *McDermott v. Laurence* (1821) 7 Serg. & R. 438, 10 Am. Dec. 468.

The firm creditors have a right to be made parties to foreclosure proceedings, upon a mortgage executed by a partner on partnership real estate to secure his individual debt for the purpose of subjecting such estate to the payment of the partnership debts. *Conant v. Frary* (1875) 49 Ind. 580.

See further, upon the effect of notice of a partnership, *infra*, head VII.

V. The position of judgment creditors.

Such property is subject to the payment of the judgments against the firm for partnership debts, in preference to judgments against the partners individually. *Erwin's App.* (1861) 39 Pa. 535, 30 Am. Dec. 542; *Overholt's App.* (1849) 12 Pa. 222, 51 Am. Dec. 568.

If any part of the property levied upon by virtue of the execution belonged to the firm, such property will not be liable for any indebtedness, except a partnership debt, until the debts of the firm are all paid. *Muir v. Leitch* (1849) 7 Barb. 348; *Schenck v. Ingraham* (1875) 5 Hun. 403; *Payne v. Matthews* (1886) 6 Paige, 20, 3 L. ed. 561, 29 Am. Dec. 738.

The levy and sale of the land upon a judgment against an individual member of the firm passes no interest or estate in it to the purchaser. *Oliver's Estate* (1890) 9 L. R. A. 421, 136 Pa. 43.

Partners owning real estate in their individual names, not disclosing the fact of a partnership or that their interests in such land are such, cannot subsequently change the condition by parol evidence, as against a creditor who has obtained a lien upon such property. *Geddes' App.* (1877) 84 Pa. 482.

funds for partnership purposes. The testimony of M. C., H. C., and A. H. Moses, taken before the register, shows that the acquisition of real estate, after that agreement was signed, continued as before, viz., that in many instances the title was taken in the name of the partner effecting the transaction, but all real estate, whether the title was so taken, or in the name of the firm, was bought

for the firm, paid for out of its funds and was taken and treated as its property, and not as the property of the member in whose name the title stood, excepting the residences of H. C. and A. H. Moses in Montgomery, and the residence of said A. H. Moses in Sheffield, and a lot given to him in Sheffield by the Sheffield Iron & Coal Company. A careful review of all the evidence satisfies

The face of the conveyance determining the character of the title as to judgment creditors and mortgagees, and as to such it cannot be altered by parol. *Holt's App.* (1881) 96 Pa. 257.

A judgment against a partnership is a lien upon the real estate of the individual partners. *Moyer Wheel Co. v. Fielding* (1886) 101 N. Y. 504.

With the same effect as if such judgment were for the separate debt of such partner, and the principle that the separate property of an individual partner is to be first applied to the payment of his separate debt, has never been held to give priority as to such property to a subsequent judgment for an individual over a prior judgment for a partnership debt, even though courts of equity will give but a mere equitable lien prior in point of time a preference over a subsequent judgment in cases where such prior lien is specific in its performance. *Meech v. Allen* (1858) 17 N. Y. 300, 73 Am. Dec. 465.

And a court of chancery will so control it as to restrict it to the actual interest of the judgment debtor in the property, so as to fully protect the rights of those who have a prior equitable interest in or liens upon such property, or in the proceeds thereof. *O'Donnell v. Kerr* (1875) 50 How. Pr. 384, following *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305; *Wilkes v. Harper* (1847) 3 Barb. Ch. 354, 5 L. ed. 672; *Sieman v. Austin* (1859) 38 Barb. 20; *Monticello Hydraulic Co. v. Loughry* (1860) 73 Ind. 566; *Peet v. Beers* (1853) 4 Ind. 46; *Troust v. Davis* (1860) 31 Ind. 34; *Gildewell v. Spaugh* (1856) 26 Ind. 319.

The equitable doctrine being that a judgment and the legal lien of its docket bind only the actual interest of the judgment debtor, and are subject to all existing equities which are valid as against him. *Ellis v. Tousley* (1828) 1 Paige, 280, 2 L. ed. 647; *White v. Carpenter* (1830) 2 Paige, 217, 2 L. ed. 682; *Gouverneur v. Titus* (1837) 6 Paige, 347, 3 L. ed. 1015.

Such lien being subject to all equities which exist against such land in favor of third persons at the time of the recovery of the judgment. *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305; *Moyer v. Hinman* (1855) 13 N. Y. 190; *Ellis v. Tousley* (1828) 1 Paige, 280, 2 L. ed. 647.

But no lien is created by the recovery of a judgment until it is docketed, and therefore no question of notice or contest, as to the priority, can arise between a creditor holding a judgment not docketed, and a party having no specific lien by mortgage, or any conveyance of title. *Blydenburgh v. Northrop* (1856) 13 How. Pr. 290; *Foot v. Dillaye* (1873) 65 Barb. 523.

And an amendment of the docket of a judgment made after the title of the judgment debtor had been devoted in the due course of law does not operate to give a lien on the estate sold under a prior incumbrance. *Sears v. Mack* (1853) 2 Bradf. 409.

So a judgment properly entered, but irregularly docketed through the omission of the clerk, under the initial letter of the judgment debtor's Christian name, instead of the initial letter of his surname, has no priority to a subsequent judgment properly entered and docketed. *Buchan v. Sumner*, *supra*, distinguished in *Mutual L. Ins. Co. v. Dake* (1876) 1 Abb. N. C. 501; *Sears v. Mack*, *supra*. 38 L. R. A.

Where a lien of a judgment is suspended by an order vacating the judgment, when such order ceases to have any validity by being vacated, the lien is revived. *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305, distinguished in *King v. Harris* (1886) 84 N. Y. 330, 336, a case where the judgment had not been docketed so as to create a lien.

If the land is purchased by the partners with their individual funds, the firm holds only such an interest in the land as arises from the fact that it was the individual property of the partners, and as such the land is liable to be taken for debts upon *scire facias*, but a judgment is not a lien until after *scire facias* is issued. *Stadler v. Allen* (1876) 44 Iowa, 198.

Upon a judgment recovered against a mercantile firm real estate can be sold by the sheriff under a *f. fa.* issued against the firm. *Hunter v. Martin* (1845) 2 Rich. L. 641.

So the interest of a *cestui que trust* in land will pass to the extent of an execution upon the land as his estate. *Jarvis v. Brooks* (1833) 27 N. H. 37, 59 Am. Dec. 359, 23 N. H. 133, following *Pritchard v. Brown* (1833) 4 N. H. 397, 17 Am. Dec. 431.

By a sale of land on a judgment, the lien of the judgment and the right to redeem are gone. *Shepard v. O'Neill* (1848) 4 Barb. 126.

An injunction to restrain a sale of partnership lands will be granted as against a judgment creditor of one partner. *Harney v. First Nat. Bank of Jersey City* (N. J.) May 15, 1894.

Neither general assignees, nor assignees in bankruptcy, nor judgment creditors, can be relieved against a prior equity. There must be a purchase and a payment of value without notice of the trust, before this can be defeated. *Sieman v. Austin* (1859) 38 Barb. 20.

Section 2905 of the Alabama Code of 1886, which provided that a judgment recovered in an action, which should bind the joint property of all of the associates, as if all had been made defendants and been sued upon their joint liability, does not apply to the case of a judgment obtained against partners sued in their common firm name without giving their individual names and under such a judgment partnership property subject to execution, and only partnership property, can be levied on or seized, and land conveyed to a partnership in its common or firm name cannot be levied upon under such an execution because as a partnership it has neither a legal title nor a perfect equity, the legal title being in the tenants in common as individuals and not subject to be forced out of them to meet partnership debts, except by proceedings in equity, which destroy *pro tanto* its character as land and convert it into personality. *Powers v. Robinson* (1890) 90 Ala. 225.

Where the description of the parties to the deed identified the property as belonging to a partnership, but the conveyance was to the persons named their heirs and assigns, creating a legal title in joint tenancy, and the judgment was against the same persons as individuals, describing them in like manner as partners, the single bill being the act of each under hand and seal, it was held the judgment necessarily became a charge upon the legal title with a right to sell it upon exemptions, such judgment being a charge as against subse-

us that the decree of the chancery court on this question was correct.

Let us now refer specially to the petition of Robert Goldthwaite, as receiver in the case of *Paul v. Knox*, in which it is stated that petitioner's claim had been adjudicated and allowed in this case, for \$18,108.11, as a claim against the estate of H. C. Moses;

that said claim arose on account of trust funds in said Moses' hands as a receiver in the case of *Paul v. Knox*, which he advanced to the firm of Moses Bros., of which he was a member, without taking the security required by the court; that Moses Bros. were indebted to said H. C. Moses for said advances at the time of the general assignment made by them

quent purchasers. *Lauffer v. Cavett* (1878) 57 Pa. 479.

Where a suit is brought against copartners, or against the survivors of a partnership, it is not necessary to declare against or pray process as to all the members and to have a return of *non est inventus* as to those not served in order to bind their interest in the partnership effects, and in either case the judgments will end the partnership as to the partners sued and served as to their individual property and all the property of the partnership. *Printup Bros. v. Turner* (1890) 65 Ga. 71.

VI. The position of purchasers.

The several members of a partnership firm cannot be regarded in law as holding real estate as tenants in common, unless it is conveyed to them as such by name, and each partner is required to join in the conveyance of real estate in order to pass the entirety thereof to the purchaser, and therefore if one partner only executes a conveyance, whether in his own name or in that of the firm, the deed will not pass anything more than his own interest. *Moreau v. Saffrans* (1856) 3 Sneed, 595, 67 Am. Dec. 582.

a. From the firm.

The purchaser of an interest in the real estate of a partnership acquires the legal title and not a mere equity. *McCauley v. Fulton* (1872) 44 Cal. 362.

While a copartnership is solvent and going on, the creditors, strictly speaking, have no equity against the assets of the partnership, and therefore a sale of any portion of the joint property to one of the partners bona fide and for valuable consideration will be valid against any claim by the partnership creditors. *Waterman v. Hunt* (1852) 2 R. I. 298.

Where real estate is conveyed to partners as tenants in common, a purchaser who purchases in good faith without notice of the partnership existing will be protected as against the claim of the partners and the partnership creditors. *Tillinghast v. Champlin* (1856) 4 R. I. 178, 67 Am. Dec. 510.

And where a bona fide sale is made of the property of a firm by its members, before any proceedings, either in law or in equity, are instituted by a creditor of the firm, the latter cannot by any subsequent proceeding acquire a lien upon the property thus disposed of. *Gwin v. Selby* (1855) 5 Ohio St. 96.

If the property be parted with by sales severally made, neither party has the dominion or possession and there is nothing through which the equities of the creditors can work. *McNutt v. Strayhorn* (1861) 39 Pa. 239.

And a partner after receiving his proportion of the value of real estate belonging to the firm, cannot afterwards be permitted to urge his legal title to the prejudice of a bona fide purchaser, who has paid the value to the firm. *Thomas v. Scott* (1842) 8 Rob. (La.) 256.

b. From partner holding the legal title.

If the legal title is vested in one partner a bona fide purchaser from him of the real estate without notice, either express or constructive, of its being partnership property, will be entitled to hold it free from any partnership claim, a court of law viewing it in general, according to the legal title. *Hoxie v. Carr* (1832) 1 Sumn. 173; *McMillan v. Hadley* (1861) 28 L. R. A.

78 Ind. 590; *Parker v. Bowles* (1876) 57 N. H. 491; *Tarbell v. West* (1881) 66 N. Y. 287; *Hiscock v. Phelps* (1872) 49 N. Y. 97; *Page v. Thomas* (1885) 43 Ohio St. 38, 54 Am. Rep. 788; *Cavander v. Bulteel* (1878) L. R. 9 Ch. App. 79, 43 L. J. Ch. 370, 29 L. T. N. S. 710, 22 Week. Rep. 177.

In equity as well as at law. *Buchan v. Sumner* (1847) 2 Barb. Ch. 165, 5 L. ed. 599, 47 Am. Dec. 305.

So if a bona fide purchaser is without information equivalent to notice, of the existing equity, on a new consideration paid for. *Martin v. Wagener* (1873) 1 Thomp. & C. 509, 518.

And unless the record in the register of deed's office indicates that the land is held by the firm as partnership property, or that the property is purchased jointly with partnership funds. *Hammond v. Paxton* (1865) 58 Mich. 396.

One of two partners purchasing real estate with partnership funds, and subsequently selling it to a third party who transfers it to a corporation of which such partner is a member, and in point of fact a substantial owner, the transaction is not a bona fide purchase. *Maloy v. Associated Lace Makers' Co.* (1890) 28 N. Y. S. R. 735.

Where real estate is conveyed to a firm in the firm name, and also to one partner in trust for the firm, the latter property being conveyed by a partner who died insolvent and indebted to the copartnership without personal representatives, nothing passes by the deed in the land conveyed to the firm so as to oust the claims of partnership creditors. *Donaldson v. State Bank of Cape Fear* (1827) 16 N. C. 102, 18 Am. Dec. 577.

A third party, who has purchased real estate from a partner, cannot be restrained by injunction issued in a suit between the partners for the liquidation and settlement of the partnership affairs, from using or enjoying such property pending such partnership suit, where the selling partner had not been proved to be indebted to the other partner, such purchaser not being a member of the copartnership or connected therewith, even though it be alleged that such purchaser knew that the property was partnership estate. *McKee v. Griffin* (1871) 23 La. Ann. 417.

c. Of partner's interest.

Partner's dealing in real estate taking title deeds which makes them tenants in common, and containing on their face no evidence of the trust, and therefore not bound by the assignment of each other for valuable consideration without notice, put it in the power of each other to circumvent innocent persons by the exhibition of titles clear upon their face, but incumbered with secret equities. *Boyce v. Coster* (1850) 4 Strobb. Eq. 25.

The purchaser of an interest in the real estate of a partnership acquires the legal title and not a mere equity, the title acquired being chargeable in equity with a lien in favor of the other partner, which can only be enforced in equity and is not recognizable at law, being simply an equitable right to have the property applied in payment of the partnership debts. *McCauley v. Fulton* (1872) 44 Cal. 362.

To the same effect, *Coles v. Coles* (1818) 15 Johns. 160, 8 Am. Dec. 231; *Greene v. Graham* (1831) 5 Ohio, 264; *Ross v. Heintzen* (1868) 86 Cal. 314; *Blake v. Nutter* (1841) 19 Me. 16; *Peck v. Fisher* (1851) 7 Cush. 387; *Buchan v. Sumner* (1847) 2 Barb. Ch. 193, 5 L.

and as members of said firm, and are still indebted to him for the same, and at the time of said assignment, "besides the property belonging to H. C. Moses individually, and to which he had the legal title, he also held the legal title to some real estate, which in equity belonged, after the adjustment and payment of the claims of said H. C. Moses

against said firm, to said firm of Moses Bros.; that as between said H. C. Moses as an individual and the said firm of Moses Bros., the said H. C. was at most the trustee of the legal title of the property so held by him for said firm after the adjustment and payment of the said debt due by said firm to him, on account of said funds so advanced by him for

ed. 611, 47 Am. Dec. 305; Lang v. Waring (1854) 25 Ala. 643, 60 Am. Dec. 538; Lowe v. Alexander (1860) 15 Cal. 293; Dupuy v. Leavenworth (1861) 17 Cal. 323; Stokes v. Stevens (1870) 40 Cal. 391.

A purchaser of such an equity takes only the interest which his vendor has and is subject to all equities, and cannot compel the conveyance of the legal title until the indebtedness is discharged. Williams v. Love (1856) 2 Head, 80, 73 Am. Dec. 191.

Such a purchaser, acquiring no title to any share of the surplus effects, but only his share of the surplus after an accounting and the adjustment of the partnership affairs. Tarbell v. West (1881) 86 N. Y. 290; Menagh v. Whitwell (1878) 52 N. Y. 147, 11 Am. Rep. 683.

And will not be entitled to ejectment against such partner. Du Bree v. Albert (1882) 100 Pa. 463.

And no greater interest can be derived from a voluntary sale by a partner of his interest, or by a sale of it under execution. Beecher v. Stevens (1876) 43 Conn. 597.

If land is conveyed to partners as tenants in common, without mention of any agreement to consider it as stock, and one partner subsequently conveyed his portion to a stranger who has no notice of the partnership, such purchaser cannot be affected by any private agreement. McDermot v. Laurence (1821) 7 Serg. & R. 438, 10 Am. Dec. 463.

A purchaser without notice of the equitable title of a partner takes it discharged from the trust, yet the presumption is that he takes only the share of the holder of the legal title. Coder v. Huling (1856) 27 Pa. 84.

So equity will protect a bona fide purchaser without notice of the share of a partner in partnership real estate. Tillinghast v. Champlin (1856) 4 R. L. 173, 67 Am. Dec. 510.

One of two partners, who were also partners in other firms, conveying all his interest in real estate and in the business of the other firms, the grantee accepting the deed and covenanting to assume all the liabilities of such firms, is liable upon his implied promise to pay, such deed being valid as against the creditors of the firm. Guild v. Leonard (1836) 18 Pick. 511.

A purchaser of a partner's interest with record notice of a mortgage ratified by partners holds subject to the mortgage lien. Stroman v. Varn (1883) 19 B. C. 307.

A purchaser of the share of a tenant in common carrying on farming business in partnership is a tenant in common with the other tenant in the partnership property, taking the undivided share of the grantor subject to the rights of such grantor and to the account to be taken between the partners. Mumford v. McKay (1832) 8 Wend. 443, 24 Am. Dec. 84.

Where a partnership firm purchases from one of its own members, who pledges his interest in the company as an indemnity against loss, and guarantees that the property can be resold within five years at an amount at least equal to the consideration, and the lands are not sold at the expiration of such time, an assignee of the notes taken for the consideration cannot assert a vendor's lien as against a member of the company who guarantees the payment of the notes. Coster v. Bank of Georgia (1853) 24 Ala. 37.

d. Of deceased partner's share.

A purchaser of the share of a deceased partner

in partnership real estate takes such property discharged from all trusts or equities in favor of the surviving partner, of which he has no notice. McNeill v. First Cong. Soc. of San Francisco (1894) 66 Cal. 105.

Where a bill is filed for partition of lands held as partnership property, a purchaser of a share of a deceased partner is entitled to partition. Greene v. Graham (1831) 5 Ohio, 264.

Where the partner applies part of the partnership property in the joint purchase of a right of settlement, and upon the death of one partner the survivor sells the land, after having it surveyed under a treasury warrant, to a purchaser who has notice of the partnership, and who obtains a grant of the whole from the commonwealth, a purchaser of the deceased partner's share from his heir is entitled in equity to the share of the deceased partner. Edgar v. Donnally (1811) 2 Munf. 387.

With reference to the question of the power of a surviving partner to sell, see note to Galbraith v. Tracy (Ill.) ante, 129, and to his power as against the heir in that respect, see note to Woodward-Holmes Co. v. Nudd (Minn.) 27 L. R. A. 840.

e. Under execution against firm.

Partners in trade may acquire the real estate in their partnership name, and a sheriff's sale of it in execution against the firm conveys all their estate. Hunter v. Martin (1845) 2 Rich. L. 541.

A purchaser of such real estate appropriated by judgment, execution, and sale against all the partners in payment of partnership debts will acquire a good title as against a general lien of a judgment prior in date for an individual debt of a partner. Martin v. Wagener (1873) 1 Thomp. & C. 509, 518.

But where real estate held as partnership assets is sold under a decree and purchased by a firm creditor who cancels his indebtedness, and such sale is subsequently held void, its incidents and consequences are also void. Allen v. Withrow (1884) 110 U. S. 119, 28 L. ed. 90.

A voluntary assignment for the benefit of creditors, if valid, is not a mere agency of the debtor, but creates a trust relation, and the creditors are the beneficiaries under which the assignee can maintain an action to protect and set aside the sale of the partnership real estate, levied under an attachment subsequent to the execution of the assignment. Smith v. Jones (1885) 18 Neb. 451; Moses v. Murgatroyd (1814) 1 Johns. Ch. 119, 1 L. ed. 53, 7 Am. Dec. 478; Shepherd v. McEvers (1819) 4 Johns. Ch. 136, 1 L. ed. 791; Nicoll v. Mumford (1820) 4 Johns. Ch. 523, 1 L. ed. 923; Ward v. Lewis (1827) 4 Pick. 518; New England Bank v. Lewis (1829) 8 Pick. 113; Pingree v. Comstock (1836) 18 Pick. 46; Read v. Robinson (1843) 6 Watts & S. 329; McKinney v. Rhoads (1836) 5 Watts, 342; England v. Reynolds (1832) 30 Ala. 370; Pearson v. Rookhill (1843) 4 B. Mon. 296.

f. Under execution against partner.

An execution may be levied upon the interest of a partner in the firm property, and it may be so for the payment of the judgment, but the purchaser only acquires the interest of the debtor, subject to the settlement of the debts and liabilities of the firm, as he only holds such interest as the partner has on final settlement and accounting of the affairs of the firm, and the rights of the partners on such accounting. Rainey v. Nance (1870)

the use of said firm, and that said property to which he, said H. C. Moses, thus held the legal title individually, was the individual property of said Henry Moses in equity, to the amount and extent of said advances, for said firm, and being so, petitioner as the creditor of said Henry C. Moses and the holder of said debt is entitled to have said property regarded as the individual property of said Henry C. Moses, and to be paid out of the proceeds thereof, if the same is sufficient therefor." We have quoted this language of the petition to show the more

plainly the position and contention of the petitioner. In short, this is the statement of the proposition, that real estate belonging to a partnership, but standing in the name of one of the partners at the time of the insolvency of the firm, is the individual property of such partner to the extent of his claim against the firm, so that, to such extent, such property must be distributed among his individual creditors, rather than among the creditors of the partnership. When H. C. Moses lent the money in his hands, as receiver, to Moses Bros., he was guilty of a

54 DL 29; *Ross v. Henderson* (1877) 77 N. C. 170; *Treadwell v. Rascoe* (1831) 14 N. C. 50; *Price v. Hunt* (1849) 33 N. C. 42; *Latham v. Simmons* (1855) 48 N. C. 27; *McCutchon v. Davis* (Tex.) April 24, 1888; *Claggett v. Kilbourne* (1882) 66 U. S. 1 Black, 346, 17 L. ed. 213.

That is such partner's interest in the firm assets, which remain after the satisfaction of the partnership debts. *Osborn v. McBride* (1876) 16 Nat. Bankr. Reg. 83, 8 Sawy. 590.

He gets merely the legal estate of the defendant in the execution, whether the purchaser knew that the property was partnership property or not, as such a purchaser takes subject to all equities whether he knew of them or not. *Ross v. Henderson, supra*; *Polk v. Gallant* (1839) 22 N. C. 396, 34 Am. Dec. 410.

But if bona fide and without notice he acquires a title valid as against the firm creditors. *Buck v. Winn* (1853) 11 B. Mon. 320.

A purchaser of partnership real estate at an execution sale, against one partner who holds in trust for the firm, is not a bona fide purchaser, where he has notice of such holding, and can acquire no interest beyond the interest of his debtor after the payment of all partnership debts. *Crow v. Drace* (1875) 61 Mo. 225. *Black v. Long* (1875) 60 Mo. 181, followed.

The purchaser of the interest of one of several partners of leasehold property held by them under a lease signed by all but in their individual names and not as partners, who purchases at an execution sale, is entitled to partition, and in the absence of notice, the partners cannot show by parol evidence that it was partnership property. *Cowden v. Cairns* (1859) 28 Mo. 471.

g. The liability to see to the application of purchase money.

Where a conveyance of partnership real estate is executed by all the partners and conveys all their title, the grantee will not be accountable for the disposition of the consideration by the firm, or any one of its members. *Lincoln v. White* (1849) 30 Me. 201.

A purchaser in such a case is not bound to see to the application of the purchase money, as such a burden would greatly reduce the value of the property. *Megibben v. Perin* (1892) 49 Fed. Rep. 183, following *Tillinghast v. Champlin* (1866) 4 R. I. 173, 67 Am. Dec. 510; *Griffey v. Northcutt* (1871) 5 Helsk. 746, decided under the Tennessee statute.

The purchaser of partnership real estate from a surviving partner, even though with notice that it is partnership property, will be protected as against a misapplication of the purchase money by such partner, where he acts bona fide and without notice of the fraudulent intent of such partner; *aliter* where he purchases with notice secretly and with the presumed knowledge of such fraudulent intention. *Tillinghast v. Champlin, supra*.

VII. The question of notice.

The position of a purchaser or mortgagee is affected by the question of notice, it being a material L. R. A.

rial question in determining the validity of the purchase or mortgage of partnership real estate whether the purchaser has or has not notice of the fact that it is partnership property, especially when he procures his title from a partner in whom the legal estate is vested or where such title is vested in the partners as tenants in common.

The question as to whether real estate held on partnership account is chargeable in the hands of a purchaser with the payment of the partnership debts, depends upon the question whether such purchaser has actual or constructive notice at the time of his purchase that it belonged to the partnership, if he has notice it is so chargeable, if not he is exonerated to the extent of the purchase money paid by him. *Hoxie v. Carr* (1832) 1 Sumn. 173.

Whether knowledge that the property is occupied and used by the partnership is constructive notice that it is owned by the partnership, must depend upon the fact whether, under all the circumstances which are known to the plaintiff, such occupation by the partnership is so inconsistent with ownership separately by the partners that the plaintiff in the exercise of reasonable care and judgment ought to have taken notice and made inquiry, and if the result of such inquiry would have been knowledge that the property has been converted from separate to partnership property, such question being a mixed one of law and fact. *Parker v. Bowles* (1876) 57 N. H. 491.

Where the legal title to partnership lands is vested in one partner, his bona fide grantee or mortgagee takes his title free from the equities of the other partners, or of copartnership creditors, but if he has notice that the land is partnership assets, he takes subject to their equities. *Tarbell v. West* (1831) 86 N. Y. 237; *Hiscock v. Phelps* (1872) 49 N. Y. 97; *Cavander v. Bulteel* (1873) L. R. 9 Ch. App. 79, 43 L. J. Ch. 370, 29 L. T. N. S. 710, 22 Week. Rep. 177.

So if a person knows that a particular real estate is partnership property and attempts to acquire title to a portion of it from one alone without the knowledge or consent of the other. *Parker v. Bowles* (1876) 57 N. H. 491; *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 607.

The following cases are to the same effect: *Priest v. Chouteau* (1844) 85 Mo. 398, 55 Am. Rep. 377, following *Mataick v. James* (1800) 13 N. J. Eq. 126; *Forde v. Herron* (1814) 4 Munf. 316; *McDermott v. Laurence* (1821) 7 Serg. & R. 488, 10 Am. Dec. 468; *Frin v. Branch* (1844) 16 Conn. 260.

If the purchaser has notice that the property belongs to the partnership, that fact will put him upon inquiry as to whether or not there are partnership debts to which it is liable. *Hoxie v. Carr* (1832) 1 Sumn. 173.

And the same is the case with a mortgage by one partner to secure his own private debt. *Norwalk Nat. Bank v. Sawyer* (1882) 38 Ohio St. 339; *Williams v. Sprigg* (1859) 6 Ohio St. 588; *Williams v. Englebrecht* (1881) 37 Ohio St. 383.

Not only as to debts existing at the time the mortgage takes effect, but also those arising subse-

breach of trust, in which his firm participated, if they knew the character of the fund that was lent them. By so doing he incurred a personal liability on himself to account for the money, and the borrowers, if chargeable with a knowledge of the violated duty, incurred a similar pecuniary liability; but, in contracting the debt, even if they participated in the breach of duty,—as we before now, in reference to this same matter, decided,—that fact did not change the nature of the obligation, so as to fasten a lien on their property for its payment. A lien, as we have said, is never an incident of a con-

tract or money obligation unless made so by the contract or by some rule of law. The proposition submitted does not differ materially from the same question presented and decided in cases heretofore before us on appeal. It cannot be sustained without overruling these and many other cases in this and other courts. *Goldthwaite v. Ellison*, 99 Ala. 497; *Ellison v. Moss*, 95 Ala. 221; 17 Am. & Eng. Encyclop. Law, p. 1195, and notes 2, 3.

What we have said is equally applicable to each of the cases set forth in the transcript,—that of *Robert Goldthwaite, Receiver*

quently. *Page v. Thomas* (1885) 43 Ohio St. 38, 54 Am. Rep. 788.

Where the purchasers do not assert ignorance that there are at the time of the purchase partnership debts due, the accompanying fact that one partner is in the exclusive possession as to the other is calculated to awaken suspicion and incite inquiry on the part of a diligent and watchful purchaser. *Hoxie v. Carr* (1889) 1 Sumn. 173.

The New York statute declares that no implied or resulting trust shall be alleged or established, to defeat or prejudice the title of a purchaser for a valuable consideration, and without notice of the trust. *Siemom v. Schurck* (1864) 29 N. Y. 613, a case where the purchase takes effect from time of actual sale, and does not reach back by relation of the date of the judgment.

But such a trust will attach in the hands of a bona fide purchaser or mortgagee with notice taking under a conveyance from the holder of the legal estate, where the conveyance makes no reference to the land being partnership stock, but vests the title in the several members as tenants in common. *Arnold v. Walnwright* (1861) 6 Minn. 363, 30 Am. Dec. 448; *Whitney v. Cotten* (1876) 53 Miss. 639; *Dyer v. Clark* (1843) 5 Met. 562, 39 Am. Dec. 697; *Hoxie v. Carr*, *supra*; *Forde v. Herron* (1814) 4 Munt. 316; *McDemot v. Laurence* (1821) 7 Serg. & R. 428, 10 Am. Dec. 463.

Where real estate is used by the partnership in the course of its business, that fact of itself furnishes notice to a purchaser from one of the partners that the property belongs to the partnership and is the subject of partnership rights and liabilities. *Buck v. Winn* (1850) 11 B. Mon. 320.

Purchasers are not required to search for judgment liens, further than to examine the proper index. *Metc v. State Bank of Brownville* (1878) 7 Neb. 172; *Hance's App.* (1845) 1 Pa. 408; *Ridgway's App.* (1850) 15 Pa. 177, 53 Am. Dec. 598; *Wood v. Reynolds* (1844) 7 Watts & S. 406.

Although a mortgagee without notice, finding the legal title in the name of the individual partners, who lends money and takes a mortgage on the premises, will be protected as a bona fide purchaser, yet the judgment creditor can make no such claim. *Page v. Thomas* (1885) 43 Ohio St. 38, 54 Am. Rep. 788.

A vendor of real estate, who is himself a partner in the firm purchasing the same, cannot assert a vendor's lien as against subsequent creditors, mortgagees, and purchasers without notice of his lien. *Coster v. Bank of Georgia* (1833) 24 Ala. 37.

Where there is nothing upon the record in the office of the register of deeds to indicate or suggest that the land belongs to the partnership, although it shows that the lands are conveyed to the defendants jointly, not showing, however, that the purchase is made with partnership funds, the purchaser is not bound by notice of the possession and use of such property by the firm, so as to make the land chargeable as partnership assets. *Hammond v. Paxton* (1885) 58 Mich. 392.
38 L. R. A.

So a party who, without notice of a partnership, advances money to one holding the equitable estate in realty, part whereof is applied in completing the contract of purchase, the same being in the possession of no one, holds the same as against the partnership and as against a receiver appointed to wind up its affairs. *Richmond v. Voorhees* (Wash.) Dec. 18, 1864.

If executors of a deceased partner, at the time of taking a mortgage upon mill property, are aware that it is in fact owned and used by the firm as partnership property, it must be taken that they are also aware that the law holds it liable like other partnership assets, to the payment of the debts, to the exclusion of the individual debts of the members, and they are therefore guilty of a breach of trust in taking the mortgage. *Miller v. Proctor* (1870) 20 Ohio St. 442.

Where the lessor of lands leased to a partnership purchases the share of one partner and subsequently mortgages the property, the new firm's possession is sufficient notice to the mortgagee, that the prior firm had placed erections upon such property and that the same are not included in the mortgage, as one partner cannot by his own act defeat the rights of his copartners. *Kerr v. Kingsbury* (1875) 39 Mich. 150, 33 Am. Rep. 362.

A conveyance of real estate made by one partner, using and signing the firm name for the purpose of securing an advance of money to the firm duly recorded, the subscribing witness testifying that he saw the firm signing the same, will, upon an attachment by another creditor, work an equitable assignment, and being within the provisions of the Texas statute relating to the recording of deeds will give constructive notice of the assignment. *Baldwin v. Richardson* (1870) 33 Tex. 16.

The purchaser of a share of a party let into a partnership for the purpose of purchase and improvement of city property has sufficient notice of the partnership and of its object to render his share liable to all the equities of the other partners, the deed providing that such partner is to hold as joint tenant with the others, and to conform in all respects to the objects of the agreement executed between them for the improvement and sale of such property. *Boyce v. Coster* (1850) 4 Strobb. Eq. 25.

In *Cavander v. Bulteel* (1873) L. R. 9 Ch. App. 79, 43 L. J. Ch. 370, 29 L. T. N. S. 710, 22 Week. Rep. 177, the claim of a mortgagee of an absconding partner having notice of the partnership was postponed to that of the continuing partner even though the debts paid by the latter were subsequent in date to the mortgage, his knowledge that the premises were in the possession of the firm as partnership assets being constructive notice of the partnership.

See further as to notice of real estate being partnership property, note to *Robinson Bank v. Miller* (Ill.) 27 L. R. A. 449, and *National Union Bank of Maryland v. National Mechanics Bank of Baltimore* (Md.) 27 L. R. A. 476, head XIII. R. W.

v. Janey & Cheney, Trustees, etc., and of Adolph Abraham and others against same parties.

There was no error in the rulings of the court below, and the decrees in each case must in all respects be affirmed.

Let the appellants, each, pay one half of the costs of this appeal.

Rehearing denied.

TENNESSEE SUPREME COURT.

August SHACKT, *Appt.*,
v.
ILLINOIS CENTRAL R. CO.

(94 Tenn. 653.)

A constructive if not an actual fraud to obtain cheap rates of freight which relieves the carrier from liability for loss of the goods is shown where a man of intelligence ships in a basket with a rope around it without making known its contents a quantity of silks, satins, laces, curtains, silver spoons and other valuable articles, most of which were for sale by his wife, in her business as a dressmaker and milliner, and remains silent when he hears the carrier's agent designating them as "household goods" the rate on which is very much less than that on merchandise.

(April 18, 1896.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Shelby County overruling a judgment of a justice of the peace in plaintiff's favor in an action brought to recover the value of certain goods lost while in defendant's possession for transportation. *Affirmed.*

The facts are stated in the opinion.

Mr. Frank Zimmerman for appellant.

Messrs. Estes & Fentress, for appellee:

It was a gross fraud to attempt to ship such articles as freight without notifying the company of the character and value of the articles. In all such cases the carrier is not liable.

2 Am. & Eng. Encyclop. Law, pp. 795, 796; *Missouri Pac. R. Co. v. York* (Tex.), 18 Am. & Eng. R. R. Cas. 628; *Southern Exp. Co. v. Womack*, 1 Heisk. 256; *Hutchinson, Carr.* §§ 213, 214; *Humphreys v. Perry*, 148 U. S. 627, 87 L. ed. 587.

Wilkes, J., delivered the opinion of the court:

This action was instituted before a justice of the peace in Shelby county to recover from the defendant railroad company the value of a hamper basket and its contents, shipped over the road by the plaintiff from Chicago to Memphis. There was judgment before the justice of the peace for \$156.50 and costs, from which the railroad company appealed to the second circuit court of Shelby county, where the case was tried before the judge

without a jury, and judgment was rendered for the defendant railroad company, and plaintiff has appealed to this court, and assigned errors.

Plaintiff is a native of Hamburg, Germany. He left that city in 1881, and went to the Argentine Republic, where he remained until 1890; thence to Brazil, where he stayed six months; thence to Chicago, in 1891; and thence to Memphis, in 1893. He was married in 1892, in Chicago, his wife having been before and since her marriage a dress-maker and milliner for a number of years. When about to leave Chicago for Memphis, on the 12th of December, 1893, the plaintiff delivered for shipment to the agent of the Illinois Central Railroad Company a lot of freight to be shipped to Memphis, consisting of four boxes, two trunks, three barrels, one sewing machine, one table, one bundle table leaves, two bundles of toy chairs, two bundles of bedding, one basket and contents, and a number of other small articles. Plaintiff carried these goods to the depot, accompanying the express driver, and his statement is that, the day being bitterly cold, all were eager to be relieved as soon as practicable. The agent of the railroad company, seeing the lot of articles to be shipped, cried out to his assistant, "Household goods," and plaintiff, standing by, heard this, but said nothing, but explains in his testimony that he had never previously shipped any goods by freight, and did not know there were different rates of charges depending on different classifications of freight. He inquired the amount of the freight bill, but was told he could pay it at Memphis, and he made no reply, and said no more. The goods were placed in a freight car, and it was sealed, and so remained until it reached its destination, when, upon opening the car, and delivering the remainder of the goods, it was ascertained that the basket and contents were missing, and they have never been found or delivered, though search has been made for them by the railroad company. The goods were billed at 1,700 pounds, and the freight rate charged was 43 cents per 100, being what is known as a "fourth-class" freight rate. Upon the bill were written the words, "Owners' risk rel. to value \$5.00." Plaintiff testifies that he did not know the meaning of

NORM.—The above case falls clearly within the fully established rule which denies recovery against a carrier for the loss of goods which the shipper has by fraud induced the carrier to take without knowing their nature and value. But this case applies the rule to a shipment in which the fraud is possibly to be regarded as constructive only and in which the goods seem to be all proper
38 L. R. A.

for shipment as freight but at higher rates. The case therefore makes a striking illustration of the rule.

As to the effect of misrepresenting values of goods shipped, see also cases as to limitation of amount of liability in note to *Ballou v. Earle* (R. L.) 14 L. R. A. 433.

these words; that they were not explained to him; and he could not ascertain, though he inquired of several persons; but the best impression he could get was that, if the goods were lost, he would receive \$500. The words are shown to mean that the goods are shipped at the risk of the owner, and the railroad company released of all liability beyond \$5 per 100 pounds. The freight rate charged 48 cents per 100 pounds—was the usual rate charged for household goods, and the railroad employes state that they were received and shipped as such household goods. This basket is described as being about 5 feet long and 3½ feet wide, there being two of them lashed together with a rope or clothes line. No one except the wife of the plaintiff testifies as to the contents of the basket, but she states that it contained the following articles: A blue suit of men's clothes, \$25; set table cloths and napkins, \$9; linen table cloth, \$1.75; one linen table cloth, \$1.85; one-half dozen solid silver table spoons, marked "A. S.," \$15; 2 dozen linen towels, \$12; 7 yards black basket cloth, \$4.20; 10 yards figured cotton cloth, \$1.25; 8 yards red plush, \$4.50; 8 yards gray ottoman silk, \$3.75; 2 yards red satin, \$1.50; 3½ yards blue velvet, \$5.25; 10 yards black silk grenadine, \$10; 7 yards Henrietta cloth, \$8.75; 5 yards brown flannel, \$3.25; box ties, ribbons, and notions, \$4; 2 vases, \$8; black skirt, with ruffle, \$3.50; bed spread, \$1.25; 2 pictures and frames, \$4; 3 silk scarfs, \$3.50; chenille table spread, \$7.50; 2 pair lace curtains, \$7; 7 roll styles pictures, \$5.25; 1 pair pillow shams, \$2.50; 1 rubber wrapper, \$3.50; total \$156.50. It appears from the statement of Mrs. Shackt that these articles were in the main goods to be sold by her in her business. The pictures were of members of the family, and the spoons a gift from her mother.

It is insisted by plaintiff that there was no intentional fraud upon his part in shipping these goods, and that he did not know the rates of charges depended on the classification of the freight or character of the goods shipped, and that the circuit judge, was in error in denying him a judgment for the value of the goods. Plaintiff's counsel assents to the proposition of law that when the value of the goods is deliberately and intentionally concealed by the shipper for the purpose of cheating the carrier out of his reasonable hire, the carrier would not be liable in case of loss, and the shipper could have no relief. But it is insisted that in this case the shipper was inexperienced, and never shipped anything in his life, and did not know the rules of railroad companies in fixing rates and classing freights, and hence was not guilty of intentionally defrauding or attempting to defraud the railroad company. We are unable, from the facts disclosed in this record, to regard the conduct of plaintiff in the light in which counsel places it. Plaintiff was a man of intelligence, about thirty-five years of age, who had traveled much; a machinist by trade. His wife had also engaged in business, and it is hardly credible that these two persons should have been so ignorant in regard to shipments of goods as they profess to have been. Indeed, the

circumstances of the shipment tend more strongly to establish a case of premeditated imposition on the railroad company than one of simple ignorance and innocence. The shipment of silks, satins, laces, curtains, silver spoons, and other articles of value in a basket with a rope around it, and without making known its contents, is not satisfactorily explained upon the ground of ignorance. They had two trunks in the same shipment, both with locks, and, while the proof does not disclose in detail what they contain, we cannot presume their contents were so valuable as the contents of this basket, without heightening the fraud in the transaction; and no good reason is given why these valuables were not placed in the trunks, except as to the pictures, that were too large for that disposition to be made of them. We can but regard this action of the plaintiff in standing by and assenting to the statement that they were household goods, as well as the manner in which they were shipped and packed, as a constructive, if not actual, fraud upon the railroad company to obtain cheaper rates of freight than could otherwise be had. Some of the articles, especially the silver spoons, would not have been shipped as freight by the defendant company on any terms, and none of the shipment was, strictly speaking, "household goods," except a few articles; the silks and other goods being in piece, never having been used, and upon these the rate would have been, if shipped at all, as high as \$1.70 per 100, instead of 48 cents, as charged. It is true, this rate was not fixed when the goods were delivered at Chicago, but it was so fixed afterwards, and assented to by the plaintiff when he received the goods at Memphis.

The case of *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587, is a well-considered one, and lays down in emphatic language the non-liability of the carrier of baggage under similar facts. In that case a traveling salesman for a jewelry firm bought a passenger ticket for passage on a railroad, and presented a trunk to be checked to the place of destination, without informing the agent of the company that the trunk contained jewelry, which it did, and without being inquired of by the agent as to what it did contain. He paid a charge for overweight as personal baggage, and the trunk was checked. It was of a dark brown color, and of a kind known as "jewelry trunks." It had been a practice of the jewelry company to send out trunks filled with goods, the trunks being of similar character to the one in question; and, as a rule, they were checked as personal baggage. But there was no evidence to show that the railroad company or their agents knew what the trunks contained. Now, that was a much stronger case than the one at bar, because in that case the articles were checked as personal baggage, and yet the supreme court held: (1) There was no evidence showing or tending to show that the agent of the railroad company had any actual knowledge of the contents of the trunk; (2) that there was no evidence from which it could fairly be said that the agent had reason to

believe that the trunk contained jewelry; (3) the agent was not required to inquire as to the contents of the trunk so presented as personal baggage; and (4) the company was not liable for the loss of the contents of the trunk. This is an important case, and reviews many cases on the subject, and, coming from the highest court, is strongly persuasive. In 2 Am. & Eng. Encyclop. Law, pp. 795, 796, are given many instances of concealment of the nature and value of the articles shipped which have been held to release the carrier from liability. In *Missouri Pac. R. Co. v. York* (Tex.) 18 Am. & Eng. R. R. Cas. 628, it was held that when goods were shipped as freight the shipper must use no artifice or fraud to deceive the carrier whereby his risk is increased, or his care and diligence lessened. If, there be such fraud or concealment, the carrier is relieved from liability. If money be placed in a trunk without communicating the fact to the carrier, and shipped as freight, the shipper is guilty of fraud. In Hutchinson on Carriers (secs. 218, 214) it is said: "Fraud may be as effectually practiced on the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package, and the nature of its contents, if there be anything in its form, dimensions, or other outward appearance which is calculated to throw the carrier off his guard, whether so designated or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper, as, if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled; or by such deception the carrier is thrown off his guard, and neglects to give to the package the care and attention which he would have given it had he known its actual value.—"And if, under such circumstances, money or other valuables concealed in a package be lost by his negligence or carelessness, it would be unjust to charge him with their full value, because such concealment would be a fraud upon him as respects his compensation for the carriage, and a deception as to the degree of care which the package required, and with which he would have guarded it had he been told the truth: as where money or jewels or other articles of great value are put into a valise or box, which is generally used to contain things of comparatively small value, and delivery made to the carrier without informing him of the contents, there being nothing in the appearance of the valise or box to indicate or to apprise the carrier that it was of more than ordinary value, it would be an imposition upon him, and the law would not lend its aid in such a case to make him accountable for the money or other valuable contents if they should be lost."

In the case of *Kuter v. Michigan Cent. R. Co.*, 1 Biss. 85, Fed. Cas. No. 7,955, Judge Drummond charged the jury that if a railroad company knew that immigrants like the plaintiff were in the habit of putting valua-

ble articles and money among their household goods, and from such knowledge might have inferred that plaintiff's box might contain money, then it became the duty of the company to make inquiry, in order to relieve itself from liability. The Supreme Court of the United States, commenting on this case, said: "We do not think such view is sound." *Humphreys v. Perry*, 148 U. S. 646, 37 L. ed. 595.

We see no error in the record, and affirm the judgment of the court below, with costs.

STATE of Tennessee

9.

Mary F. ALSTON *et al.*

(94 Tenn. 674.)

1. **The right of succession to the property of a deceased person** whether by law or inheritance is a creature of statute law and not a natural right beyond legislative control.
2. **A tax on the privilege of receiving property** by inheritance or will or otherwise at the death of the former owner is not a tax on the property or on the right of alienation.
3. **A discrimination between direct descendants and collateral kindred and strangers** does not make a collateral inheritance tax unconstitutional.
4. **Exempting every estate under two hundred and fifty dollars** in value but not exempting that sum in larger estates from a succession tax does not make the tax unconstitutional.

(April 20, 1896.)

CROSS-APPEALS from a decree of the Circuit Court for Lauderdale County in a proceeding to collect a succession tax; the state appealing from so much of the decree as failed to find certain property subject to the tax, and defendants appealing from so much of the decree as held the statute which imposed the tax to be constitutional. *Modified and affirmed.*

The facts are stated in the opinion.

Mr. John P. Gause for the State.

Messrs. W. G. Lynn and *W. E. Lynn* for defendants.

Wilkes, J., delivered the opinion of the court:

This cause involves the constitutionality, and to some extent the construction, of chapter 174 and section 7 of chapter 89 of the Acts of 1893; the former being an act to provide for a collateral inheritance and succession tax, and the latter a section of the general revenue law passed at that session. The court below held the acts to be constitutional; that the interests passing under the will of John J. Alston to his widow and to his brother, Volney S. Alston, were not subject

NOTE.—See recent decisions of Maine and Massachusetts upholding the constitutionality of inheritance or succession taxes, in *State v. Hamlin* (Me.) 25 L. R. A. 682, and *Minot v. Winthrop* (Mass.) 28 L. R. A. 232.

to such tax, but that other devices and legacies were subject thereto, as will be more fully explained hereafter. Both the state and the parties held liable appealed, but the state has assigned no errors.

The facts, as agreed upon, are substantially as follows: Dr. John J. Alston died in Lauderdale county in June, 1894. He left a will which was duly probated, and his widow, Mary Frances Alston, is his executrix. He owned the personal property and real estate referred to in his will. This will gives to his widow certain notes on Jones and others; some mill machinery; a life interest in tracts of 235 acres, 120 acres, 50 acres, and 5 acres of land; all cash on hand or deposit; the rents of a storehouse in Henning, Tenn., during life; the dividends and profits on his \$3,000 of stock in a Ripley bank for life; and possibly some other property. To his niece Mrs. Lee A. Crutcher and her husband, W. C. Crutcher, he gave two tracts of land during life, one containing 240 acres and the other 12½ acres, with remainder to their children. He also gave to his niece and her husband certain live stock. To Mrs. McCowan and Mrs. Griggs, two nieces, he gave a remainder interest in the tracts of 120 acres and 50 acres, in which a life estate was given to the widow, providing that the widow might give them possession before her death, if she chose to do so. The 235-acre tract and the 5-acre tract of land given to the widow for life are directed to be sold at her death, and the proceeds to be divided, one half to the testator's brother, Volney S. Alston, and the other half to two nephews, William and James Dyer.

The decree of the court below is substantially that the property given to the widow, Mary F., and the brother, Volney S., is not subject to the succession or inheritance tax provided by such acts, but that such of it as was given to William and James Dyer was subject to such tax; but nothing was decreed as to the property given to Lee A. Crutcher and her husband.

It is stated by counsel representing the defendants that there is a clerical mistake in the decree, in that the liabilities of the property given to William and James Dyer are adjudicated, when it was intended to adjudicate the rights of Mrs. Lee A. Crutcher and her husband, and it is agreed that it may be treated as corrected. William and James Dyer are not parties to the agreed case in the court below, nor in this court; but Mr. and Mrs. Crutcher are parties in both courts, and their counsel in this court appears for them, and waives the error, and submits the question as to their liability. Considering the record as thus corrected, we proceed to examine the questions presented.

It is manifest that, by the express terms of the acts referred to, none of the property of the testator passing under his will to his widow is subject to the tax therein provided: and we proceed to examine as to the liability of the property, personal and real, given by the will to Lee A. Crutcher and her husband, W. C. Crutcher.

The first section of chapter 174, Acts 1893, provides for a tax upon all estates, real, 28 L. R. A.

personal, and mixed, situate in the state, whether the person dying seized live in the state or not, passing either by will or inheritance, or by any deed, grant, bargain, gift, or sale made in contemplation of death, or to take effect, in possession or enjoyment, after the death of the grantor, to any person or body, corporate or politic, in trust or otherwise, when the property thus passing goes to any other than the father, mother, husband, wife, children, and lineal descendants: provided, that no estate valued at less than \$250 shall be subject to said duty or tax, and that the term "children" shall not be construed to apply to adopted children. This act was intended to put into operation a general system of succession or inheritance taxation, and to repeal all laws in conflict with it. It was approved April 10, 1893, and fixes the rate of taxation at \$5 on the \$100 of value of the property passing. On the same day, but whether prior or subsequent in point of time does not appear, the general revenue act was passed for that session, being chapter 89, and in the seventh section of the latter Act a similar tax is provided and assessed. This section differs from chapter 174 in that it exempts property passing to the same parties mentioned in chapter 174, and in addition the following persons: Brothers, sisters, the wife or widow of a son, and husband of a daughter, and any legally adopted child; but no mention is made of exemption of estates of less than \$250 in value. No error is assigned nor point made as to this variance; and as the question of the effect of the variance is in no way presented, and as to the parties before us cannot arise directly, we express no opinion as to this variance and its effect, if any.

It is contended that the acts are unconstitutional because they attempt to restrain and restrict the devolution of property by will or inheritance by placing a tax upon such devolution; and, again, because the act is partial, in that the tax is imposed if the property is given to certain persons, but not if given to others; and, again, that the tax is not equal and uniform, because small estates, of less than \$250 in value, are exempt from its operation, while those of that amount or over are subject to its provisions.

In considering these grave questions, a short history of succession and inheritance taxes may not be inappropriate. Such taxes were recognized by the Roman law. 1 Gihbons, *Decline and Fall of the Roman Empire*, pp. 163, 164. They were adopted in England in 1780, and have been much extended since that date. Dowell, *Hist. Taxn.* p. 148; Act 20 Geo. III. chap. 28; 45 Geo. III. chap. 28; 16 & 17 Vict. chap. 51; *Green v. Croft*, 2 H. Bl. 30; *Hill v. Atkinson*, 2 Meriv. 45. Such taxes are now in force generally in the countries of Europe. Review of Reviews, Feb. 1898. In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887; and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, in 1891; Tennessee, in 1891, chapter 25, now repealed by chapter 174, Acts 1893. They were adopted in North Carolina in 1848, but

repealed in 1888; were enacted in Virginia in 1844, repealed in 1855, re-enacted in 1868, and repealed in 1884. In New Hampshire, Wisconsin, Minnesota, and Vermont, such laws have been passed, but held unconstitutional on various grounds.

Upon general principles, the right to tax the succession or inheritance of property is founded on a reasonable basis, since the right of any person to succeed to property of a deceased person, whether by will or inheritance, is a creature of statute law, and the manner in which it shall pass by no means a natural right. 2 Bl. Com. p. 10; 2 Kent, Com. 12th ed. 835; *Dos Passos*, Collateral Inheritance Tax, 20; *Brettun v. Fox*, 100 Mass. 234; *Mager v. Grima*, 49 U. S. 8 How. 490, 12 L. ed. 1168; *Wallace v. Myers*, 38 Fed. Rep. 184, 4 L. R. A. 171; *Peters v. Lynchburg*, 76 Va. 927; *State v. Dalrymple*, 70 Md. 294, 8 L. R. A. 372; *Pullen v. Wake County Comrs.* 66 N. C. 361; *Strode v. Com.* 52 Pa. 181; *Re Swift's Estate*, 187 N. Y. 77, 18 L. R. A. 709; *Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337.

This idea is recognized almost universally by statutes which provide the manner in which property shall descend in the absence of any will of the deceased, and in statutes which regulate the passage of property by will. As the right to succeed depends upon the law of the state, it follows that the state may regulate that right as public necessity or policy may dictate, and may subject it to such burdens and reasonable conditions as may best subserve the purposes of the state. It must be borne in mind that the tax is not upon the property, but the right or privilege of acquiring it by succession. It is a condition upon which the person may take the estate of a deceased relative by inheritance, or testator by his will. It is a retention by the state of a part of a deceased person's property, which the state may take to meet its necessities, and which, in certain cases, it may take *in toto*, as in cases of escheated property. It is not a tax upon the right of alienation, but on the privilege of receiving by inheritance or will, or otherwise, at the death of a former owner. *Strode v. Com.* 52 Pa. 181; *Eyre v. Jacob*, 14 Gratt. 431, 78 Am. Dec. 387; *Peters v. Lynchburg*, 76 Va. 929; *Re Howe's Estate*, 2 L. R. A. 825, and *note*, 112 N. Y. 100; *Schoofield v. Lynchburg*, 78 Va. 866; *Clymer v. Com.* 52 Pa. 189; *Carpenter v. Pennsylvania*, 58 U. S. 17 How. 463, 15 L. ed. 129; *Frederickson v. Louisiana*, 64 U. S. 23 How. 447, 16 L. ed. 578; *Tyson v. State*, 28 Md. 577; *State v. Dalrymple*, 70 Md. 298, 8 L. R. A. 372; *Re Howard*, 5 Dem. 487; *State v. Mann*, 76 Wis. 469; *Minot v. Winthrop*, 163 Mass. 113, 26 L. R. A. 259; *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 632; *Scholey v. Rew*, 90 U. S. 23 Wall. 831, 23 L. ed. 99; *Re Knoedler's Will*, 140 N. Y. 377; *Re Merriam's Estate*, 141 N. Y. 479.

In *Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337, the constitutionality of such a tax was denied on the ground that the act imposing it was discriminating, unequal, and not proportional. But they have been sustained in very many cases, only a few of which we cite: *Mager v. Grima*, 49 U. S. 8 How. 490, 28 L. R. A.

12 L. ed. 1163; *Scholey v. Rew*, 90 U. S. 23 Wall. 831, 23 L. ed. 99; *Re Howe's Estate*, 112 N. Y. 100, 2 L. R. A. 825, and *note*; *Wallace v. Myers*, 38 Fed. Rep. 184, 4 L. R. A. 171; *Eyre v. Jacob*, 14 Gratt. 423, 78 Am. Dec. 387; *Tyson v. State*, 28 Md. 577; *State v. Dalrymple*, 70 Md. 294, 8 L. R. A. 372; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502; *Strode v. Com.* 52 Pa. 181; *Minot v. Winthrop*, 163 Mass. 113, 26 L. R. A. 259. In the latter case the right to transmit property is called a privilege, and also a commodity, in the sense of the constitution of Massachusetts, and which the state has a right to sell at a reasonable price. See also, *Re Romaine's Estate*, 127 N. Y. 80, 12 L. R. A. 401; *Re Howe's Estate*, 112 N. Y. 100, 2 L. R. A. 825, and *note*; *Callin v. Trinity College Trustees*, 113 N. Y. 183, 8 L. R. A. 206. Upon reason and authority, we are of opinion that the tax is constitutional, and may be sustained as a tax upon the privilege or condition of receiving property by will or inheritance.

It is next insisted that the tax is not made uniform, but bears unequally, inasmuch as a distinction and difference is made between direct descendants and collateral kindred and strangers. If this is so, it has abundant reason upon which to sustain such discrimination, for the moral claim of collaterals and strangers is less than of kindred in the direct line, and the privilege is therefore greater. It is well settled that classifications may be made of privileges for purposes of taxation, and it has generally been done in our revenue laws; the only restriction being that the classifications should be natural, and not arbitrary. *State v. Schlier*, 8 Helsk. 286; *Fulgrum v. Nashville*, 8 Lea, 635; *Robbins v. Shelby County Taxing Dist.* 13 Lea, 303; *Demoreille v. Davidson County*, 87 Tenn. 218; *Re Howe's Estate*, 112 N. Y. 100, 2 L. R. A. 825, and *note*; *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 632. We conclude that the tax is not unconstitutional because it discriminates between direct descendants and collateral kindred and strangers.

Again, it is said the tax is unconstitutional because of the \$250 exemption, and it is properly said the exemption is not of \$250 out of all estates but that estates under \$250 in value are exempted from any tax. In other words, an estate worth \$249 escapes taxation, but one of \$250 or over is subject to tax. It is peculiarly within the province of the legislature to declare what privileges shall be taxed and what exemptions may be allowed, in order to make taxes bear most lightly upon those least able to bear them; and the exemption of small estates is neither arbitrary, nor is it devoid of good reason, inasmuch as the expenses of administration are proportionately much greater in small than in larger estates. In the various states where such taxes are imposed there is a similar exemption depending on the size or value of the estate. In New York the limit is \$500; in Pennsylvania, \$250; in Maryland, New Jersey, Delaware, Maine, Michigan, and California, \$500; in Connecticut and West Virginia, \$1,000; in Ohio and Massachusetts, \$10,000. Doubt as to the constitutionality

of this tax on the ground of the exemption has been expressed in *State v. Mann*, 76 Wis. 469; *State v. Gorman*, 40 Minn. 232, 2 L. R. A. 701; *Le Duo v. Hastings*, 39 Minn. 110. But in many other cases the exemption has not been held to affect the validity or constitutionality of the act. See the cases already cited, and especially the case of *Minot v. Winthrop*, 163 Mass. 118, 26 L. R. A. 259. We are of opinion that the act is not invalid or unconstitutional on account of the exemption.

The result is that under the provisions of the Acts of 1893 the property given by the will of John J. Alston to his widow, Mary F. Alston, is not subject to the tax imposed by said acts. The live stock given to W. C. and Lee A. Crutcher is liable to such tax, as well as their life estate or interest in the

tracts of 240 and 12½ acres of land; the said Lee A. being a niece of the testator, and W. C. Crutcher a stranger in blood. The interests given by the will to the children of W. C. and Lee A. Crutcher; to Volney S. Alston; to William and James Dyer; to Mrs. McCowan and Mrs. Griggs,—are all estates or interests in remainder, and, by the express terms of chapter 174, cannot be taxed until the termination of the life estates in the same premises, and the question of their liability cannot now be properly adjudicated.

The decree of the court below is modified as herein indicated, and otherwise affirmed. The costs of this cause on appeal will be paid one half by the state and the other half by W. C. and Lee A. Crutcher. The costs of the court below will remain as herein adjudicated.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

KANSAS CITY, FT. SCOTT & MEMPHIS
R. CO., *Plff. in Err.*,

Jesse H. COOK.

(66 Fed. Rep. 115.)

1. One who crosses on a railroad ferryboat in violation of the rules of the company against the carrying of passengers upon such boat, and after concluding his visit again enters the company's yard and the boat, remains a trespasser in proceeding through the yard to reach a public ferryboat after he is ordered off the railroad boat, although the employes of the company direct him as to the way through the yard to the ferry landing, where, if he were carried back on the railroad boat he would have had to pass through another yard, and there was no other way to the ferry than through the yard.

2. A licensee passing through a railroad yard is guilty of contributory negligence which will prevent recovery for injury from being run over by an engine which passed him on one track, switched on to the track on which he was walking, and reversed its direction, where he does not look to the rear but walks on from twenty to thirty yards before he is overtaken.

(February 5, 1896.)

ERROR to the Circuit Court of the United States for the Western District of Tennessee to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

NOTE.—The above case is believed to be without any direct or close precedent in respect to the character as a trespasser of a person passing over private grounds by a dangerous route which the owner directs him to take in leaving the premises. It must be observed that the court by no means intimates that the owner of the premises had the right to insist on the trespasser's exit by an unnecessarily dangerous route, but expressly says the same danger would be risked in going through a similar railroad yard if the passenger

Statement by *Lurton, Circuit Judge:*

This writ of error was sued out by the Kansas City, Ft. Scott & Memphis Railroad Company, against which company the appellee, Jesse H. Cook, recovered a judgment for damages sustained by being run over by a locomotive engine while running backward in its private switching yards in the village of West Memphis, state of Arkansas. The suit was begun in a state court at Memphis, Tenn., from which the railway company, as a nonresident corporation, removed the suit to the circuit court of the United States for the western division of the western district of Tennessee. West Memphis is a small village, of from two to three hundred inhabitants, and is immediately on the west bank of Mississippi river and opposite the city of Memphis. The cars of the appellant company coming from the west and northwest are transferred by a railway ferry from West Memphis to the east bank of the river. On both banks of the river were inclined railway tracks, by means of which its trains were loaded on or discharged from the steam ferry. These inclined tracks connected with switching yards on both sides of the river, where trains arriving and departing were made up, and where continual switching was going on. The steam ferry was owned and operated exclusively by the railway company, and did not engage in any other business than that of transferring railway trains from one side of the river to the other. The officers of the boats were prohibited from carrying passengers other than those in the company's cars, and its servants and employes. There was a regular steam passenger

had been permitted to recross the ferry and return as he came. The substance of the doctrine of the case seems to be that one who has trespassed upon dangerous premises continues to be a trespasser while leaving them by a route which the owner chooses for him and compels him to take, at least when that is as safe as any other exit. As to the general subject of liability to trespassers, see *Gordon v. Cummings* (Mass.) 9 L. R. A. 640, and *nota*.

ferry operated between Memphis and West Memphis for the accommodation of the general public. The defendant in error, a farmer, from the state of Mississippi, and a stranger, was, while visiting friends in Memphis, informed by them that he could pass over the river on railway transfer boats without charge, and from the west side get a better view of a great railway bridge in course of construction across the Mississippi. Acting upon this information, and wholly from motives of curiosity, he, together with some chance acquaintances, went aboard one of the transfer boats, and crossed to West Memphis. His presence on the boat seems to have been unobserved, as no questions were asked him or fare or permit demanded. He then made his way through the yards of the company to a point from which he could examine the railroad bridge. When ready to return, his friends having returned by way of the uncompleted bridge, he made his way back through the switching yard, and down the incline, and onto the transfer boat. He found thereon a passenger train about to be transferred to Memphis. He was asked by the conductor of the train if he had come down on the train, to which he replied that he had not. Shortly afterwards he was approached by one of the officers on the boat, who asked him if he had come across on the boat, who, on being told that he had not, said that the boat did not take passengers, and that he could not return that way. He then asked what he must do, and was told that he would have to get off and go to the depot, where he would find a ferryboat which would take him across. He offered to pay to cross, but was told again that that boat did not take passengers across. Cook then says he asked the officer to show him the way he must go, and that the officer took his arm, and told him that he must get off, and must go up the railroad track. The west bank of the river is a low bottom, and subject to overflow. The railroad company, for its own uses, had made an embankment which was entirely occupied by its tracks and switches. The top of this embankment was above high water. This embankment and its tracks constituted the switching yard of the company. At the time of the accident, the river was out of its banks, and there was water on both sides of the embankment. On this embankment there were four principal tracks, besides switches and spur tracks. These tracks were quite close together, there being a space of fourteen feet between the center of one track and the center of that adjoining. It was possible to walk between the tracks, there being a minimum of two feet clear space when each track was occupied by the widest cars in use. Between the outside tracks and slope of the embankment it was possible to walk in safety at some points; at others the slope of the embankment was too great. The West Memphis depot was near the northern end of this yard. The regular ferry landing was immediately in the rear of this depot. One of the streets of the village crossed this yard at the north end of the depot, and this street was the route both to depot and ferry landing behind it. There was no other way, in the

then stage of the river, for one to get from the transfer boat than that by way of this embankment to the depot. When there, one could turn to the left on this traveled way and go west to the village, or turn to the right and go down to the ferry landing. The point where plaintiff was overtaken and run down was about 250 feet south of the street or way crossing the yard at depot, and on the direct and only way out of the yard, whether he wished to turn east or west when he reached this street. One of plaintiff's witnesses, acquainted with the location, in answer to a question as to whether there was any other way Cook could have gotten up to the depot except by those tracks, said: "After he got off the transfer boat, he would have to come up the tracks to get out anywhere." A plank walk led from back end of depot to the ferry landing. By all the testimony it is shown that engines or trains were in almost continuous motion within the limits of this yard, and all agree that it was an extremely dangerous place for use as a walkway, especially by one unacquainted with the tracks and their uses.

Argued before Taft and Lurton, *Circuit Judges*, and Severens, *District Judge*.

Mr. Wallace Pratt, with *Messrs. E. F. Adams* and *C. H. Trimble*, for plaintiff in error:

It is not negligence in the state of Arkansas, where the common law prevails, for men running a locomotive in a private switching yard to fail to see a person walking along a railroad track for his own purposes, or to warn him of the approach of the locomotive by bell or whistle.

St. Louis, I. M. & S. R. Co. v. Monday, 49 Ark. 257.

In the absence of statute this is the general law of negligence in the United States.

Mobile & O. R. Co. v. Stroud, 64 Miss. 784; *Louisville, N. O. & T. R. Co. v. Cooper*, 68 Miss. 368; *Dooley v. Mobile & O. R. Co.*, 69 Miss. 650; *Mobile & O. R. Co. v. Watty*, 69 Miss. 145; *Glass v. Memphis & O. R. Co.*, 94 Ala. 581; *Candelaria v. Atchison, T. & S. F. R. Co.* (N. M.) Aug. 21, 1891; *Smith v. Fordyce* (Tex.) Dec. 23, 1891; *McDermott v. Kentucky Cent. R. Co.*, 93 Ky. 408; *Oatts v. Cincinnati, N. O. & T. P. R. Co.* (Ky.) May 4, 1893; *Louisville & N. R. Co. v. Kellem* (Ky.) Feb. 14, 1898; *Little Schuykill, Nav. R. & Coal Co. v. Norton*, 24 Pa. 469, 64 Am. Dec. 673; *Philadelphia & R. R. Co. v. Hummel*, 44 Pa. 378, 84 Am. Dec. 457; *Mulherrin v. Delaware, L. & W. R. Co.*, 81 Pa. 375; *Finlayson v. Chicago, B. & Q. R. Co.*, 1 Dill. 579; *Illinois Cent. R. Co. v. Godfrey*, 7 Ill. 500, 22 Am. Rep. 113; *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 286, 48 Am. Rep. 719; *Johnson v. Boston & M. Railroad*, 125 Mass. 75; *Morrissey v. Eastern R. Co.*, 126 Mass. 377, 30 Am. Rep. 686; *Wright v. Boston & M. Railroad*, 129 Mass. 440; *Wright v. Boston & A. R. Co.*, 143 Mass. 296; *Nicholson v. Erie R. Co.*, 41 N. Y. 536; *Chicago & N. W. R. Co. v. Smith*, 46 Mich. 504, 41 Am. Rep. 177; *Illinois Cent. R. Co. v. Hall*, 72 Ill. 222; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706; *Tennbrook v. South Pacific Coast R. Co.*, 59

Cal. 269; *Van Schaick v. Hudson River R. Co.* 43 N. Y. 527; *Richmond & D. R. Co. v. Anderson*, 81 Gratt. 812, 81 Am. Rep. 750; *Lang v. Holiday Creek R. Co.* 42 Iowa. 677; *Morris v. Chicago, B. & Q. R. Co.* 45 Iowa, 29; *Manser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602; *Illinois Cent. R. Co. v. Hetherington*, 88 Ill. 510; *McClaren v. Indianapolis & V. R. Co.* 83 Ind. 819; *Baltimore & O. R. Co. v. State*, 62 Md. 479, 50 Am. Rep. 288; *St. Louis, I. M. & S. R. Co. v. Freeman*, 86 Ark. 41; *St. Louis, I. M. & S. R. Co. v. Ledbetter*, 45 Ark. 246; *Carrington v. Louisville & N. R. Co.* 88 Ala. 472; *Toomey v. Southern Pac. R. Co.* 10 L. R. A. 189, 86 Cal. 874.

The fact that plaintiff was struck while walking along the track in the vicinity of a highway, but not upon the highway, does not alter the case.

St. Louis, I. M. & S. R. Co. v. Monday, 49 Ark. 265; *Kelley v. Michigan Cent. R. Co.* 65 Mich. 186.

Evidence that there was a crossing near the place of the accident was inadmissible.

Carrington v. Louisville & N. R. Co. 88 Ala. 472; *Savannah & W. R. Co. v. Meadors*, 95 Ala. 187; *Hale v. Columbia & G. R. Co.* 84 S. C. 292; *Neely v. Charlotte, O. & A. R. Co.* 83 S. C. 136; *Chicago, R. I. & P. R. Co. v. Eisinger*, 114 Ill. 79; *Texas & N. O. R. Co. v. Hare*, 4 Tex. Civ. App. 18.

If the captain of the boat had authority to permit him on application to walk along the tracks of defendant, the servants of defendant not aware of this action of the captain were under no obligation to protect plaintiff by taking steps to prevent it, unless they had done some act to mislead him; and if they had no reason to anticipate the danger to which he exposed himself they owed him no active duty.

Richards v. Chicago, St. P. & K. C. R. Co. 61 Iowa, 426; *Barstow v. Old Colony R. Co.* 143 Mass. 535.

As the captain of the boat had no authority to carry passengers on or over the yards, he could give no license to plaintiff to walk in the yard. *Virginia Midland R. Co. v. Roache*, 88 Va. 375; *Reary v. Louisville, N. O. & T. R. Co.* 40 La. Ann. 82.

If a license was given him to walk along the tracks he accepted it with the condition that he was not thereby to impede defendant's business by getting in the way of its trains and that he must look out for himself without increasing the measure of vigilance which the law imposed upon defendant while conducting its business on its own grounds.

Missouri Pac. R. Co. v. Moseley, 57 Fed. Rep. 421; *McAdoo v. Richmond & D. R. Co.* 105 N. C. 140; *Barstow v. Old Colony R. Co.* and *Richards v. Chicago, St. P. & K. C. R. Co. supra*; *Merced v. Richmond & D. R. Co.* 108 N. C. 616.

Plaintiff was guilty of contributory negligence in stepping upon defendant's track without looking or listening for moving trains.

Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 543; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *Mobile & O. R. Co. v. Stroud*, 64 Miss. 784; *Horn v. Baltimore & O. R. Co.* 54 Fed. Rep. 301; *Missouri Pac. R. Co. v. Moseley, supra*; *Patton v.* 36 L. R. A.

East Tennessee, V. & G. R. Co. 12 L. R. A. 184, 89 Tenn. 370; *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 265.

This is equally true where the accident happens in a town or city, and though plaintiff stepped off from one track on to another to avoid an engine approaching in front.

Mobile & O. R. Co. v. Stroud, Missouri Pac. R. Co. v. Moseley, and *Chicago, R. I. & P. R. Co. v. Houston, supra*; *Richards v. Chicago, St. P. & K. C. R. Co.* 81 Iowa, 426; *Ivy v. East Tennessee, V. & G. R. Co.* 88 Ga. 71; *Tennis v. Inter-State Consol. Rapid Transit R. Co.* 45 Kan. 503; *Johnson v. Truesdale*, 46 Minn. 845.

Mr. George Gillham, for defendant in error:

The rule requiring one who goes upon a railroad track to look and listen is not universal.

Horn v. Baltimore & O. R. Co. 54 Fed. Rep. 301.

In the present case the plaintiff had no reason to suspect that any train would or could approach him from behind.

The plaintiff was surprised by the switching from one track to the other and the injury thus caused.

Patton v. East Tennessee, V. & G. R. Co. 12 L. R. A. 184, 89 Tenn. 370; 2 Wood, Railway Law, 1804, 1805.

It is the duty of a railroad in running its trains along streets or other frequented places to exercise great caution.

Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 399, 98 Am. Dec. 175.

Backing a train in street or across crossing without a lookout or notice is gross negligence.

Robinson v. Western Pac. R. Co. 48 Cal. 409; *Barley v. Chicago & A. R. Co.* 4 Biss. 430.

Where one is riding free by consent of the company fairly obtained, he is a passenger and entitled to all rights and privileges as such.

2 Wood, Railway Law, 1039, 1040; *Todd v. Old Colony & F. R. Co.* 8 Allen, 18, 80 Am. Dec. 49.

One riding by invitation is a passenger.

2 Redf. Railways, 226; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 483, 14 L. ed. 508; *The "New World" v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019; *Eaton v. Delaware, L. & W. R. Co.* 1 Am. Law Record, 121.

A railroad is bound as to its passengers or persons upon its premises by invitation to see to it that its premises are in such condition in all respects that a person in exercise of ordinary care can leave them without injury.

2 Wood, Railway Law, 1164; *Beard v. Connecticut & P. Rivers R. Co.* 48 Vt. 101.

It must not put passengers off in a dangerous place.

Wood, Railway Law, 726, 1123, 1124, and note 2; *Columbus & I. Cent. R. Co. v. Farrell*, 81 Ind. 408; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *Delamater v. Milwaukee & P. du Ch. R. Co.* 24 Wis. 578; *Hobson v. Northern Eastern R. Co.* L. R. 10 Q. B. 271; 2 Wood, Railway Law, 1409, note 6; *Guy v. New York, O. & W. R. Co.* 80 Hun. 399; *Chance v. St. Louis, I. M. & S. R. Co.* 10 Mo. App. 351.

When forcing the plaintiff to leave the boat at this dangerous place, it was the duty of the

company to warn him of the dangerous character of the place and situation.

2 Redf. Railways, 232; *Derwort v. Loomer*, 21 Conn. 254; *McLean v. Burbank*, 11 Minn. 277; *Dudley v. Smith*, 1 Campb. 187; *Cockle v. Southeastern R. Co.* 27 L. T. N. S. 320; 2 Wood, Railway Law, 1166, note 1.

Lurton, Circuit Judge, delivered the opinion of the court:

The most favorable statement of the circumstances immediately attendant upon the accident is that made by the defendant in error: The statement was that while in the yard of the appellant company, under the circumstances heretofore stated, and while making his way through that yard for the purpose of reaching the passenger ferryboat, he was walking upon the most westerly of the yard tracks when he met an engine, with tender attached, coming from the direction of the depot; that he stepped off of that track to the one on his left, and had walked twenty or twenty-five yards in a northerly direction upon that track when some one between him and the depot, towards which he was walking, called out to him, "The train is going to run over you;" that he immediately looked back, when he was struck and knocked down and run over by an engine moving backward, with its tender in front. He made an effort to climb or catch onto the rear of the tender, failed, and was run over, losing a leg, and sustaining other very serious injuries. At the same time a train was passing on the track he had shortly before abandoned. He says he heard no bell or whistle, and did not hear the engine approaching from the rear. The engine which ran over him, he says, was the same engine which he had met and given way to when he stepped over to the track next on his left. That engine had just brought in the Kansas City train, had been taken charge of by the roundhouse employes, cut loose from its train, and was being taken to the roundhouse. To get there, it had to be taken towards the transfer landing on the west track, to a point about midway between the depot and incline, and then switched to the track next east, and backed some 200 yards, on the track upon which Cook was walking, to the roundhouse switch. According to the theory of plaintiff, this engine passed Cook, then reversed its direction, and took the track plaintiff was on, and ran him down.

Plaintiff's contention is that the railroad company was negligent in not warning him of his danger in time to get off the track. He says a switchman was seated on the rear end of the tender, with his legs hanging over, and that he should have seen the danger and given him notice. This very employé was introduced as a witness by the plaintiff, and he testifies that, as soon as he saw him on the track, he warned the engineer, but that there was not time to do more, for the rear of the tender struck him and the injury was done before anything could be done to avoid it. There was no evidence that any employé on the engine or tender was aware of the dangerous position of plaintiff until at the very moment of the collision, and

no evidence that, after his danger became known, any effort to avoid injury would have averted the catastrophe. The evidence as to whether a bell was being sounded was contradictory. If any duty rested upon the railroad company to keep some one on the lookout ahead, or to keep a bell sounding, when engines or cars were being moved over its tracks and switches, then there was evidence tending to show negligence. But, if the liability of the railroad company depends upon the exercise of all reasonable precaution to avert the impending danger after it had knowledge of the dangerous position of the plaintiff, then the plaintiff made no case, and the request made to so instruct the jury, on the conclusion of all the evidence, should have been granted.

There was no question as to the duty of the railroad company at a public road crossing. This yard and these tracks were crossed by what the witnesses call a "paper street," near the depot. But that way was several hundred feet north of where this accident occurred. Still further north was another path, crossing at a point where there was but one track. Neither was there any question as to the duty of a railroad company to a passenger. The court very properly eliminated every question of that sort by telling the jury that there was no evidence tending to show the relation of passenger and carrier.

Was the railroad company guilty of any negligence? The answer depends upon the duty and obligation resting upon it in respect to a person in its private switching yard under the circumstances detailed. When he crossed from Memphis to West Memphis, he did so in violation of the regulations of the company owning and operating the transfer boat. He did so without the invitation of any one having authority to suspend that rule. Whether his presence on the boat was unobserved, or he was there by the improper connivance of those on the boat, is equally immaterial, for he was, in either event, there without legal right, and necessarily a trespasser. When he had concluded his visit to the west bank, and again entered the yard of the company, and again entered upon the boat, he resumed his status as a trespasser. This much the court distinctly charged. The only duty which the law imposed under such circumstances is that the owner thus intruded upon will not wantonly and unnecessarily inflict injury upon the trespasser.

The learned judge who presided upon the trial in the circuit court was of opinion that when he left the boat, under order of its officer, and undertook to make his way through the yard of the company to the public ferry, a little higher up the river, while going through the yard the duty of the company was to afford him that degree of protection due from the company to strangers in that yard, by some species of invitation or license, express or implied. The view entertained by the circuit court is best shown by his instruction to the jury on this point, in regard to which he said:

"I think any reasonable man will say that, because he was violating their rules and regulations in being on their boat, they had no

right to embarrass him in any way by putting him off their boat, and then claiming he was a trespasser on their grounds because he was a trespasser there originally. When they determined to enforce their rule that he should not come back across the river on their boat, they necessarily imposed upon him the duty, and it appears from the proof in this case, beyond any sort of dispute, that the captain, or somebody on the boat whom he took to be the captain, told him he must go to the Bryan, and come back across the river on that boat. He was undertaking to do that. Now, I say to you that it would be wholly unreasonable—and you know it would be unreasonable—to say that that man, as against this company, putting him in that situation, was a trespasser upon their premises upon the other side of the river, if it was necessary for him to be on those premises to get to the ferryboat Bryan. However much he was an intruder on the boat, he was not an intruder on their premises when they put him off and would not bring him back, and they cannot hold him to the responsibility of being a trespasser on their incline and tracks if you find from the circumstances and situation of that incline and those tracks that it was a reasonable thing for him to be in and about those tracks, and a necessary thing for him to be in and about those tracks to get to the ferryboat Bryan."

To this the court added that he could not, on the other hand, be called a licensee: "They did not," said the court, "in other words, license him to be over there, and give him a special privilege to go over their tracks and by their yard in order to get to the ferryboat Bryan; and I should not say, under the circumstances of this case, that he could be called a 'licensee.' He was neither a licensee nor a trespasser. He was an unfortunate man whom they refused to take across the river, and who had to go to another boat, and must pass over and across their tracks to do so, if you find the fact that way."

As to the measure of care required from the company towards so anomalous a man, the court said to the jury: "Now, what duty did they owe him? He seems to suggest by his counsel that they owed him some sort of a special duty to look out for him while he was in their yard and on their tracks, because they had put him there. I do not think he can claim that position under the law. They were not under an obligation to issue an order: 'Look out for this man. We have put him off the transfer boat to go to the steamer Bryan. Keep a special lookout for him.' They were under no such obligation to him. But they owed to him that kind of reasonable care and diligence that every railroad company and every person running their engines would owe to a man found on their tracks without fault upon his part."

If this view was entertained upon the assumption that the direction given as to the way to the ferry landing operated to send the appellee through this dangerous yard, which might have been avoided, then his honor was mistaken as to the *locus in quo*. There was, at the then stage of the river, no way off the

boat or premises of the railroad company that did not require the appellee to go through the yard and to the depot. When once there, he could turn to the left at the path or street which crossed the yard at that point, and thence west to the village, or he could turn to the right, and take the plankway down to the ferry. When the company discovered him thus intruding upon its boat, it had one of two things to do,—either to carry him over in violation of its rule, or to say to him, "Get off my boat, and get off my premises, and cross the river by the means open to you and all others." If it carried him over, which, of course, it was not bound to do, he would have been subjected to the same kind of danger in getting up the incline and through its yard on the Memphis side as that which confronted him on the west side. His case was like that of a man found trespassing in the center of his neighbor's premises. If ordered off, he must cross a portion of the premises to get off. Cook had so placed himself, of his own volition, that he was a trespasser where he was found, and must continue a trespasser until he could get off of the premises upon which he was intruding. To tell him where he could take the public ferryboat, and point out to him the way thereto, under the circumstances, did not operate as a license, and change the relation which he bore to the railroad company, or impose on it any duty which had not before rested upon it in regard to one who was on its premises without invitation, express or implied. The narrow embankment elevated above high water was covered with a network of railway tracks, at intervals connecting with each other. It was the place where trains were broken up, and outgoing trains made up. Engines and cars were from the necessities of a great business in continual motion backward and forward, and passing from one track to another. The business of the company, the rapidity of transportation, the success with which that business should be conducted, and the dangerous character of the work required to be there done demanded that the business of such a yard should be surrendered to the company's own uses, free from any interference, and untrammelled by unnecessary restrictions upon the manner in which its trains should be there handled. That a straggling village lay behind this yard, and that, to reach the public ferry, it was necessary to cross the yard, cannot alter the case as to this appellee. At a street crossing other and different duties are imposed, by reason of the fact that the public and the railroad at public crossings have equal and reciprocal rights and duties. But these rights and duties at public crossings do not enlarge the public rights or extend the company's duties to points in its private yard not occupied as public streets. At the crossing the public had certain legal rights, but upon its tracks generally, and inside its switching yards especially, one uninvited has no legal right whatever. That this yard was uninclosed does not alter the question. We are not dealing with a case of premises exposed to the curiosity of persons incompetent to look out for themselves, or with the

consequences to animals led by instinct upon an uninclosed and dangerous space. That this yard was private property, and was used for purposes which made its use as a walkway exceedingly dangerous, was a thing which any man competent to go without guardianship must be assumed conclusively to know. Upon such premises the plaintiff below had no business, no legal right, and necessarily was an intruder. Having no legal right to be where he was, the company stood in no such relation to him as it would to one at a street crossing, or to a passenger, or to an employé whose duty kept him in the yard. *Aerkfets v. Humphreys*, 145 U. S. 420, 36 L. ed. 759. It was negligence *per se* for one to intrude himself into such a place, and his presence there imposed no particular duty upon the company, except that general duty which every one owes to every other person to do him no intentional wrong or injury. Its liability for failing to discharge this duty can only arise when it becomes aware of the danger in which he stood. This switching yard was private property. In *Nicholson v. Erie R. Co.*, 41 N. Y. 530, where the question was as to the legal right of a stranger to use the ordinary track of a railroad as a walkway, and who was injured by a collision with some cars which had been insufficiently secured and had broken loose, the court, concerning the liability of the company to one thus injured and the right of the company concerning the use to which it might put its own property, said: "It had the same unqualified right which every owner of property has to do with his own as he pleases, and keep it and use it where and as he pleases on his own ground, up to the point where such use becomes a nuisance." Where no statute affects the question, the railroad company is under no obligation, with reference even to its employes, to keep a special lookout in its own yard, or to keep a bell ringing when an engine or train is in motion. *Aerkfets v. Humphreys*, *supra*. In the case last cited, the court said that "the ringing of bells and the sounding of whistles on trains, going or coming, and switch engines moving forward or backward, would have simply tended to confusion." Every one about such a yard as an employé or a trespasser must be taken to know the hazards of the situation, and that safety requires the utmost vigilance. The danger is apparent, and every instinct of self-preservation sounds a loud warning. *Missouri Pac. R. Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. Rep. 921.

Plaintiff was not rightfully in the yard; his being there was negligence. The railroad company owed him no duty except to avoid, after discovering his danger, any wanton or unnecessary injury being done him.

In a case decided by the supreme court of Arkansas, it was said: "The plaintiff being wrongfully upon the track, no duty arose in his favor until his presence was discovered for the company had the right to run its trains without reference to the possibility that unauthorized persons might straggle upon its tracks. It was not bound to anticipate the intrusion. And, after he had been seen upon the track by the men in

charge of the train, they might act upon the presumption that he would step aside in time to avoid a collision, unless it was so obvious that, owing to his condition or circumstances over which he had no control, he could not extricate himself from the danger which menaced him. The sole duty which the corporation owed to him was not wantonly or with reckless carelessness to run over him after his situation was perceived." *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 257.

The same rule was announced by this court in the case of *Newport News & M. V. Co. v. Howe*, 6 U. S. App. 185, 3 C. C. A. 121, and 52 Fed. Rep. 362, where the question was as to the liability of the railroad to one of its employes who had gone to sleep upon its tracks. We cite a few of the many cases which support the view we have announced: *Nicholson v. Erie R. Co.* 41 N. Y. 526; *Soldana v. Galveston, H. & S. A. R. Co.* 43 Fed. Rep. 862; *Mobile & O. R. Co. v. Stroud*, 64 Miss. 784; *International & G. N. R. Co. v. Cocks*, 64 Tex. 158; *International & G. N. R. Co. v. Garcia*, 75 Tex. 591.

But if it be assumed that plaintiff was a licensee, and that the railroad company was guilty of negligence in not sooner discovering his presence, yet the negligence of the plaintiff, under the undisputed facts of this case, so grossly contributed to his own injury as to bar any recovery. In such a place he was under the highest obligation to exercise the utmost degree of vigilance in looking out for approaching engines or cars. Notwithstanding the appellee knew that he was in the midst of a network of tracks and switches, he did not, after being driven off of one track, take the slightest precaution to look out for a train coming on him from the rear. A train immediately followed the engine to which he had given way on the western track. The noise of its passage only made it the more important that he should use his eyes to see to it that no train ran on him from front or rear. If it be assumed that, when he crossed from one track to the other, he did look to the rear, though this is not shown, yet he afterwards walked on straight ahead for from twenty to thirty yards, according to his own account, without looking behind him. The duty of one under such circumstances is not only to look each way on going upon a railroad track, but to continually exercise vigilance and observe the track behind as well as before. The duty of looking is a continuing one. *Patton v. East Tennessee, V. & G. R. Co.* 89 Tenn. 370, 12 L. R. A. 184. It is no answer to say that he did not expect that this engine, which had passed him on one track, would switch onto another track, and reverse its direction. In a yard full of tracks and switches, he had no right to take such a thing for granted. The case in this respect is totally unlike that of *Patton v. East Tennessee, V. & G. R. Co.*, cited above. There the plaintiff stepped off the track to let a train pass him. When it had passed, as he supposed, he stepped back, and resumed his journey, without looking behind him. Within a few yards he was overtaken and run over by some cars which had broken loose from the train ahead, and

were following through their own momentum. The court thought that, under such exceptional circumstances, the question as to whether the plaintiff was guilty of such a degree of contributory negligence as should bar his recovery might be submitted to a jury. Here the plaintiff was in a place where there was continuous movement, backward and forward. Switching from one track to another in the breaking or making of trains was to be anticipated by any man who was observant. "It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom. *Elliott v. Chicago, M. & St. P. R. Co.* 160 U. S. 245, 37 L. ed. 1068. The noises about him made it all the more important that he should not rely on his sense of hearing alone. Under the circumstances of this case, the failure of the plaintiff to watch his rear was gross negligence. *Missouri Pac. R. Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. Rep. 921. It is true that questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a

verdict returned in opposition to it, it may withdraw the case from the jury, and direct a verdict. *Elliott v. Chicago, M. & St. P. R. Co.* cited above; *Missouri Pac. R. Co. v. Moseley*, cited above; *Ackfets v. Humphreys*, 145 U. S. 420, 36 L. ed. 758; *Newport News & M. V. Co. v. Howe*, 6 U. S. App. 172-186, 3 C. C. A. 121, and 53 Fed. Rep. 362. "When the evidence leaves no doubt that, if the plaintiff had made any proper use of his senses, he could have both seen and heard, in due season, an approaching train, and thereby have avoided injury, the question is one of law, and not a question for the jury." *Blount v. Grand Trunk R. Co.* 9 C. C. A. 526, 61 Fed. Rep. 875. If but one inference can be legally drawn from the facts of a case, a direction for a verdict in accordance with that inference is proper. *Horn v. Baltimore & O. R. Co.* 6 U. S. App. 381, 4 C. C. A. 346, and 54 Fed. Rep. 301.

The request for a peremptory instruction should have been allowed. For this and the other errors we have indicated, *the case must be remanded, with directions to award a new trial.*

CALIFORNIA SUPREME COURT.

J. W. INGRAM, *Respt.*,

(October 30, 1894.)

v.
E. P. COLGAN, State Controller, *Appt.*

(.....Cal.....)

1. That coyotes are a pest and scourge to the breeders of sheep and other small domestic animals is a matter of common knowledge.
2. To provide adequate means of defense against coyotes is within the general police power and does not violate fundamental principles of free government or infringe upon the original rights of the citizen.
3. A statute giving a bounty for killing coyotes is not a violation of the constitutional provision against gifts of public money.
4. The presentation to the board of examiners which by Pol. Code, section 672, is required before the controller can draw his warrant for a claim, is not excused by the Act of March 31, 1891, in case of a claim for a bounty for killing coyotes, although the act provides for proving the claim and obtaining a certificate thereof from the board of supervisors.

(On Rehearing.)

5. No appropriation is made by a statute providing for the payment of a bounty of \$5 out of the general fund in the treasury for each coyote which shall be destroyed, since the total amount which may be devoted to such purpose is not specified.

APPPEAL by defendant from a judgment of the Superior Court of Sacramento County in favor of petitioner in a proceeding for a writ of mandamus to compel defendant to pay bounties which petitioner claimed for killing coyotes. *Reversed.*

The facts are stated in the opinions.

Mr. W. H. Hart, Atty-Gen., for appellant.

Messrs. Freeman & Bates for respondent.

Searls, O. J., filed the following opinion:

The Act of the legislature of the state of California, approved March 31, 1891, entitled "An act fixing a bounty on coyote scalps" (Stat. 1891, p. 280), provides in its first section that "any person who shall kill and destroy any coyote or coyotes, in any county of this state, after the passage of this act, shall be paid a bounty of five dollars out of the general fund in the state treasury for each coyote so destroyed." The second section of the act provides that the person killing any coyote, as provided in section 1, shall present the scalp containing the nose and ears of the coyote destroyed to any officer authorized to administer oaths, and make and subscribe to an affidavit showing

NOTE.—For constitutionality of appropriations of public money, see *Daggett v. Colgan* (Cal.) 14 L. R. A. 474, and *note*; *Waterloo Woolen Mfg. Co. v. Shanahan* (N. Y.) 14 L. R. A. 481; and also later cases: *Bourn v. Hart* (Cal.) 15 L. R. A. 431; *Patty v. Colgan* (Cal.) 15 L. R. A. 744; *Cutting v. Taylor* (S. Dak.) 15 L. R. A. 601; *Institution for Education of Mute & Blind v. Henderson* (Colo.) 15 L. R. A. 803; 23 L. R. A.

Wasson v. Wayne County Comrs. (Ohio) 17 L. R. A. 735; *Conlin v. San Francisco City & County Supra.* (Cal.) 21 L. R. A. 474; *Marion Twp. Board of Education v. State* (Ohio) 25 L. R. A. 770; *State v. Moore* (Neb.) 25 L. R. A. 774.

For sectarian appropriations, see *note* to *Synod of Dakota v. State* (S. Dak.) 14 L. R. A. 418

time and place that such animal was killed, which scalp and affidavit may be deposited with the clerk of the board of supervisors of the county in which such coyote was killed. Section 8 provides that the board of supervisors shall quarterly determine the number of scalps deposited with the clerk, and by whom, and shall give to each person who may have deposited scalps a certificate certified by the clerk, showing the number of scalps deposited by such person, and the sum due him at the rate of five dollars per scalp, and then proceeds as follows: "Such certificate may be presented to the controller of the state, who may draw his warrant on the general fund in the state treasury for the sum named therein, in favor of the person entitled thereto." The remaining sections provide for the destruction of the scalps, and that no bounty shall be paid for scalps unless presented within three months after the coyote is killed. The respondent, J. W. Ingram, in 1893, killed seventy-three coyotes in the county of Kern, state of California, in due time presented the scalps, and made affidavit as by law provided, and in due and proper form received, after an examination, etc., a certificate of the clerk, under seal of the board, showing that he had killed seventy-three coyotes, and that there was due said Ingram the sum of \$365 from the state of California. The certificate was presented to appellant as controller of the state April 26, 1894, and a demand made that he, the said controller, draw his warrant on the general fund in the state treasury in favor of said J. W. Ingram for said sum of \$365, which was refused. Respondent thereupon filed an affidavit in the superior court in and for the county of Sacramento, setting out the foregoing facts, and showing a compliance with the terms of the statute, and averring that "after allowing and paying all warrants drawn by the state controller against the general fund, and all claims allowed by the state board of examiners for the forty-fifth fiscal year, there remains more than sufficient in said fund to meet the said warrant demanded by the said Ingram." The sworn affidavit or petition admitted "that said claim of said Ingram has never been presented to nor acted upon by the state board of examiners." An alternative writ of mandate issued to appellant, as per the prayer of the sworn petition therefor. Appellant appeared, and demurred to the affidavit and petition upon various grounds, among which were that it did not state facts sufficient to constitute a cause of action; (2) that it fails to show that the claim was presented to the board of examiners before being presented to the state controller; (3) it does not show that said claim is exempt from the provisions of section 672, Pol. Code; (4) it fails to show that there is an appropriation or available fund for the payment of the claim; (5) that said act is unconstitutional and void, in that it seeks to create an obligation on the part of the state which would be a gift, and without sufficient consideration. The demurrer was overruled, and, appellant refusing to answer, such proceedings were thereupon had that a peremptory writ issued to appel-

38 L. R. A.

lant, commanding him to draw his warrant upon the treasury, etc. Defendant appeals.

The statute in question comes within the purview of the police power of the state. This power is said to extend to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. It is a power inherent in the state by virtue of, and one of the attributes of, its sovereignty. Under the exercise of this general police power, persons and property are subjected to restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which, as was said by Redfield, *Ch. J.*, in *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625, "no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned." It is coextensive with self-protection, and is often referred to as "the law of overruling necessity." It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society. *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 192, 22 Am. Rep. 71. How far the provisions of the legislature can extend is always submitted (subject to constitutional limitations) to its discretion, provided its acts do not go beyond the great principle of securing the public safety; and its duty to provide for the public safety, within well-defined limits and with discretion, is imperative. "All laws for the protection of lives, limbs, health, and quiet of the person, and for the security of all property within the state, fall within this general power of government." *State v. Noyes*, 47 Me. 189. "Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a government usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions." Tiedeman, *Pol. Powers*, pp. 4, 5. The Statute of March 31, 1891, is not within the limitation to the exercise of the police power. That coyotes are a pest and scourge to the breeders of sheep and other small domestic animals is matter of common knowledge. To provide adequate means of defense against this common enemy to those engaged in an important industrial pursuit is clearly within the general police powers of the legislative branch of the government, through which all police power is exercised. The statute is not then void in the sense that it violates the fundamental principles of free government, and infringes upon the original rights of the citizen. This remark is indulged for the reason that it has been said by some of the most eminent jurists of our country that the state legislature, in the absence of constitutional limitations, is not so far omnipotent that it can pass valid laws violative of the fundamental theories upon which en-

lightened government is constructed. *Caldor v. Bull*, 3 U. S. 3 Dall. 886, 1 L. ed. 648; *Wilkinson v. Leland*, 27 U. S. 2 Pet. 657, 7 L. ed. 553; *Taylor v. Porter*, 4 Hill, 145, 40 Am. Dec. 274; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Varrick v. Smith*, 5 Paige, 187, 3 L. ed. 659, 28 Am. Dec. 417; *Griffith v. Crawford County Comrs.* 20 Ohio, 609; *Ross' Case*, 2 Pick. 169.

There is no suggestion that the statute infringes the Federal Constitution. It remains then to inquire, Does it violate any provision of the constitution of this state? The contention of appellant is that the bounty provided to be paid by the statute is a gift, and inhibited by the thirty-first section of article 4 of the Constitution of California, which, so far as applicable, is as follows: "The legislature shall have no power to give or to lend. . . . Nor shall it have power to make any gift or authorize the making any gift of any public money or thing of value to any individual, municipal or other corporation whatever." A "gift" has been judicially defined as "a voluntary transfer of his property by one to another, without any consideration or compensation therefor." *Gray v. Barton*, 55 N. Y. 72, 14 Am. Rep. 181. To the same effect is 2 Bl. Com. 440; 2 Stephen, Com. 102; 2 Kent, Com. 437. A "bounty" signifies moneys paid or a premium offered to encourage or promote an object, or procure a particular act or thing to be done. *Fowler v. Dancers*, 8 Allen, 84. A sum of money or other things given, generally by the government, to certain persons, for some service they have done or are about to do to the public. *Abbe v. Allen*, 39 How. Pr. 484. The terms "bounty" and "reward" are nearly allied in meaning, the distinction being the former is said to be the appropriate term where the services or action of many persons are desired, and each who acts upon the offer may entitle himself to the promised gratuity without prejudice from or to the claims of others, while a reward applies to the case of a single service, which can be only once performed, and therefore will be earned only by the person or co-operating persons who succeed while others fail. Black, Law Dict. title *Bounty*. A primary meaning of "bounty" is goodness, kindness, virtue, worth; (2) liberality in bestowing gifts or favors, gracious or liberal giving, generosity, munificence; (3) a premium offered or given to induce men to enlist in the public service, or to encourage any branch of industry, as husbandry or manufactures. Webster. As applied to bounties given by statute, there is a consideration implied; so long as the consideration is not rendered, it remains a mere offer or privilege, which may be taken away by a repeal of the statute; but when earned, by complying with the conditions of the statute, the right to the bounty becomes vested. *Cooley, Const. Lim.* 6th ed. pp. 471, 472; *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 80 U. S. 13 Wall. 373, 20 L. ed. 611; *People v. Board of State Auditors*, 9 Mich. 527. There being a consideration for the claim of respondent, rendered by him under the offer of the stat-

ute, the money claimed is not a gift and is not, therefore, obnoxious to the provision of the constitution quoted *supra*. *Ryer v. Stockwell*, 14 Cal. 184, 78 Am. Dec. 634. Our attention is not called to any other constitutional provision, either state or federal, with which the statute in question is claimed to conflict; hence, we conclude that as the statute comes within the general welfare, for which the legislature is authorized to provide under its police powers, and not being violative of the fundamental law, it must be upheld as a valid and subsisting law.

Should the claim have been presented to the state board of examiners? The trial court evidently proceeded upon the theory that, as the Act of March 31, 1891, provided that any person who shall kill and destroy any coyote or coyotes in any county of the state shall be paid a bounty of five dollars for each coyote so killed, out of the general fund of the state treasury, and provided for taking the proof thereof and issuing a certificate therefor by the board of supervisors of the proper county, and provided that "such certificate may be presented to the controller of state, who may draw his warrant on the general fund in the state treasury," etc., it dispensed with the necessity of a presentation of the claim to the state board of examiners. Section 660 of the Political Code provides that any person having a claim against the state, for which an appropriation has been made, may present the same to the board (of examiners); if the board approves the same, they must, under section 661, indorse their approval thereon, and transmit the same to the controller, who must thereupon draw his warrant, etc. If no appropriation has been made for the payment of a claim provided for by law, or if an appropriation made has been exhausted, the board must, upon approving it, transmit it to the legislature, with a statement of their approval. Section 672 is as follows: "The controller must not draw his warrant for any claim unless it has been approved by the board, and, when hereafter the controller is directed to draw his warrant for any purpose, this direction must be construed as subject to the provisions of this section, unless the direction is accompanied by a special provision exempting it from its operation." Section 673 exempts official salaries and claims upon the contingent fund of either house of the legislature from the operation of the foregoing sections. It will be perceived that by section 672 a direction to the controller to draw his warrant in payment of a claim which has not been approved by the board of examiners is not sufficient, unless it is accompanied by a special provision exempting it from the operation of that chapter. We find nothing in the provision of the statute in question exempting the claims therein provided for from the section.

Respondent contends that there was no necessity for presenting the claim to the board of examiners; that it has been audited and made certain by the action of the board of supervisors, so that no duty remained, except to make payment; and in support of this view we are referred to *Meyer v. Porter*, 65 Cal.

67; *Freehill v. Chamberlain*, 65 Cal. 608; *Greene County v. Daniel*, 102 U. S. 187, 26 L. ed. 99; *Lincoln County v. Luning*, 138 U. S. 582, 33 L. ed. 767. *Meyer v. Porter* was a case in which a mandate was sought against the treasurer of Sacramento to compel him to pay out of funds in the city treasury certain past-due and payable coupons belonging to bonds issued by the city under a statute passed in 1858, and which provided an interest and sinking fund for the payment of the interest annually, and the bonds at maturity. It was claimed on behalf of the city, among other things, that the coupons should have been presented for examination, audit, and allowance to the board of trustees and auditor, pursuant to a statute in 1868. This court held, however, that, as the law under which the bonds issued made it the duty of the treasurer to pay the coupons in the manner and out of the fund provided for that purpose, no warrant was necessary to authorize their payment. In *Freehill v. Chamberlain* the same question was raised, and the court held that the statute under which the bonds were issued established them as debts to be paid, and hence that neither the auditor nor the board of trustees had any discretion or authority to reject them, or prevent payment. It will be observed that these cases involved contracts entered into by the city under and pursuant to a statute authorizing them so to do, and providing the time, place, and manner of payment, and that the Act of 1868 (Stat. 1863, p. 415) was a law passed long subsequently, and imposing new burdens upon the holders of city bonds. In *Greene County v. Daniel*, where a like question was raised, it was held that the issuing of the bonds by the county court, signed by its presiding officer, was the equivalent of auditing by the same body, as required by a statute in case of claims against the county, and that the amount and validity of the liability were definitely fixed when the warrants issued. In *Lincoln County v. Luning* it was held that a similar clause, requiring claims to be presented to the county commissioners, etc., applied only to unliquidated claims and accounts, and did not apply to bonds and coupons. *Sawyer v. Colgan* (decided April 24, 1894), 102 Cal. 288, related to the duty of the controller to issue his warrant in payment of coupons upon bonds issued under an act passed in 1857, known as "Indian War Bonds;" and it was held that, in view of the provisions for their payment under the law, it was not necessary to present such coupons to the examiners. The board of examiners was not provided for until 1858 (Stat. 1858, p. 212). Since that date it has been in force, and section 672 of the Political Code embodies substantially the same provision as section 5 of the original act. A "claim" is a demand of some matter, as of right, made by one person upon another, to do or forbear to do some act or thing, as a matter of duty. The controller must not draw his warrant for any claim unless it has been approved by the board, and, if directed so to do, it must be subject to section 672, *supra*, unless the direction is accompanied by a special provision exempting it from

the provision of said section 672. The statute in regard to bounties for killing coyotes may be construed to direct the controller to draw his warrant, but it does not in any way exempt it from the operation of such section. Whatever the rule may be in cases which do not come within the technical definition of the term "claim," we are of opinion that, if any force is to be given to this section in any case, it applies to the present one. The controller can never draw his warrant upon the treasurer except when directed so to do by some law; and, if such direction alone is sufficient to require it, then we at once do away with the force and effect of a salutary provision of the statute, enacted as a safeguard of the treasury. It will not do to say that the supervisors have audited the claim, and that that is sufficient. The statute has designated the board of examiners as the body by which the audit must be made, and either such audit of a claim must be had, or a special provision exempting the claim from such audit must be contained in the direction to the controller, before it becomes his duty to issue his warrant. For this reason we are of opinion the court below erred in awarding the writ of mandate against the controller, and the judgment should be reversed, and the court below directed to dismiss the writ.

I concur: **Belcher, C.**

Per Curiam:

For the reasons given in the foregoing opinion, *the judgment is reversed, and the court below directed to dismiss the writ.*

I concur in the judgment: **Fitzgerald, J.**

Beatty, Ch. J., and Van Fleet, J., did not participate in the foregoing decision.

A petition for rehearing was subsequently filed in response to which on November 28, 1894, the following opinion was filed:

Per Curiam:

The parties to this cause unite in asking the court to determine the question whether or not the act entitled the "Coyote Scalp Act" makes an appropriation for the payment of claims under it. In order to comply with this request the judgment herein is set aside and a rehearing granted, and it is ordered that the cause be forthwith resubmitted, and that either party may within fifteen days from this date file additional points and authorities on the question of such appropriation if he so desires.

After rehearing **Henshaw, J.**, on February 28, 1895, on behalf of the court delivered the following opinion:

Upon joint petition of appellant and respondent, this cause was ordered to be heard in bank for the determination of the single question whether or not the act under consideration ("An act fixing a bounty on coyote scalps." Stat. 1891, p. 280) made appropriation for the payment of claims arising

under it. The opinion heretofore rendered, filed October 30, 1894, stands confirmed, and what is now added is to be construed with it.

The objections raised to the sufficiency of the act are (1) that no appropriation at all is made by it; (2) that, if an appropriation is made, that appropriation is void for uncertainty in amount.

It is provided by section 23, article 4, of the Constitution that "no money shall be drawn from the treasury but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the controller." This inhibition is supplemented by subdivision 17, § 483, Pol. Code: "No warrant must be drawn unless authorized by law, and upon an unexhausted, specific appropriation provided by law to meet the same. Every warrant must be drawn upon the fund out of which it is payable and specify the services for which it is drawn, when the liability accrued, and the specific appropriation applicable to the payment thereof." The Constitution of 1849, art. 4, § 23, provided: "No money shall be drawn from the treasury but in consequence of appropriations made by law." By act of the legislature, in 1854 the duties of the controller were expressed in terms substantially the same as those now found in subdivision 17 of section 483 of the Political Code, above quoted. Stat. 1854, p. 29. The laws of the state regarding appropriations have thus been uniform from a very early day, and, if any contrariety of opinion be found in the adjudicated cases, it cannot be explained upon the ground of changed provisions in the law. One of the earliest cases upon the question of appropriation is that of *People v. Brooks*, 16 Cal. 28. The act there in question provided that the sum of \$15,000 per month, or a sum less than that, in accordance with the contract to be entered into, "is hereby appropriated out of any money in the treasury not otherwise appropriated." It was claimed that no specific appropriation of funds in the treasury had been made. The opinion by Field, *Ch. J.*, is an elaborate exposition of the law, and in it he says: "To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury. As a matter of fact, there have seldom been in the treasury the necessary funds to meet the several amounts appropriated under the general appropriation acts of each year. The appropriation is made in anticipation of the receipt of the yearly revenues. It constitutes, indeed, the authority of the controller to draw his warrants, and of the treasurer, when in funds, to pay the same, and that is all. When the constitution, therefore, says that no money shall be drawn from the treasury but in consequence of appropriations made by law, it only means that no moneys shall be drawn except in pursuance of law; and when the Act of April 18, 1854, provides that no warrants shall be drawn except there be an unexhausted, specific appropriation

to meet the same, it means only that the controller shall not draw a warrant for a specific object when he has already drawn for the full amount of the appropriation made for that object." The true test as to whether any particular language in an act is sufficient to make an appropriation is here found. "To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid." If the amount be certain, one of the reasons for the constitutional requirement is complied with, in that the people are enabled to determine how much of their money is to be devoted to the named purpose. The designation of the fund likewise enables the people to see how much of the moneys set apart to a particular fund is to be drawn from it and used for the specific end. But under our system, countenanced by the custom of years, it is not necessary in all cases that the act in terms should name the fund. The general fund itself is defined to be "the moneys received into the treasury, and not specifically appropriated to any other fund." Pol. Code, § 454. From these moneys all appropriations are paid which are not made payable out of any other especially named fund.

The language of the act here under consideration is as follows: "Any person who shall kill or destroy any coyote or coyotes shall be paid a bounty of five dollars out of the general fund in the state treasury, for each coyote so destroyed." The question remains whether, measured by the rule above given, this language constitutes an appropriation. We think not. The fund from which the bounties are to be paid is explicitly designated, but the amount of money in the general fund devoted to the payment of these bounties is not specified. The language lacks the first essential to an efficient appropriation. There is no designated amount, and consequently there is no "specific appropriation" to be exhausted, unless it can be said that the whole general fund is set aside as a specific appropriation to the end in view,—a proposition not seriously to be considered. *Redding v. Bell*, 4 Cal. 833. It is freely conceded that the use of technical words in a statute is not necessary to create an appropriation. But, while no set form of language is requisite, upon the other hand there are some things which plainly enough are not severally an appropriation. A promise by the government to pay money is not an appropriation. A duty on the part of the legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. Usage of paying money in the absence of an appropriation cannot make an appropriation for future payment. *Ristins v. State*, 20 Ind. 333. The utmost that can be claimed for the act under consideration is that it pledges the good faith of the state to the making of an appropriation. Herein the language of the supreme court of Colorado, in *Institute for Education of Mute & Blind v. Henderson*, 18 Colo. 105, 18 L. R. A. 398, is peculiarly apposite: "To permit the disbursement of

an indefinite amount of money, as these bounty acts contemplate, is to introduce an element of uncertainty into these calculations that will seriously embarrass both the legislature and the departments in giving effect to our state constitution with relation to the levying of taxes to meet appropriations. If the legislature desires to pay bounties, it may do so for all proper purposes by making the necessary appropriations therefor. Thus the public funds of the state will be protected, and the safeguards provided by the vigilance of the framers of our fundamental law will be given a construction best calculated to prevent the evils aimed at." The conclusion thus reached is in no wise affected by such cases as *San Francisco v. Dunn*, 69 Cal. 78, and *Grand Lodge, I. O. G. T. of California v. Markham*, 102 Cal. 169. In those cases the acts construed made contribution to the support of indigents, under section 22, article 4, of the Constitution. As to the act under consideration in *Grand Lodge, I. O. G. T. of California v.*

Markham, the constitution itself provides the manner of the making of the appropriation, and the act, conforming to the manner prescribed, has the constitution of the state for its direct authority. In *San Francisco v. Dunn*, *supra*, it was held that no legislative action is required to give force to the constitutional proviso, and that upon the happening of the contingency the language of the constitution, *ex proprio vigore*, acted as an appropriation, and qualified the general constitutional inhibition. These cases, therefore, are not in point upon the present question.

For this reason, in addition to those heretofore given, *the judgment is reversed*, and the court below directed to dismiss the writ.

We concur: *Temple, J.; Garoutte J.; Harrison, J.; McFarland, J.*

Beatty, Ch. J., and *Van Fleet, J.*, did not participate in this decision.

NORTH CAROLINA SUPREME COURT.

LOVE, Appt.,

City of RALEIGH

(..... N. C.)

1. A city is not liable for the acts of its servants in the management of fireworks which its officers are managing without lawful authority.
2. A municipality is not answerable for the torts of a servant except where the wrong complained of is an act done in the course of its lawful employment, or an omission of a duty devolving upon him as incident to such service.
3. Authority to expend public money for pyrotechnic display and conduct it under the auspices of the city officers is not included in general power to pass ordinances.

(April 16, 1895.)

APPEAL by plaintiff from a judgment of the Superior Court for Wake County in favor of defendant in an action brought to recover damages for personal injuries received by plaintiff through the alleged negligence of defendant's servants in the management of a display of fireworks. *Affirmed.*

The facts are stated in the opinion.

Messrs. Battle & Mordecai, for appellant:

The charge was that the jury might find from the evidence that the defendant turned over the work of sending up the fireworks to experts as independent contractors or jobmen, and if they should so find, then the defendant was not liable.

A contractor, who simply undertakes to

bring about a result after his own methods, is not a servant. But one is such who, though he is to have a stipulated price for a thing, executes it under the direction or superintendence of the employer.

Bishop, Non-Cont. L. § 602.

An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.

2 Thomp. Neg. §§ 12, 22, 893, p. 899.

In *Winall v. Brinson*, 82 N. C. 554, A made a contract with B that B should, for a stipulated sum, remove a house from one side of a street to the other, and the plaintiff was injured by B's negligence. A was held responsible for it.

One who on account of peculiar skill is employed by the day to oversee work for his employer, and who takes the entire charge of it, is yet so far a servant that his employer is answerable for his malfeasance.

Morgan v. Bowman, 22 Mo. 538.

The sending up of fireworks in a city is in itself dangerous. Under such circumstances the employment of a separate contractor is no defense to the one for whom the work is done.

Thomp. Neg. § 24, p. 901.

The fact that the men who came out with the fireworks may have been in the employ of the persons from whom the fireworks were purchased does not in law make them any the less the servants of the city.

Wyllie v. Palmer, 19 L. R. A. 285, 187 N. Y. 248; *Wood v. Cobb*, 18 Allen, 58.

If the public was induced to attend by an invitation, express or implied, a person injured by the default or neglect of defendant can recover.

Campbell v. Boyd, 88 N. C. 129, 48 Am. Rep. 740.

The undertaking was not *ultra vires*.

2 Thomp. Neg. § 4, p. 787; *Cohen v. New*

NOTE.—As to liability of city for injuries caused by fireworks, see also *Scanlon v. Wedger* (Mass.) 16 L. R. A. 886, and *note*; also the later cases of *Speir v. Brooklyn* (N. Y.) 21 L. R. A. 641, and *Fifeild v. Phoenix* (Ark.) 24 L. R. A. 490.

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York, 4 L. R. A. 406, 113 N. Y. 532; *Salt Lake City v. Hollister*, 118 U. S. 256, 80 L. ed. 176; *Jones, Neg. Mun. Corp.* §§ 172, 176, 179; *Speer v. Brooklyn*, 21 L. R. A. 641, 139 N. Y. 6.

The city was liable.

Meares v. Wilmington Comrs. 81 N. C. 73, 49 Am. Dec. 412; *Speer v. Brooklyn* and *Cohen v. New York*, *supra*.

Messrs. J. N. Holding and Strong & Strong for appellee.

Avery, J., delivered the opinion of the court:

The principal questions presented by this appeal are: First, whether the city of Raleigh was empowered by any general or special statute to purchase fireworks, and order a committee to direct the manner of making the display; second, whether, if no such authority had been delegated to the municipality it would be answerable for the wrongful conduct of agents acting within the scope of its instruction to them, but in the exercise of authority not delegated to it by the legislature. It will possibly aid us in the elucidation of these questions to lay down some general fundamental rules defining and fixing the limits of municipal powers. So long as a city keeps within the purview of its delegated authority, it is not responsible for any act of its agents, done in the exercise of its judicial, discretionary, or legislative powers, except where subjected to such liability by some express provision of the constitution or of a statute. *Moffitt v. Asheville*, 103 N. C. 255; *Hill v. Charlotte Aldermen*, 73 N. C. 56, 21 Am. Rep. 451; 1 Shearm. & Redf. Neg. § 262; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 867. But when such a corporation is acting in its ministerial capacity, or its corporate, as distinguished from its governmental, character, in the exercise of powers conferred for its own benefit, and assumed voluntarily, it is answerable for the torts of its authorized agent, subject to the limitation that such wrongful acts must not only be within the scope of the agency, but also within the limits of the municipal authority. *Moffitt v. Asheville*, 103 N. C. 254, 2 Dill. Mun. Corp. 4th ed. § 968 (766). In the section cited above, *Judge Dillon* says: "If the act complained of necessarily lies wholly outside of the general or special powers of the corporation, as conferred by its charter or by statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act, or whether it be done by officers without its express command; for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote or action." Referring especially to the wrongful acts of agents of municipalities, the same author says in a subsequent section (969a): "As to torts or wrongful acts not resting upon contract, but which are *ultra vires* in the sense above explained (viz. wholly and necessarily beyond the possible scope of the chartered powers of the municipality), we do not see on what principle they can create an implied liability on the

part of the municipality. If they may, of what use are the limitations, of the chartered corporate powers?" 2 Thomp. Neg. 787; *Smith v. Rochester*, 76 N. Y. 506; *Albany v. Cuntiff*, 2 N. Y. 165. It is not denied that if the agent, in the course of his employment, is guilty of negligence, or commits even a willful trespass, with the belief and intention that the act will inure to the benefit of the principal, then not only does the doctrine of *respondet superior* apply, but both principal and servant may be made to answer for the resulting damage. See authorities cited in *Tate v. Greensboro*, 114 N. C., on pages 416, 417, 24 L. R. A. 671; especially 2 Dill. Mun. Corp. §§ 979, 980, *et seq.*; *Hewitt v. Swift*, 8 Allen, 420; *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416; *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507. "Without express power," says *Judge Dillon*, 1 Mun. Corp. § 149 (100) "a public corporation cannot make a contract to provide for celebrating the Fourth of July, or to provide an entertainment for its citizens or guests. Such contracts are void, and, although the plaintiff complies therewith on his part, he cannot recover of the corporation." *Hodges v. Buffalo*, 2 Denio, 110; 2 Dill. Mun. Corp. §§ 916 *et seq.*; *Austin v. Coggeshall*, 12 R. I. 339, 34 Am. Rep. 643. It is needless to cite further authority in support of the proposition that if a city is not empowered to contract a debt for the purpose of making a display on a national holiday, or on such an occasion as the centennial anniversary of its existence as a municipality, it would follow of necessity that it could not, by empowering agents to supervise a display that it could not lawfully pay for, subject its taxpayers to liability for the willful wrong or negligence of such agents, when they are acting entirely outside of the scope of any duty that the city is authorized to impose. 2 Dill. Mun. Corp. § 969a. A municipality is not answerable for torts of a servant, except where the wrong complained of is an act done in the course of his lawful employment, or an omission of a duty devolving upon him as an incident to such service.

Before entering upon the consideration of the sufficiency of the statutes relied upon to authorize the action of the mayor and aldermen of the city in making an appropriation and appointing a committee to purchase the necessary articles and to supervise the pyrotechnic display on the occasion referred to, it is perhaps best to recur to the rule that a municipality is clothed with those powers only which are granted in express terms, or necessarily or fairly implied from or incident to those expressly granted, and which it is essential to exercise in order to carry out objects and purposes of creating the corporation. 1 Dill. Mun. Corp. § 89 (55); *State v. Webber*, 107 N. C. 962. In all of the cases relied upon by plaintiff's counsel it seems that the municipalities had the authority to pass an ordinance or make an order under color of authority. It has not been contended or alleged that the action is founded upon the creation of a nuisance by the city, nor can it be successfully maintained that the use of

fireworks is analogous to the case of blocking up a public highway which it is the duty of the municipality to maintain in good condition. The charter of the city (Laws 1891, chap. 248), grants to the mayor and aldermen when assembled, the following powers:

"Sec. 81. That the aldermen when convened shall have power to make and provide for the execution thereof, such ordinances, by-laws, rules and regulations for the better government of the city as they may deem necessary: provided, the same be allowed by the provisions of this act and be consistent with the laws of the land.

"Sec. 82. The board of aldermen shall contract no debt of any kind unless the money is in the treasury for its payment, except for the necessary expenses of the city government.

"Sec. 83. That among the powers hereby conferred on the board of aldermen, they may borrow money only by the consent of a majority of the qualified registered voters, which consent shall be obtained by a vote of the citizens of the corporation after thirty days' public notice, at which time those who consent to the same shall vote 'Approved' and those who do not consent shall vote 'Not Approved'; they shall provide water and lights, provide for repairing and cleansing the streets, regulate the market, take all proper means to prevent and extinguish fires, make regulations to cause the due observance of Sunday, appoint and regulate city policemen, suppress and remove nuisances, regulate, control and tax the business of the junk-shops and pawn-shop keepers or brokers, preserve the health of the city from contagious and infectious diseases; may provide a board of health for the city of Raleigh and prescribe their duties and powers, provide ways and means for the collection and preservation of vital statistics; appoint constables to execute such precepts as the mayor or other persons may lawfully issue to them, to preserve the peace and order, and execute the ordinances of the city; regulate the hours for sale of spirituous liquors by all persons required to be licensed by the board, and during periods of great public excitement may prohibit sales of spirituous liquor by all such persons for such time as the board may deem necessary; may pass ordinances imposing penalties for violations thereof not to exceed a fine of fifty dollars or imprisonment for thirty days. . . . They shall have the right to regulate the charge for the carriage of persons, baggage, and freight by omnibus or other vehicle, and to issue license for omnibuses, hacks, drays, or other vehicles used for the transportation of persons or things for hire. They may also provide for public schools and public school facilities by purchasing land and erecting buildings thereon and equipping the same within the corporate limits of the city or within one half mile thereof. They may also construct or contract for the construction of a system of sewerage for the city and protect and regulate the same by adequate ordinances; and if it shall be necessary, in obtaining proper outlets for the said system, to extend the same beyond the corporate limits of the city, then in such case

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the board of aldermen shall have the power to so extend it, and both within and without the corporate limits to condemn land for the purposes of right-of-way or other requirements of the system, the proceedings for such condemnation to be the same as those prescribed in chapter 49, section 6, of the Private Laws of 1862 and '63, or in the manner prescribed in chapter 49, volume 1, of the Code."

In these provisions of the charter and in sections 3800 to 3805, both conclusive, of the Code, will be found enumerated all of the powers granted to the city by general or special laws. We do not think that the general power to pass ordinances can be held to carry with it by implication any such grant of authority as that to expend the public money for, and conduct under the auspices of the city officers, such a display as that described by the witnesses. We are aware that such authority has been assumed by cities and towns in many of the states, but where the exercise of it has been drawn in question in the courts it has been sustained only when some statute expressly conferred the power to make the appropriation for that particular purpose. As we understand the authorities cited, the supreme court of Massachusetts has given its sanction to the validity of expenditures for such purposes only where some express provision of law was shown to warrant it. In one of the cases cited from that state (*Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289), the court held that, even where a person was injured by the negligent use of fireworks by the servants of a city that had ordered the display for the gratuitous amusement of the people, under the authority of a statute, the city was not liable to answer in damages. In an earlier case it had been held that a city council must act strictly in pursuance of statutory power to make such displays to subject it to liability for injuries due to the negligence of its servants in the management of it. *Morrison v. Lawrence*, 98 Mass. 219. Where no statutory authority is shown for a wrongful act done under the direction of a municipality, the supreme court of Massachusetts lays down the general rule as to its liability substantially as we have stated it. *Cas-anagh v. Boston*, 139 Mass. 426, 52 Am. Rep. 716; *Clafin v. Hopkinton*, 4 Gray, 502.

If there is no authority conferred upon the mayor and aldermen by the statute mentioned, and we can discover none after diligent search and examination, it is immaterial whether the persons in immediate control of the fireworks were servants acting under the direction of the committee appointed by a resolution passed by the mayor and commissioners, and stood in the relation of agents to the city, or whether they were independent contractors. If the authorities of the city acted *ultra vires* in ordering the display, the question whether they employed expert pyrotechnists, and acted upon their advice after securing their services, is equally as irrelevant. If, therefore, it were conceded that the chairman of the committee appointed by the city for the purpose supervised and directed the negligent management of the fireworks, and at such a place as it

was evidence of a want of care to select, we think it was the duty of the court nevertheless to tell the jury that the mayor and aldermen were not authorized by law to make an appropriation for and direct the management of a display of fireworks, and that the city was not liable to respond in damages for the wrongful or negligent conduct of a servant acting under instructions given by the city, but without authority of law.

For the reasons given, we think that the court should have instructed the jury that in no aspect of the evidence was the defendant

corporation liable for the acts of its servants in the management of the fireworks. Whether the rulings of the court upon the admissibility of testimony were abstractly erroneous or not is not material, since, whether excluded or admitted, it was manifest that the plaintiff was not, in any view of the evidence, entitled to recover. There was no error of which the plaintiff can justly complain, and the judgment must be affirmed.

Montgomery, J., did not sit.

IOWA SUPREME COURT.

STATE of Iowa
v.
Burt RUSSELL *et al.*, *Appts.*
(.....Iowa.....)

1. The discharge of the grand jury upon motion of the county attorney,

NOTE.—Qualification of grand jurors.

- I. Alien.
- II. Oaths.
- III. Residence.
- IV. Voter.
- V. Freeholders and householders.
- VI. Taxpayers.
- VII. Locality.
 1. County.
 2. Apportionment.
 3. Courts.
- VIII. Exemption.
 1. Age.
 2. Officers.
 3. Owner of grist-mill.
- IX. Bias.
 1. Opinion and prejudices.
 2. Connection with previous trial.
 3. Interest.
 4. Prosecutor.
 5. Relation.
 6. Sutor.
 7. Conscientious scruples.
- X. Prior service.
- XI. Bystanders.
- XII. Disqualification for crime.
- XIII. Negroes.
- XIV. Women.
- XV. Pleading and practice generally.
- XVI. Ignorance.
- XVII. Loyalty.

I. Alien.

An alien grand juror is incompetent, and an indictment found by a grand jury of which he is a member will be set aside as invalid if attacked at a proper time and in the proper manner, and this is the general rule except in Indiana. *State v. Ray* 54 Iowa, 109 (mo. ar.); *Ragantball v. Com.* 14 Bush, 487 (mo. qu.); *Com. v. Cherry*, 2 Va. Cas. 20 (pl. abate.); *State v. Cole*, 17 Wis. 674 (mo. qu.; pl. abate.); *Reich v. State*, 68 Ga. 73, 21 Am. Rep. 265 (pl. abate.).

In *Guykowski v. People*, 2 Ill. 476, it was said that no alien is qualified to serve as a juror in any case, but the question involved in that case was as to petit jurors.

That a grand juror is an alien may be pleaded in abatement, but cannot be reached by a motion to quash unless the disqualification is shown by the

upon the ground that two of the jurors resided in the same civil township, is not such an adjudication of the illegality of the grand jury as to defeat the indictments found by it.

2. An indictment found by a grand jury, two persons of which were unnecessarily from the same civil township, is void under a statute which says that not

record or indictment. *State v. Foster*, 9 Tex. 65 (mo. qu.).

And cannot be grounds for a motion to set aside after the defendant has exercised the right of challenge. *People v. Henderson*, 28 Cal. 465 (mo. set aside).

And it is too late to object to alienage after pleading to the merits. *Fenalty v. State*, 12 Ark. 680 (mo. qu.); *Territory v. Romero*, 2 N. M. 474 (mo. new tr.); *Byrme v. State*, 12 Wis. 519 (mo. qu.; mo. new tr.).

Or after verdict. *State v. Griffin*, 38 Ia. Ann. 509 (mo. new tr.). See *State v. Parks*, *infra*.

And the right of challenge for this cause may be waived where "declaration of intention" qualifies. *Territory v. Harding*, 6 Mont. 323. See *Territory v. Clayton*, *infra*.

And the burden of proof is on the party charging alienage as a disqualification. *State v. Haynes* 54 Iowa, 109 (mo. ar.).

Under Ind. Rev. Stat. 1848, 951, an indictment cannot be objected to because one of the grand jurors was an alien. *State v. Taylor*, 8 Blackf. 173.

Under Iowa Code, § 4261, making alienage a ground of challenge, a motion to set aside indictment for that cause will not be allowed. *State v. Gibbs*, 39 Iowa, 318 (mo. set aside).

And in *Boyington v. State*, 2 Port. (Ala.) 100 (pl. abate.), a plea in abatement, that one of the grand jurors was an alien, was denied after indictment as incompetency of a grand juror cannot be questioned after their action is completed.

But in *State v. Middleton*, 5 Port. (Ala.) 484, it was said that a plea in abatement for a disqualification may be made after indictment.

So in *State v. McGee*, 36 Ia. Ann. 206 (mo. new tr.), it was held that after a plea to the indictment, it was too late to object that a grand juror was an alien by motion for a new trial, as the objection should be by motion to quash or by plea in abatement. This overrules *State v. Parks*, *infra*.

In *State v. Parks*, 21 Ia. Ann. 251 (mo. new tr.), it was held that objection could be made for this cause by motion for new trial where the accused had no information as to disability, until after trial.

But this case was overruled by *State v. McGee*, *supra*, and *State v. Griffin*, 38 Ia. Ann. 509 (mo. new tr.), holding that motion for new trial cannot reach the objection that a grand juror was an alien.

more than one person shall be drawn as a grand juror from any civil township excepting where necessary because more jurors are required than there are townships in the district, and which makes it the duty of the officer to reject all superfluous names drawn from any township.

3. Having more members from a civil township on the grand jury than the law permits is not merely technical error, for which the supreme court cannot reverse a conviction upon an indictment found by it.

Where the grand juror became naturalized during the term, an indictment was held valid on a motion in arrest, as objection should be by plea in abatement. *Grubb v. State*, 14 Wis. 435 (mo. ar.).

And the grand juror becoming a citizen before a vote is taken, renders the indictment valid, under Mont. Comp. Stat., § 130, providing that a person who has "declared his intention" to become a citizen is competent as a grand juror. *Territory v. Clayton*, 8 Mont. 1 (mo. qu.; chal.). See *Territory v. Harding*, 6 Mont. 323.

And the presumption will be that a grand juror was competent although he became naturalized two months after he had served as grand juror, in order to prosecute a homestead, having come to this country as a child with his father, and living in the parish for thirty years and voting frequently, and serving on grand juries. *State v. Guillory*, 44 La. Ann. 817 (mo. qu.).

Where an alien was drawn but was not on the grand jury that indicted, the motion to quash was properly overruled. *State v. Brodden*, 47 La. 375 (mo. qu.).

So excusing a grand juror who is an alien will not impair the action of the grand jury. *State v. Causey*, 43 La. Ann. 897 (mo. qu.).

The answer of a grand juror that he is not an alien prima facie qualifies him. *People v. Freeland*, 6 Cal. 96 (chal.); *People v. Roberts*, Id. 214 (obj.).

II. Citizen.

If objection is made in the proper manner, an indictment will be invalid if any of the grand jurors are not citizens.

And it was held that Ark. Dig., chap. 94, § 20, providing that objection cannot be taken after jury is sworn, refers to petit jurors. *State v. Brown*, 10 Ark. 78 (pl. abate.).

And on issue joined by the state to a plea in abatement, the burden of proof is on the state to establish that the juror was a citizen. *Beason v. State*, 34 Miss. 602 (pl. abate.).

But a plea in abatement simply alleging that a grand juror was not a citizen or a legal voter of the county is indefinite and insufficient in not showing what county. *State v. Emery*, 59 Vt. 84 (pl. abate.).

And an order "to summon 'good and lawful' citizens who possess the qualifications specified in the statute of Alabama" is equivalent to "qualified citizens of the county." *Yancy v. State*, 63 Ala. 141 (obj.); *Stewart v. State*, *infra*.

III. Residence.

The presumption is that grand jurors are all residents of the proper county, and if the objection is made at the right time and in the proper manner, the nonresidence of a grand juror indicting will disqualify and render invalid the action of the grand jury. Temporary absence will not disqualify, and in some states six months' residence with intention of becoming a citizen qualifies.

And nonresidence will render the indictment invalid if properly pleaded. *Territory v. Woolsey*, 3 Utah, 470 (mo. ar.); *Doyle v. State*, 17 Ohio, 222 (pl. abate.); *State v. Rowland*, 36 La. Ann. 193 (mo. qu.).

But six months' residence with intention of becoming a citizen qualified in the Wisconsin territory although the family resided elsewhere. *Leak v. United States*, 1 Pinney, 77 (mo. qu.).

4. That a brother of the man whose wife is indicted for adultery was upon the grand jury which found the indictment, is not, under the Iowa statutes, ground for quashing the indictment.

5. A divorce after the finding of an indictment for adultery is no bar to further prosecution of the indictment, although the statute says that no prosecution for adultery can be commenced but on the complaint of the husband or wife, since, after proceedings are once com-

pleted, the indictment is valid.

It will be presumed that grand jurors are residents of the county. *Easterling v. State*, 35 Miss. 210 (mo. qu.).

That one of the grand jurors did not reside in the county must be pleaded in abatement where such a plea was allowable before the code took effect. *State v. Vahl*, 20 Tex. 779 (mo. ar.).

An indictment should be quashed where one of the grand jurors became a resident of another county, which was detached from the county of trial, before the indictment. *State v. Wilcox*, 104 N. C. 847 (pl. abate.).

But in *United States v. Tuska*, 14 Blatchf. 5 (pl. abate.), a plea in abatement that one was a non-resident was denied on the ground that this would prevent many trials, and destroy the effect of the statute requiring challenge to be tried by the court.

And under the Texas Criminal Code, art. 377, providing that any person may challenge the grand jury before empaneling and in no other way, an objection cannot be made to the indictment that one of the grand jurors was a nonresident of the county. *Lienburger v. State* (Tex.) March 1, 1893 (obj.).

And an order to the sheriff to summon eight "qualified persons" was sustained, as this only meant residents of the county. *Stewart v. State*, 36 Ala. 70 (mo. qu.); *Yancy v. State*, 63 Ala. 141.

And residence within the territory a sufficient time, but part of it on the Indian reservation, did not disqualify a grand juror. *Harless v. United States*, 1 Morris (Iowa) 169 (mo. qu.).

And temporary absence from the state without the intention of changing the residence will not disqualify. *State v. Alexander*, 35 La. Ann. 1100 (mo. qu.).

IV. Voter.

An objection that a grand juror is not a voter as required by statute must be specific and definite, and in some states such objection is cut off by code provisions.

A plea in abatement that two members of the grand jury were not properly registered was not sustained where they were registered for voting for delegates to the constitutional convention which was the same as for general election. *Adams v. State*, 23 Fla. 511 (pl. abate.).

Lists are not conclusive evidence that a person is qualified to vote on a tax proposition. *State v. Ougdon*, 14 R. I. 267 (pl. abate.).

Where the statute requires the commissioners to select from registered voters such as are of approved integrity, fair character, sound judgment, and intelligence, in absence of fraud, their action will be sustained although they may not exhaust the list of voters in making up the grand jury before taking others. *Reeves v. State*, 29 Fla. 527 (pl. abate.).

And in *State v. Duggan*, 15 R. I. 412 (pl. abate.), it was held that a plea in abatement that one of the grand jurors was disqualified in that he was not qualified to vote upon a proposition of tax, or for the expenditure of money, should not be sustained, as failing to allege in what part said grand juror was not qualified, and pleading a conclusion of law

menced, they may be carried on without further action on the part of the one who commenced them.

(May 12, 1894.)

A PPEAL by defendants from a judgment of the District Court for Harrison County convicting them of adultery. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Sanford H. Cochran for appellants.
Messrs. John Y. Stone and Thomas A. Cheshire for the State.

Robinson, J., delivered the opinion of the court:

The indictment alleges that the crime charged was committed on the 5th day of September, 1892, in Harrison county, in this

and stating that in the case of *State v. Davis*, *infra*, the point was not raised, nor the question discussed.

And a motion to quash an indictment for the above reason, made after a plea of not guilty, will not avail. *State v. Maloney*, 12 R. L. 331 (mo. qu.). See also *State v. Rife*, *infra*.

In *State v. Davis*, 12 R. L. 422, 34 Am. Rep. 704 (pl. abate.), that a grand juror was not qualified to vote on a tax proposition in city or town, was held to be a good plea. But see *State v. Duggan*, *supra*.

But a plea that a grand juror was not a legal voter of the county is indefinite as not showing what county. *State v. Emery*, 59 Va. 84 (pl. abate.).

And a similar plea was held insufficient under *W. Va. Acts 1893*, p. 109, providing that an objection to grand jurors cannot be made by plea in abatement under that section, &c., providing for a loyalty oath of grand jurors and prohibiting a plea in abatement. *Bradford v. State*, 4 W. Va. 768 (pl. abate.).

So under *Kan. Crim. Code*, § 79, providing that no objection can be made for irregularity in selection of grand jurors, unless on account of corruption, a plea in abatement that some were not registered voters or on the assessment roll was insufficient. *State v. Donaldson*, 43 Kan. 481 (pl. abate.).

And under *Fla. Crim. Code 1861*, providing certain grounds for quashing an indictment, but not on the ground of non-registered elector, and *U. S. Rev. Stat. 1023*, providing that no indictment will be insufficient; in matters of form not prejudicial, an illegal registration will not vitiate. *United States v. Ewan*, 40 Fed. Rep. 451 (pl. abate.).

In *Doyle v. State*, 17 Ohio, 222, a plea in abatement that one of the grand jurors was not an elector was held sufficient.

This case was limited in *State v. Easter*, 30 Ohio St. 542, 27 Am. Rep. 478, holding that a plea in abatement for bias through relationship could not be made, and the *Doyle* Case depended solely on statutory disqualification.

V. Freeholders and householders.

Under statutes requiring the grand jurors to be "freeholders," or statute requiring them to be "freeholders or householders," or statute requiring them to be "freeholders and householders," if such requirements of the statutes are not complied with the action of such body will be invalid as against proper objection. *Wills v. State*, 69 Ind. 266 (mo. qu.; pl. abate.); *Com. v. St. Clair*, 1 Gratt. 556 (pl. abate.); *State v. Bookafellow*, 6 N. J. L. 405 (pl. abate.); *Kerby v. Com.* 7 Leigh, 747 (pl. abate.); *State v. Herndon*, 5 Blackf. 75 (pl. abate.); *Barney v. State*, 12 Smedes & M. 68 (pl. abate.); *Martin v. State*, 22 Tex. 214 (pl. abate.); *Jackson v. State*, 11 Tex. 261 (pl. abate.); *Stokes v. State*, 24 Miss. 621 (pl. abate.); *McQuillen v. State*, 8 Smedes & M. 587 (pl. abate.); *Stanley v. State*, 16 Tex. 587 (pl. abate.); *State v. Duncan*, 7 Yerg. 271 (pl. abate.); *State v. Hawkins*, 10 Ark. 71 (pl. abate.).

And under *Ala. Code*, § 4599, providing that they should be "householders or freeholders," an order to summon "householders and freeholders," will render an indictment invalid. *Fowler v. State*, 100 Ala. 86 (obj.).

Some of the cases decide in favor of the validity
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of the action of the grand jurors who have not the required qualifications, on the question of pleading and practice or statutes as where the statute required that the jurors should be "reputable freeholders or householders of the county, and taxable therein," the plea that the jurors were not reputable freeholders or householders of the county and taxable therein was held indefinite and insufficient, besides *Indiana 2 Gavin & Hord, Stat.*, 431, provides that no plea or objection can be made to irregularity in selection of grand jurors unless corruption exists. *Hardin v. State*, 23 Ind. 847.

So a plea that one of the grand jurors was not a freeholder nor householder in the county was bad, where he might be qualified by owning land in the state. *State v. Bryant*, 10 Yerg. 527 (pl. abate.).

So a plea that a grand juror was not a freeholder was insufficient under a statute providing that they might be either "freeholders or householders." *Powers v. State*, 37 Ind. 144 (mo. qu.; pl. abate.).

And on objection of this kind it was held that a plea in abatement must be verified. *Com. v. Sayers*, 8 Leigh, 722 (pl. abate.).

And objection by motion for new trial, or motion in arrest is too late. *State v. Motley*, 7 Rich. L. 287 (mo. ar.).

Under *Ky. Rev. Code*, 55, art. 1, providing no person shall be a grand juror unless a citizen and housekeeper, and *Ky. Crim. Code*, § 153, providing for objection on arraignment or calling for trial, a motion to set aside, not made until second term, where the grand juror was not a housekeeper, was too late. *Com. v. Smith*, 10 Bush, 478 (mo. set aside).

And in *State v. Allen*, 1 Ala. 442 (pl. abate.), it was held that oral evidence could not contradict the record.

And in *Moore v. Com.*, 9 Leigh, 699 (pl. abate.), a plea that a grand juror was not a freeholder was not sustained by evidence.

And in *Com. v. Ayres*, 6 Gratt. 568, it was held where the indictment was quashed because one was not a freeholder, that it could not be used as an affidavit to require the accused to show cause why information should not be filed.

And in *People v. Jewett*, 6 Wend. 386 (pl. abate.), it was held that the New York Statute of April 16, 1827, providing property qualification, was directory and not mandatory.

The presumption is that only householders and freeholders of the county are on the grand jury. *Cornelius v. State*, 12 Ark. 783 (mo. new tr.); *Willey v. State*, 46 Ind. 363 (mo. qu.); *Beauchamp v. State*, 6 Blackf. 299 (obj.).

And a person having an equitable interest in land is a freeholder and qualified. *Com. v. Helmondollar*, 4 Gratt. 536 (pl. abate.).

In *State v. Ligon*, 7 Port. (Ala.) 167 (pl. abate.), a plea that a grand juror was not a freeholder or householder was held insufficient under a former decision (unreported). The state having joined issue by affirmative allegation had the burden of proof, but the issue was immaterial and the case was remanded for repleader.

So it was held in *State v. Brown*, 64 Mo. 367 (pl. abate.), that a grand juror was not a freeholder or householder in that county, was not a good objection.

state, by the defendants, who then and there had sexual intercourse with each other. At that time the defendant Emerine Russell was the wife of James Coulthard. He voluntarily appeared and testified before the grand jury, and asked that the defendants be dealt with according to law. At that time an action for divorce, instituted by his wife, was pending, and the divorce was afterwards granted to her. She then married her codefendant, Burt Russell.

And under Ala. Code, §§ 4732-4890, providing that no objection can be made to an indictment except that the grand jury was not drawn in the presence of an officer, an objection that the grand jurors were not taken from the list of householders and freeholders is insufficient. *Cross v. State*, 63 Ala. 40 (obj.).

So under W. Va. Acts 1884, chap. 133, § 2, providing that if the grand juror is not a freeholder, it will not affect the indictment, and that no objection shall be sustained to an indictment for disqualification of a grand juror, that one was not a freeholder is not a good objection. *State v. Henderson*, 29 W. Va. 147 (mo. qu.).

And South Carolina, 14 Stat. at L. 119, 691, § 1, dispenses with property qualification. *State v. Williams*, 36 S. C. 344 (pl. abate.).

But in *Palmore v. State*, 29 Ark. 243 (mo. set aside), it was held that Gantt's Digest, section 1973, prohibiting the motion to set aside the indictment because the grand jurors are not householders or freeholders, violates a constitutional privilege, although the court holds that it is not necessary under the statute that the grand jurors shall be householders or freeholders.

Objection that the grand jury were freeholders and householders will not avail, although Mississippi Act July 20, 1870, abolished property qualifications as Miss. Rev. Code, 499, provided that no objection can be made to impeding the grand jury. *Head v. State*, 44 Miss. 749 (pl. abate.).

The selection, by the sheriff, of a talesman who is not a householder or freeholder will not invalidate, and Ala. Code 1876, as to objections, does not apply, being supplanted by Act December 19, 1876; but it was said that an erroneous direction of the court, as to class of persons to be selected from, would be fatal. *Oliver v. State*, 66 Ala. 8 (pl. abate.).

VI. Taxpayers.

Under the statutes requiring payment of taxes as condition precedent of right to act, an indictment will be invalid, where some of the members are not taxpayers, if objection is made in the proper manner. *State v. Durham Fertilizer Co.*, 111 N. C. 658 (mo. qu.); *Avirett v. State*, 76 Md. 510 (pl. abate.); *State v. Griffice*, 74 N. C. 316 (mo. qu.); *State v. Jones*, 8 Rob. (La.) 618 (mo. qu.); *State v. Haywood*, 94 N. C. 847 (mo. qu.); *State v. Watson*, 86 N. C. 624 (pl. abate.).

In Georgia as the grand jurors are taken from the receiver's returns there is an implied qualification that they are taxpayers. *United States v. Collins*, 1 Woods, C. C. 499 (mo. qu.).

But in *United States v. Benson*, 31 Fed. Rep. 896 (pl. abate.), it was held that a plea in abatement that the grand jury was incompetent because some were not taxpayers, was a technical objection, besides U. S. Rev. Stat., § 1025, provides that no indictment found in the United States court shall be insufficient as to matters of form which are not prejudicial.

And an objection was not sustained where a motion to quash was not made in time. *State v. Blackburn*, 80 N. C. 474 (mo. qu.); *State v. Baldwin*, Id. 390 (mo. qu.).

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1. The defendants had not been held to await the action of the grand jury, and had no opportunity to object to it until after the indictment had been found. Before pleading to it they moved to set it aside on two grounds, the substance of the first of which is that the grand jury by which the indictment was found was illegal, for the reason that two of its members were residents of the same township. The motion was overruled. As we understand the record, at the term of

The fact that a grand juror had paid his taxes after he was drawn, will not sustain a plea in abatement in Florida. *Collins v. State*, 31 Fla. 574 (pl. abate.).

And failure to pay poll-tax that is not yet due will not render a grand juror disqualified. *Smith v. State*, 29 Fla. 408 (pl. abate.).

Under R. I. Judicial Act, chap. 7, § 1, providing all persons over twenty-five years of age and qualified to vote on a tax proposition or expenditure of money in a town shall be liable to serve as jurors, a plea in abatement that some grand jurors had not paid their tax was insufficient, as payment of taxes on realty is not a condition precedent, and owning a certain amount of realty qualifies them to vote on a tax, under R. I. Const., art. 2, § 1. *State v. Rife* (R. I.) May 25, 1894 (pl. abate.). See *State v. Duggan*, 15 R. I. 412, subhead *Voter*, for other cases on this statute.

VII. Locality.

Grand jurors must be from the county where the crime has been committed unless there has been a change of venue, and the accused may waive his rights in such a case, but the right to a trial by jurors in the vicinage cannot be taken away by statute.

Under a statute providing for apportionment throughout the county, substantial compliance with the same is sufficient.

And the provision of the local grand juries within the subordinate district of a county for certain courts is valid.

As to the grand jurors in the federal court being taken from the division of the district there is some conflict.

1. County.

Unless the grand juror is from the county required by law, an objection that he is not from the proper county should be sustained. *Clark v. State*, 1 Ind. 253 (mo. qu.); *Peters v. United States* (Okla.) Sept. 7, 1894 (mo. new tr.); *Laura v. State*, 26 Miss. 174 (mo. new tr.); *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116 (obj.).

Where the statute provides for trial in either county for offenses committed within one hundred rods of the county line, the accused cannot be indicted by a grand jury of the county outside of that where the offense was committed, under Ill. Const., art. 2, § 9, providing for trial in such county. *Buckrice v. People*, 110 Ill. 29 (pl. abate.).

But an indictment purporting to be by grand jurors of the state of O— inquiring of crimes and offenses within and for the county of Monroe will be held to be a grand jury of that county. *Mackey v. State*, 3 Ohio St. 332 (obj.).

And if it is discretionary with the court to direct a vacancy to be filled from the list or county, the court may order them filled from the county. *Jones v. State*, 18 Fla. 399 (pl. abate.).

2. Apportionment.

Under Iowa Code 1886, § 241, providing that not more than one person shall be drawn as a grand juror in a township, and section 4337, providing for motion to set aside if not selected as prescribed, a failure to follow the statute in selecting will justify

court at which the indictment was found, and after it was returned, the grand jury was discharged on motion of the county attorney, for the alleged reason that two of the grand jurors resided in the same civil township, "and did at the time the grand jury were drawn." We do not think that action of the district court was such an adjudication of the legality of the grand jury as to affect the liability of the defendants under the indictment found, but the validity of that must

be determined on the merits, without regard to the action of the court in discharging the jury. Grand jurors are drawn substantially as follows: On or before the first Monday of September of each year the county auditor apportions the number to be selected from each election precinct, which amount in the aggregate to seventy-five, and causes written notices of the apportionment to be delivered to one of the judges of election in each precinct. The judges thereupon select the re-

a motion to set aside. See *STATE V. RUSSELL* (mo. set aside).

And where the names from three townships were eliminated, the indictment was invalid. *State v. Beckey*, 79 Iowa, 388 (mo. qu.).

And so where the equality in precincts required by the statute was not followed, a plea in abatement should be sustained. *Barton v. State*, 12 Neb. 260 (pl. abate.); *Bobannan v. State*, 15 Neb. 209 (pl. abate.).

But a plea in abatement should be overruled, where Neb. Civ. Code, § 658, providing that grand jurors shall be selected proportionately from each precinct, was substantially followed. *Polin v. State*, 14 Neb. 540 (pl. abate.).

Under Minnesota Special Laws 1876, chap. 214, providing that grand jurors for R— county shall be selected from qualified electors of the several wards in St. Paul and towns of said county, all that is required is that the whole of the county shall be utilized, regardless of ward or town lines. *State v. Hawks*, 56 Minn. 129.

And under Iowa Code, §§ 236, 237, providing for an apportionment throughout the county, where there was no name from one township, and two of the boards supplied two names from the delinquent townships, which were not drawn on this grand jury, the irregularity will not vitiate. *State v. Brandt*, 41 Iowa, 563 (mo. set aside).

And under Iowa Code, § 4266, prohibiting a challenge after the grand jury are sworn, an objection on account of improper apportionment will not avail. *State v. Pierce* (Iowa) May 8, 1894 (mo. qu.; chal.).

A plea in abatement to qualification or competency of grand jurors is a proper mode of objecting, but irregularity in apportioning that does not go to competency, must be objected to by challenge. *Huling v. State*, 17 Ohio St. 383.

Objection to qualification of grand juror for improper apportionment can only be made by one under prosecution, and in this case the motion to quash the array did not show he was under prosecution, although he was subsequently indicted. *Thayer v. People*, 9 Dougl. (Mich.) 417 (mo. qu.).

And a motion to quash because three townships were not represented was properly overruled, where the county commissioners added names from said townships after the venire was returned, as objection should be by plea in abatement, and the grand jury was properly qualified. Besides N. C. Code Crim. Proc., § 229, provides that a revision of jury lists will not vitiate, if the law has been substantially complied with. *State v. Haywood*, 38 N. C. 437 (mo. qu.).

3. Courts.

Under Ill. Const., art. 6, § 26, providing the recorder's court of Chicago should be the circuit court of Cook county with the same jurisdiction, a grand jury of the criminal court was properly convened from the county. *Peri v. People*, 65 Ill. 17 (mo. new tr.).

But where the act limited the jurisdiction of the court to the city of Chicago, the jury could not be taken from the county outside the city. *Bell v. People*, 2 Ill. 307 (mo. qu.).

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A statute authorizing grand jurors for a special court from a part of the county is not unconstitutional. *Ellis v. State*, 92 Tenn. 85 (pl. abate.).

And that ineligible persons were drawn but not on the grand jury is not a good plea, as where a resident of Baltimore city and ineligible for the court of Baltimore county was drawn. *State v. Glasgow*, 59 Md. 209.

So the act requiring that they should be drawn from the immediate vicinity of a court is not unconstitutional. *Williams v. State*, 61 Ala. 38 (obj.).

An act establishing a special court at C— with jurisdiction over certain districts did not disqualify the citizens of such districts from being grand jurors in a circuit court at H— in the same county. *Williams v. State*, 3 Helsk. 87 (mo. ar.; mo. new tr.).

It is not a valid objection that a section of the act of establishing court of P— county at U— requires grand jurors to be taken from that beat and that all resident citizens of that beat shall be excluded from terms of court at M—. *Sanders v. State*, 55 Ala. 188.

And under an act requiring the grand jury to be summoned from the county, the fact that the territory was not limited to that of the court in the county, is immaterial. *Spito v. State* (Tex.) Nov. 11, 1893 (obj.).

Under Act of Congress, April 5, 1890, providing for division into four districts, but constituting one judicial district, where a grand jury was not drawn from the whole district as intended, but from a local division made for holding court, an indictment was invalid. *United States v. Dixon*, 44 Fed. Rep. 401.

But the converse was held in *United States v. Wan Lee*, 44 Fed. Rep. 707 (obj. ev.).

And an objection that the grand jurors were not all from the eastern district of South Carolina will not avail where the practice had been similar for nearly one half a century. *United States v. Butler*, 1 Hughes, C. C. 457 (chal.; mo. qu.).

And an objection that the grand jury was not taken from the county, but from the judicial district, was insufficient as Act of Congress September 9, 1890, applies when the jurisdiction is coextensive with the district. *People v. Green*, 1 Utah, 11 (mo. qu.).

A party obtaining a change of venue and quashing the indictment cannot then complain that he should be indicted by the grand jury of the county which originally indicted him, as his right may be waived. *Parker v. Com.* 12 Bush, 191 (obj.).

VIII. Exemption.

1. Age.

Exemption by reason of old age is not a disqualification that will invalidate an indictment. *State v. Brooks*, 9 Ala. 9 (pl. abate.); *Breeding v. State*, 11 Tex. 257 (pl. abate.); *Booth v. Com.* 16 Gratt. 519 (pl. abate.); *Carter v. State*, 75 Ga. 747 (pl. abate.); *Weeks v. State*, 81 Miss. 490 (obj.); *Davison v. People*, 90 Ill. 221 (pl. abate.; mo. qu.; mo. ar.), *Spigener v. State*, 62 Ala. 383 (mo. qu.).

And it was said to be the rule in *Com. v. Pritchett*, 107 Pa.

quired number of persons, and return their names to the county auditor with the election returns. Code, §§ 234, 236, 238. The returns thus made necessarily show the township in which each one of the seventy-five jurors resides. When a grand jury is to be drawn, the county auditor or his deputy is required to write out the names of persons on the list on separate ballots. Id. § 240. The drawing is conducted as follows: After thoroughly mixing the ballots so prepared,

"the clerk or his deputy shall draw therefrom the requisite number of jurors to serve as aforesaid, and shall, within three days thereafter, issue a precept to the sheriff, commanding him to summon the said jurors to appear before the court as provided in section 230 of the Code. When the grand jury shall be composed of five jurors only, the number drawn shall be eight, and when the grand jury shall be composed of seven members the number of grand jurors to be drawn

Exemption on account of old age was not a disqualification at this time of service, where the act exempted but provided that it should not disqualify. *Carter v. State*, 75 Ga. 747 (pl. abate.); *Jackson v. State*, 76 Ga. 551 (pl. abate.); *State v. Miller*, 2 Blackf. 36 (pl. abate.).

And in *Green v. State*, 50 Md. 123, 43 Am. Rep. 542 (mo. ar.), a motion in arrest because a grand juror was over age was overruled on the ground that exemption does not disqualify, and an objection should be made at an earlier stage in the trial.

Although N. J. Rev. Stat., § 41, makes want of statute qualification a ground of challenge to a juror, but gives no right to challenge the array by motion to quash, because one is over age. *State v. Black* (N. J.) March 25, 1890 (mo. qu.).

And over age does not disqualify in Georgia although they were disqualified by Georgia Act, 1883, but competency was restored by Georgia Act December 22, 1884. *Loeb v. State*, 75 Ga. 258 (pl. abate.).

But under the Florida statute requiring that he must be under sixty years of age, this will disqualify, but is not sustained by evidence in this case. *Kitrol v. State*, 9 Fla. 9 (pl. abate.).

If a grand juror was excused for over age, the presumption is that it was properly done,—for the defendant or the court could not require him to serve. *State v. Brown*, 12 Minn. 583 (mo. ar.).

2. Officer.

That a grand juror is exempt as an officer is not a disqualification which will render him incompetent, and will not invalidate the indictment. *State v. Wright*, 58 Me. 828 (mo. qu.; pl. abate.); *State v. Quimby*, 51 Me. 395 (mo. qu.); *Owens v. State*, 25 Tex. App. 553 (pl. abate.); *State v. Stunkle*, 41 Kan. 456 (mo. qu.; pl. abate.); *Glassinger v. State*, 24 Ohio St. 206 (pl. abate.); *State v. Adams*, 20 Iowa, 486 (obj.); *Re Nowland*, 2 Jebb, 1 (chal.).

And under Ky. Gen. Stat., chap. 62, § 1, providing no civil officer should be competent, the court erred in setting aside an indictment, because the foreman was a school trustee. Motion to set aside not having been made promptly, the right was waived. *Com. v. Fritchett*, 11 Bush, 277 (mo. set aside).

And in *Rex v. Sheridan*, 31 How. St. Tr. 543 (chal.), a challenge before sworn that one of the grand jurors was an office-holder and in the employ of the government was not allowed at that time, but it was suggested that objection could be made by plea.

And in *Re Headley*, Russ. & R. C. C. 117, it was suggested that a British or Irish peer ought not to serve on a grand jury except an Irish peer who is a member of the house of commons, which suggestion was adopted.

And on a plea in abatement that a grand juror was a surveyor of the highway and disqualified, the accused was entitled to a jury on that issue. *Day v. Com.* 2 Gratt. 562 (pl. abate.).

That the court in its discretion excused a deputy sheriff, who was also a witness, from serving on the grand jury, was not error. *State v. Schieler* (Idaho) April 20, 1894 (mo. set aside); 28 L. R. A.

3. Owner of grist-mill.

Although 1 Va. Rev. Code, chap. 75, disqualifies an owner of a grist-mill from being a grand juror a plea in abatement not locating the mill is insufficient. *Moran v. Com.* 9 Leigh, 651 (pl. abate.).

IX. Bias.

1. Opinion and prejudice.

Some courts hold that bias or an opinion formed by a grand juror will not disqualify him. *State v. Hughes*, 1 Ala. 655 (chal.); *State v. Baltimore & O. R. Co.* 15 W. Va. 382, 36 Am. Rep. 303 (mo. new tr.); *State v. Shelton*, 64 Iowa, 383 (chal.); *State v. Billings*, 77 Iowa, 417 (chal.); *Com. v. Woodward*, 157 Mass. 516 (pl. abate.); *State v. Hamlin*, 47 Conn. 25, 36 Am. Rep. 54 (pl. abate.).

And other cases hold the same, but this on the ground of mode and manner of objection. *Patrick v. State*, 16 Neb. 330 (chal.); *Williams v. State*, 69 Ga. 11 (pl. abate.); *State v. Rand*, 33 N. H. 216 (mo. ar.); *Lee v. State*, 69 Ga. 705 (pl. abate.); *People v. Jewett*, 3 Wend. 314 (chal.; mo. qu.); *Musick v. People*, 40 Ill. 293 (chal.); *United States v. White*, 5 Cranch, C. C. 457 (pl. abate.); *People v. Colmery*, 23 Cal. 631 (mo. set aside).

But in *Stewart v. State*, 13 Ark. 744 (mo. ar.), and in *Pike County Justices v. Griffin & W. P. Plank Road Co.* 15 Ga. 39 (chal.), it was held that opinion or favor is a good cause of objection.

Where an objection for such a cause is allowed the evidence must be clear in order to sustain the same. *Com. v. Clark*, 3 Browne (Pa.) 325 (chal.); *United States v. Clune* (Cal.) 62 Fed. Rep. 798 (mo. qu.); *State v. Hinkle*, 6 Iowa, 380 (pl. abate.); *Territory v. Staples*, 2 Idaho, 773 (mo. set aside); *State v. Gillick*, 10 Iowa, 98 (chal.).

Where objection was by plea in abatement that a grand juror was prejudiced and malicious, the court held that such plea came too late, distinguishing *State v. Rockafellow*, 6 N. J. L. 405, where a grand juror was not a freeholder, on the ground that in the latter case the statute absolutely disqualified, but in this case the plea should have been made by challenge and besides the defendants were convicted on their own confessions, and imperfections in preliminary proceedings would not prejudice. *Gibbs v. State*, 46 N. J. L. 353, 45 N. J. L. 379, 46 Am. Rep. 733 (pl. abate.).

The fact that a grand juror is politically prejudiced or a partisan in politics will not be a disqualification. *United States v. Eagan*, 30 Fed. Rep. 609 (pl. abate.).

And in *Scarlets' Case*, 12 Coke, 96, it was said that an indictment will be void where a malicious person procured himself a place on the grand jury by confederating with the clerk; as 11 Hen. IV. provides that no indictment should be found by any persons named to the justices without due returns from the sheriff but by lawful people returned without nomination.

But the converse was held in *Com. v. Thompson*, 4 Leigh, 667, 26 Am. Dec. 839 (pl. abate.), where there was no corruption shown.

And impersonation by another acting as grand juror renders the indictment void. *Nixon v. State*, 63 Ala. 535 (pl. abate.).

shall be twelve; provided that in drawing such grand jury not more than one person shall be drawn as a grand juror from any civil township excepting where the grand jury is by law required to be drawn from a district containing fewer civil townships than the number of grand jurors required to be summoned; in which case if the number of civil townships in such district be not less than one half of the number of jurors required, not more than two persons shall be

drawn as grand jurors from any such township; and if the number of civil townships be less than one half of the number of jurors required not more than three persons shall be drawn as grand jurors from any such township. If more persons shall be drawn from any civil township than are hereby authorized it shall be the duty of the officer drawing such grand jury to reject all superfluous names so drawn, and to proceed with the drawing until the required number of jurors

But persuading others not to attend whereby the juror procured a place on the jury, will not invalidate, where those absent are not shown to be entitled by having been selected. *State v. Mead*, 15 R. I. 416 (pl. abate.).

The exclusion of a biased person will not justify a motion to quash. *United States v. Belvin*, 46 Fed. Rep. 361 (mo. qu.).

Under Dakota Crim. Code, § 15, sub. 6, providing for challenge to grand juror if he is so prejudiced that he cannot act impartially, the refusal of challenge will invalidate. *People v. Wintermute*, 1 Dak. 68 (chal.).

Aaron Burr claimed the right to challenge the grand jury "for favor" and the counsel for the government admitted his right of challenge. It was suggested that the jurors might withdraw and thus save all question as to evidence of bias, which suggestion was adopted. When the foreman asked to be excused for having formed an opinion the court ruled that he must have declared an opinion. Another grand juror claimed to have an opinion as to law and facts, and he was permitted to withdraw. *Trial of Aaron Burr*, Rob. ed. 10.

The accused cannot have a grand jury reassembled in order to prove that they had unqualified opinions. *People v. Traversa*, 88 Cal. 233 (mo. set aside).

And the grand jury will not be called to expurgate themselves as to an opinion, by a party expecting an indictment, as Ala. Code Dig., § 51, restricts the pleading in abatement for the array, or disqualification of its members to the term at which the indictment is found. *State v. Clarissa*, 11 Ala. 37 (mo. for leave to chal.).

And in *People v. Manahan*, 32 Cal. 68 (obj.), where three of the thirteen were challenged for opinion by a party, the court ordered the grand jury not to consider his case, and ordered a special grand jury to consider his case, to which he objected, but this was not error.

2. Connection with previous trial.

Some cases hold that where a grand juror has served on a previous grand jury, which had indicted the accused for the same offense or served on a former trial jury for the same offense, it will disqualify. *United States v. Jones*, 31 Fed. Rep. 725 (pl. abate.); *State v. Gillick*, 7 Iowa, 297 (mo. qu.); *State v. Osborne*, 61 Iowa, 330 (chal.).

The same question was made in *State v. Cole*, 19 Wis. 129, 35 Am. Dec. 673 (mo. qu.), but the case was reversed on another point.

Other cases hold that service on a coroner's jury for the same offense will not disqualify. Some put this ruling on a question of pleading and practice. *Lee v. State*, 69 Ga. 705 (pl. abate.); *State v. Lamon*, 10 N. C. 175 (pl. abate.); *State v. McEntire*, 2 N. C. Law Repos. 257 (mo. ar.); *Betts v. State*, 65 Ga. 508 (pl. abate.).

3. Interest.

The interest of a grand juror has generally been held insufficient disqualification to render an indictment invalid; as that the grand juror was interested in a bank, in a charge of burglary or embezzlement, except where he is prosecutor, for 33 L. R. A.

which see that subhead. *State v. Rickey*, 10 N. J. L. 97 (mo. qu.; pl. abate.); *Rolland v. Com.* 32 Pa. 304, 22 Am. Rep. 753 (chal.; mo. qu.); *State v. Brainerd*, 56 Vt. 532, 45 Am. Rep. 818 (pl. abate.).

But in these cases the question was decided on pleading.

So where the board of trustees had returned one of their member and a grand juror had contributed to pay witness' expenses, or was interested in prosecuting liquor selling in that county, this did not disqualify him in the liquor case, and objection cannot be made by plea in abatement but by challenge, before they are sworn. *Koch v. State*, 38 Ohio St. 358 (pl. abate.).

And that a grand juror is interested as a taxpayer is not ground for a disqualification. *Com. v. Ryan*, 5 Mass. 90 (mo. qu.); *State v. Newfane*, 13 Vt. 423 (pl. abate.).

And that he was a resident of the town or county from which the defendant embezzled funds did not disqualify. *Com. v. Brown*, 1 L. R. A. 620, 147 Mass. 535 (pl. abate.).

But in *Queen v. Upton St. Leonards*, 10 Q. B. 337, it was said that interested persons ought not to serve on grand juries.

4. Prosecutor.

That the grand juror is prosecutor in some states disqualifies by statute, but objection must be made promptly and may be waived, as to whether or not it is a good objection, in absence of statute; the cases are not united but disagreement comes from the rulings on the manner and mode of objecting.

Although in some states it is provided by statute that a prosecutor is disqualified from acting as a grand juror, a prosecution may be preferred upon knowledge of two of the grand jurors. *State v. Terry*, 30 Mo. 363 (mo. qu.).

So where the statute in Ark. Mansf. Dig., § 2066, provides that a person held to answer may object to a grand juror, if he is a prosecutor, if he has not been held to answer, the act does not apply. *Baker v. State*, 53 Ark. 513 (mo. set aside).

That the prosecutor was a member of the grand jury indicting cannot be objected by motion to arrest. *Johnson v. State*, 63 Ga. 179 (mo. ar.).

And if a prosecuting witness merely appeared in response to a subpoena he was not disqualified, although Nev. Stat. 1886, p. 49, provided challenge if a grand juror was a prosecutor. *State v. Millain*, 3 Nev. 409 (chal.).

And an objection by *amicus curie* that a grand juror originated a complaint for murder which was likely to come before the grand jury, was overruled. *Tucker's Case*, 3 Mass. 236 (obj.).

A plea in abatement that the grand juror was an agent of the prosecutor is insufficient where challenge could have been made before indictment. *Fisher v. State* (Ga.) Jan. 27, 1894 (pl. abate.).

Under Texas Code, art. 377, providing for challenge to array and prohibiting objections to qualifications in any other way and providing for such challenge by prisoner in jail, the failure to make such challenge at the proper time will prevent an objection by plea in abatement that the grand

shall be secured." Code, section 241, as amended in 1886 by section 2, chapter 43, Acts 21st Gen. Assem. It has been decided frequently that when there has been a substantial compliance with the provisions of the law in drawing a grand jury an indictment returned by it should not be set aside on account of some slight departure from the statute in the drawing, and some of its provisions have been held to be directory. *State v. Ansaleme*, 15 Iowa, 44; *State v. Knight*,

19 Iowa, 94; *State v. Carney*, 20 Iowa, 83; *State v. Brandt*, 41 Iowa, 600.

It is claimed that the provisions of the statute now under consideration are directory, and that the motion to set aside the indictment on the ground stated was properly overruled. But none of the cases cited rose under the Statute of 1886, and the part of that statute quoted has not been held to be directory merely. The case of *State v. DeBord*, 88 Iowa, 108, was decided since it was

juror was a prosecuting witness. *Kemp v. State*, 11 Tex. App. 174 (pl. abate.).

That one of the grand jurors was an assistant prosecutor for the county in a special case against another party who was indicted by that grand jury would not affect an indictment against a party whom he was not employed to prosecute, but as to the case in which he was interested, it was said that such indictment would be worthless. *People v. Lauder*, 82 Mich. 109 (pl. abate.).

Under Mo. Rev. Stat. 1889, §§ 4087, 4088, a grand juror might be challenged for being a prosecutor or a witness. *State v. Williamson*, 106 Mo. 162 (pl. abate.).

In *United States v. Reed*, 2 Blatchf. 435 (mo. qu.), it was said that 2 N. Y. Rev. Stat., 724, §§ 27, 28, providing objection to competency of grand juror before sworn because he is a prosecutor, and that no other challenge to the array shall be allowed, applies to the federal court, and a challenge to an individual grand juror because he has not freehold qualifications, or not competent as to age, or biased, may be made, but a challenge to the array is abolished, but the question was as to improper venire.

But in *United States v. Williams*, 1 Dill. 486, where the plea in abatement was that the grand juror was a prosecutor, it was held that the objection would be good if taken by a person under prosecution who has been held to answer by way of challenge before the jury is sworn, but if Minn. Rev. Stat. 1888, p. 636, providing that a person held to answer may challenge a prosecutor or witness applies under Act of Congress July 20, 1840, providing for same qualification, that this means age, citizenship and not prosecutor (refusing to follow *United States v. Reed*, *supra*), and that he is not disqualified (court divided).

5. Relation.

In absence of prohibitory statute, the relationship of grand juror with prosecutor or party injured is not a good objection.

Some of the cases decide this on the question of pleading, as that a grand juror was a nephew of the murdered man is not a good plea in abatement. *State v. Easter*, 80 Ohio St. 542, 27 Am. Rep. 478 (pl. abate.).

So a similar objection was waived by not pleading in abatement in Florida. *Reynolds v. State*, 33 Fla. 301 (mo. ar.).

So a plea in abatement or motion to quash on the ground of relationship of prosecutor is insufficient, where challenge could have been made. *Lascelles v. State*, 80 Ga. 347 (pl. abate.).

And that the son of the prosecutor in a larceny case was a member of the grand jury and actively participated, will not vitiate the indictment. If the objection had been made by challenge it might have been different. *State v. Sharp*, 110 N. C. 604 (pl. abate.).

And objection that a grand juror was brother-in-law of the complaining witness will not invalidate. *Com. v. Haag*, 10 Lanc. L. Rev. 265 (mo. qu.).

6. Suttor.

If the statute is mandatory prohibiting a party

from serving as grand juror, if he has a suit pending at court, it will disqualify him. *State v. Smith*, 80 N. C. 410 (pl. abate.); *State v. Gardner*, 104 N. C. 739 (mo. qu.).

But this objection must be made in proper time and in the proper manner, or it will not avail. *State v. Porta*, 100 N. C. 457 (pl. abate.).

And in *State v. Edens*, 85 N. C. 522 (pl. abate.), it was held that a grand juror is not disqualified by reason of having a suit pending in the same county in another court.

7. Conscientious scruples.

Excusing a juror in a capital case for conscientious scruples is proper. *Gross v. State*, 2 Ind. 289 (exception); *Jones v. State*, 2 Blackf. 476 (chal.).

Or a Mormon in a polygamy case. *Clawson v. United States*, 114 U. S. 477, 29 L. ed. 179 (mo. set aside); *United States v. Reynolds*, 1 Utah, 236 (pl. abate.).

X. Prior service.

Statutes providing that no persons shall be appointed to serve as jurors more than once in a certain period, have been held directory merely. *State v. Cox*, 52 Vt. 471 (pl. abate.); *Bloodworth v. State*, 6 Baxt. 614, 32 Am. Rep. 546 (pl. abate.).

And in *State v. Elson*, 45 Ohio St. 648 (pl. abate.), it was held that § 2 Ohio Laws, 106, providing for the selection of persons who had not served as regular jurors in a court of record in the county within two years, did not disqualify a grand juror who had served on the petit jury in a court of record in the same town.

And the same was held in *Both v. State*, 3 Ohio C. Ct. Rep. 59 (pl. abate.), but the same case holds that Ohio Rev. Stat., § 5175, providing for challenge to a person called as juror having served as talesman in any court of record in twelve months, applies to petit jurors only.

And under Ala. Rev. Code, § 4187, providing that no objection to the formation of a grand jury could be made after its organization, an objection than the record did not show that they had not performed prior service, was insufficient. *Moses v. State*, 58 Ala. 117 (obj.).

And whilst an objection on this ground is a cause for challenge under U. S. Rev. Stat., § 812, it is not a disqualification that will invalidate the indictment, but where the accused had no opportunity to challenge, he may plead in abatement a disqualification of a grand juror. *United States v. Reeves*, 3 Woods, C. C. 199 (pl. abate.).

And Oregon Civil Code 1882, § 918, prohibiting service as juror in a circuit court more than once a year, applies only to petit jurors in the circuit court, as the grand jury in Oregon is summoned in the county court. *United States v. Clark*, 46 Fed. Rep. 633 (Alaska) (mo. qu.).

But Ind. Rev. Stat., 138, p. 358, providing that grand jurors can only serve for one year, is mandatory. *Barber v. State*, 6 Blackf. 188 (pl. abate.).

Under 2 Ind. Rev. Stat. 1876, p. 419, providing no challenge to the array can be made unless under affidavit, a challenge of prior service of grand jurors not so made was properly overruled. *McClary v. State*, 75 Ind. 280 (chal.).

enacted, but construed other provisions of the law. In *State v. Beckey*, 79 Iowa, 868, it appeared that a grand jury had been drawn in manner as follows: The ballots containing the names returned from each of fifteen townships were separated and sealed in separate envelopes. Those were placed in a box, from which twelve envelopes, that being the required number of jurors, were drawn. The ballots in each envelope were then taken out, placed in a box, and one ballot drawn there-

from, and the person named on the ballot drawn was summoned as the juror from his township. It was held that there was a substantial departure from the requirements of the statute, and that an indictment found by the grand jury so drawn should be set aside. It appears to us that the same conclusion must be reached in this case. It is the general rule that "negative terms in a statute show a legislative intent to make the provision imperative requiring a strict performance

Excusing a juror for prior service is not error. *State v. Ward*, 60 Vt. 143 (pl. abate.).

XI. Bystanders.

Some cases hold that under a statute requiring talemens to be filled from qualified citizens of the county if they are filled from bystanders the proceedings are void. *Couch v. State*, 68 Ala. 168 (mo. qu.); *Finley v. State*, 61 Ala. 201 (limited Cross v. State, 63 Ala. 40) (mo. ar.).

And to the same effect, *Jones v. State*, 18 Neb. 604 (mo. qu.).

But in *Cross v. State*, supra, it was said that this defect would not avail if attacked collaterally.

But under a statute requiring the panel to be filled from the body of the county from persons having the proper qualifications, the fact that the sheriff filled the same from persons at the courthouse door will not avoid the indictment. *Fletcher v. People*, 81 Ill. 116 (obj.); *Jim v. Territory*, 1 Wash. 48 (mo. qu.).

And to the same effect, *Johnston v. State*, 7 Smedes & M. 55 (mo. ar.).

And to the same effect where objection was not made before indictment, *Dowling v. State*, 5 Smedes & M. 664 (chal.).

And such action was sustained because a motion to arrest was used after a plea to the merits. *Montgomery v. State*, 8 Kan. 268 (mo. ar.).

And under Illinois Crim. Code, § 411, providing that indictment should not be quashed for disqualification of grand jurors, and objection that the panel was completed from bystanders will not avail. *Nealon v. People*, 30 Ill. App. 481 (mo. correct record).

And Florida Laws 1875, chap. 2046, and Ind. Rev. Stat. 1881, § 1649, and Tennessee Act 1817, Ark. Code, § 404, provide for filling the panel from bystanders. *Lorraine v. State*, 4 Yerg. 145 (mo. ar.); *Newton v. State*, 21 Fla. 53 (pl. abate.); *Burrell v. State*, 129 Ind. 290 (pl. abate.); *Runnels v. State*, 28 Ark. 121 (mo. set aside).

Under Ohio Rev. Stat., § 5175, providing for setting aside the whole array if the grand jurors are not selected as prescribed by law, but that no indictment can be quashed for irregularity, a motion to quash because some were taken from bystanders was properly overruled; besides Ohio Rev. Stat., § 1223, providing for bystanders, is held applicable to this county. *McCarthy v. State*, 5 Ohio C. Ct. Rep. 627 (mo. qu.).

In *Epperson v. State*, 5 Lea, 291 (pl. abate.), it was said that if a juror was taken from bystanders it does not vitiate an indictment found by him and twelve grand jurors taken from the venire. This case questions whether disqualification of one will invalidate where twelve qualified concurred and found a true bill. The plea in abatement in this case, however, did not show that the grand juror was disqualified.

XII. Disqualification for crime.

Cases sustaining the action of grand jurors where some of them have been charged with infamous crimes were generally decided on the question of pleading. *State v. Deason*, 6 Baxt. 511 (pl. abate.); *State v. Wittington*, 38 La. Ann. 1408 (chal.); *Woods v. State*, 28 Tex. App. 490 (pl. abate.).

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Or that the evidence did not sustain the objection. *State v. Smith*, 38 La. Ann. 1414 (mo. new tr.).

When the record shows "ballotted for, elected, tried, and sworn" it is equivalent to "good and lawful men." *Turner v. State*, 9 Humph. 119 (obj.).

An accused person may at arraignment show by plea that his indictors were not "*probi et legales homines*" as the Indiana statute prescribing manner of selection should be construed as Stat. 2 Hen. IV., chap. 9. *Vattier v. State*, 4 Blatchf. 73 (pl. abate.).

Under 2 Hen. IV., chap. 9, providing that grand jurors shall be *probi et legales homines* it was held that persons outlawed in personal actions could be challenged for that cause. *Withipole's Case*, Cro. Car. 134 (pl. abate.).

Iowa Code, section 2382, giving the defendant the right to challenge when held to answer, does not give the prosecuting attorney right to challenge for cause where four grand jurors were implicated in an offense and removed. *Ketler v. State*, 4 G. Greene, 291 (mo. set aside).

Hawk. P. C. 2, chap. 2517, says many indictments in inferior courts (1 Keb. 629; 2 Keb. 471; 1 Ld. Raym. 592, 600) have been (Cro. Eliz. 751; Cro. Jac. 635; Palm. 282, 389; 2 Rolle, 400; 2 Rolle, 82; 3 Mod. 122; Popham, 202) quashed for want of words "*proborum et legalium hominum*" in the caption of the indictment, setting forth by what person it was found (1 Keb. 629; 2 Keb. 471; 1 Lev. 208).

But this is said to be no exception to an indictment found in the court of king's bench, or grand sessions, or counties palatine, and hath been (2 Keb. 125, 208; 1 Keb. 50; Cro. Jac. 41; 1 Sid. 108, 387; 2 Rolle, 82) overruled as to indictments in other courts; because all men shall be intended to be honest and lawful until the contrary appear.

He is sustained by, 1 Keb. 629; Palm. 282; Id. 389; 2 Rolle, 400; Cro. Jac. 635; 1 Sid. 108; Cro. Jac. 41.

He is not sustained by, 2 Keb. 208; 1 Ld. Raym. 592; Id. 607; 1 Sid. 387; 1 Lev. 208.

And rulings were on other reasons in, 1 Keb. 50; 2 Keb. 125; Id. 471.

And rulings were on other reasons combined with this objection in, Cro. Eliz. 751; 2 Rolle, 82; 3 Mod. 122; Popham, 202.

In *King v. Farre*, 1 Keb. 629 (excep.), it was said here the entry is on their oaths present, without saying "*probos et legales homines*," but in all inferior courts which are removed either it is "*probos et legales*" which difference was agreed upon and exceptions overruled.

King v. Fitz, 1 Keb. 50, says where an indictment did not say "*probi et legales homines*" yet being for taking away the stones of a church the court would not quash it.

King v. Pool, 2 Keb. 125,—an indictment did not say "*proborum et legalium hominum* which per curiam is well enough, and ruled one way and the other but because it was not "*et armis*" it was quashed.

2 Keb. 208,—there is no case of that kind on that page.

Palm. 282, *Le Countee de Barkah's Case*,—the indictment was quashed for omission of *proborum et legalium hominum*.

King v. Morris, 2 Keb. 471,—whilst the indictment does not appear to have *et probos et legales homines*,

in respect to both time and manner." 28 Am. & Eng. Encyclop. Law, p. 455, note 3; Sutherland, Stat. Constr. § 454; *State v. Hil-mantel*, 21 Wis. 574; *Bladen v. Philadelphia*,

60 Pa. 464. The statute in question does not merely direct the manner of drawing jurors, but provides that "not more than one person shall be drawn as a grand juror from any

the objection was to the allegation as to the venue and second that the allegation as to *juratores* sworn to inquire did not say "*pro Domino Rege*."

1 Palm. 389,—the indictment was quashed (Mich. 21 Jac.) because it omitted *proborum legalium hominum*.

Rex v. Browne, 1 Ld. Raym. 562,—it appears that the words were omitted but the point was not made in that case.

Rex v. Lamb, 1 Ld. Raym. 609,—in neither case does the question appear.

In *Hamond v. Queen*, Cro. Eliz. 751, the indictment was quashed for the omission of these words and because the venue was left out.

In *King v. Hinton*, 8 Mod. 122, the indictment was quashed because the words "on the oath of twelve *probes et legales homines*" was left out.

In *Roy v. Miller*, 2 Rolfe, 400, the indictment was quashed for omission of words, "*probrates*, etc."

In *Flack's Case*, 2 Rolfe, 82, the indictment was quashed where it omitted the words "*probrates*, etc." and also omitted the venue.

In *Harlson v. Errington*, Popham, 202, it was said the names should be in the indictment, for per-adventure they are not "*probrates*, etc."

In *Oilly's Case*, Cro. Jac. 685, the caption did not show that they were *probrates*, etc., of the county.

In *Le Roy v. Walker*, 1 Sid. 108, the objection was overruled for the omission of these words "*probrates*, etc."

In *Roy v. Ceellers*, 1 Sid. 367, the words were omitted but there was no express ruling upon it.

In *Bande's Case*, Cro. Jac. 41, the case was in king's bench and the words were omitted, but the omission was held to be no ground for exception because "they shall be so intended unless the contrary be shown."

In *Pigge v. Gardner*, 1 Lev. 208, the judgment was in court of Ely and it was objected that the writ of inquiry of damages is "*per sacramentum duodecim*" etc., and not "*proborum et legalium hominum*." But the exception was overruled, for the court being a royal franchise it is not as in case of inferior courts.

Originally the grand jurors were also trial jurors, and after accusing, tried the defendant, but gradually a change was made and a traverse jury was adopted.

Under Leg. Ethel III., 3, the practice was for the twelve senior thanes to go out and the reeve with them and swear on the relic that is given them in hand, that they will accuse no innocent man or conceal any crime. *Lesser's History Jury System*, 124.

The first enactment in regard to assize is the constitution of Clarendon adopted in 1164, whereby Henry II. checked the power of the church, to the effect that laymen should not be accused except by legal accusers, and if the offending persons be such that none will dare to accuse, the sheriff, upon the requisition of the bishop, shall cause twelve lawful men of the vicinage or town, having sworn before the bishop, to declare the truth. Id. 137.

The assize of Clarendon two years later required twelve lawful men of each hundred with four lawful men from each township to present criminals in their district, the persons so presented being sent at once to the ordeal. Id. 139.

And the assize of Northampton in 1166 provided that persons accused of certain crime be on the oath of twelve knights of the hundred, and if there be no knights, on the oath of twelve free and lawful men, and by oath of four men in each township, the party is to be subjected to the ordeal of water, 23 L. R. A.

and if he fail, then suffer the loss of one foot. Id. 140.

The ordinance of 1194, Rich. I., was for four sworn knights in each county to choose two for each hundred, and the latter two co-opt ten men, making twelve for each county. *Stubbs, Select Charter*, 27.

The abolition of the ordeal by the Lateral Council in 1216 led the way to the usage of a second or trial jury to traverse the decision of the former or grand jury. Id. 142.

XIII. Negroes.

All statutes discriminating against the negroes in formation of a grand jury are contrary to the Thirteenth and Fourteenth Amendments of the United States Constitution. *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676 (hab. corp.); *Com. v. Johnson*, 78 Ky. 509 (obj.) (of judge criminally prosecuted); *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567 (mo. qu.); *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354 (mo. set aside).

But after a plea of not guilty, and petition for removal of cause to the federal court, a plea in abatement on this ground was too late. *Cooper v. State*, 64 Md. 40 (pl. abate.).

And habeas corpus on this ground was denied in federal court where proper objections were not made in the state court as there was a remedy by review. *Wood v. Bush*, 140 U. S. 278, 35 L. ed. 505 (hab. corp.).

And under Ala. Rev. Code, §§ 4067, 4187, providing that no objection for disqualification can be made except that the grand jury were not drawn in the presence of the officer, an objection that negroes were excluded would not avail. *Boulo v. State*, 51 Ala. 15 (pl. abate.).

And where a party waives his right to object, he cannot object by habeas corpus. *Haggard v. Com.* 79 Ky. 366 (hab. corp.).

An objection that part of the grand jurors were negroes was insufficient under Miss. Code, § 490, art. 131, providing that impaneling the grand jury is conclusive evidence of competency except for fraud. *Lee v. State*, 45 Miss. 114 (pl. abate.).

And a white man cannot complain that negroes were not on the panel. *Com. v. Wright*, 79 Ky. 22, 42 Am. Rep. 208 (obj.).

XIV. Women.

Under Wash. Terr. Code 1881, providing that all electors and householders shall be competent grand jurors, if a married woman lives with her husband and is a householder, she may be a competent grand juror. *Rosenkrantz v. Territory*, 2 Wash. 287 (obj.); *Walker v. Walker*, Id. 288; *Hays v. Territory*, 5 West Coast Rep. 685 (Wash.) (1894) (obj.); *Schilling v. Territory*, Id. 684 (obj.).

Washington Code, § 3060, as amended, was held unconstitutional on account of its title, and did not render married women eligible to be grand jurors. *Rumsey v. Territory*, 3 Wash. 332a (obj.).

And under an act that was unconstitutional, failing to confer the right of suffrage, women could not act as grand jurors. *Harland v. Territory*, 3 Wash. Terr. 131 (chal. mo. ar.).

XV. Pleading and practice generally.

Objection that a grand juror, who, indicted, was disqualified, should be made before a plea of not guilty, as such a plea is a waiver of objections to the competency of grand jurors. *State v. Martin*, 24 N. C. 101 (mo. ar.); *McTigue v. State*, 4 Baxt 313 (mo. new tr.); *Grant v. State*, 2 Tex. App. 163 (obj.); *United States v. Gale*, 100 U. S. 65, 27 L. ed. 387;

civil township," excepting in certain cases, when it becomes necessary to do so; and in the excepted cases the number which may be drawn from one township is made as small

as is practicable. The statute not only prohibits the drawing of more than one juror from one township in such cases as this, but provides expressly that if more are drawn it

Cooper v. State, 120 Ind. 377 (pl. abate.); Territory v. Armijo (N. M.) Sept. 4, 1894 (mo. ar.).

And the same was said to be the rule in Curtis v. Com. 87 Va. 589 (mo. ar.; mo. new tr.).

And the obligors on a recognizance are bound by this rule also. State v. Borroum, 25 Miss. 208 (plea).

And in Turner v. State, 78 Ga. 174 (pl. abate.), it was said that objections to competency should be made before bill is found.

In Lacy v. State, 31 Tex. Crim. Rep. 78 (mo. set aside), under Tex. Crim. Code, art. 523, limiting the right to set aside an indictment to a few specified grounds, not including disqualification, it was held that such objection cannot be made after an indictment approving Doss v. State, 28 Tex. App. 506 (mo. set aside), holding the same and overruling Woods v. State, 28 Tex. App. 490, as to a dictum to the contrary which said that such a motion could be made on the ground that an improper person was present.

But in State v. Middleton, 5 Port. (Ala.) 494 (pl. abate.), it was held that such a plea may be made after indictment, overruling Boyington v. State, 2 Port. (Ala.) 100, but where the question was as to alien.

Some cases hold under statutes that objection for disqualification must be made before the grand jury is sworn. Logan v. State, 50 Miss. 259 (obj.). Durrah v. State, 44 Miss. 789 (pl. abate.); Head v. State, Id. 749 (pl. abate.); State v. Turlington, 102 Mo. 643 (pl. abate.).

And in Hudspeth v. State, 50 Ark. 534 (mo. set aside), it was held that Mansf. Dig., §2093, providing that a person held to answer may object to competency of grand juror before sworn, does not apply to persons who had been indicted by a previous grand jury.

And a motion in arrest after verdict will not be allowed as objection to the qualification of a grand juror. State v. Carver, 49 Me. 585, 77 Am. Dec. 275 (mo. ar.).

A plea in abatement is generally the proper way to reach the objection of disqualification unless the statute provides some other way that is exclusive. Shinn v. Com. 22 Gratt. 899 (pl. abate.); Com. v. Smith, 9 Mass. 107 (pl. abate.).

This case of Com. v. Smith, *supra*, was a case where the objection was to be an affirming Quaker, and as to oath of grand jury, see note to State v. Noyes (Wis.) 27 L. R. A. 775.

But in Com. v. Parker, 2 Pick. 563 (mo. ar.), where it was objected that some of the grand jurors were improperly on the jury because the venire was not signed, it was said Com. v. Smith, *supra*, would end the motion in holding that objection to personal qualification of the grand jurors must be made before indictment. "It is not necessary to apply the remarks here and we have some doubts as to the correctness of it in all cases; and the case in which it was made was decided upon another point."

And under Louisiana Act March 6, 1840, providing that objection must be made on the first day of the term, a motion in arrest is not the proper mode to object to competency of grand jurors. State v. Nolan, 8 Rob. (La.) 513 (mo. ar.).

The disqualification of three will not authorize the court to set aside the whole panel. State v. Jacobs, 6 Tex. 92 (chal.; mo. qu.).

But the discharge of one, and substitution of another without giving the right of challenge as to the last, will not require setting aside the indictment where the disqualification is not shown. State v. Fowler, 52 Iowa, 108 (mo. set aside).

That the names of all the grand jurors were not

on the official list will not be a disqualification. Sayle v. State, 8 Tex. 120 (pl. abate.); Thomason v. State, 2 Tex. App. 550 (pl. abate.); State v. Collier, 17 Nev. 275 (mo. qu.); Williams v. State, 73 Ga. 180 (pl. abate.).

Or that the certificate of the county auditor did not show that the grand jurors were qualified where Minn. Gen. Stat., chap. 103, required objection to be by challenge. State v. Thomas, 19 Minn. 484 (pl. abate.).

And the failure of the court to interrogate the grand jurors as to their qualifications as required by statute will not invalidate. James v. State, 58 Ala. 280 (pl. abate.); O'Kelly v. Territory, 1 Or. 51 (error); Sage v. State, 127 Ind. 15 (pl. abate.).

The presumption is that grand jurors were qualified. Jerry v. State, 1 Blackf. 385 (except.); Wein-zorpflin v. State, 7 Blackf. 186 (mo. ar.); Potsdamer v. State, 17 Fla. 385 (obj.); Galvin v. State, 6 Coldw. 283 (mo. new tr.); Stone v. State, 30 Ind. 115 (mo. qu.).

And in Nichols v. State, 46 Miss. 284 (mo. qu.), the objection to the grand jury was not stated, but the court said Miss. Code 1857, p. 499, makes fraud alone the subject of challenge to the array.

And under Indiana 2 Gavin & H. Stat., 433, § 12, providing no objection to any grand juror for irregularity in selection can be made unless for corruption, it was held that a plea must show why objection was not made by challenge. Mershon v. State, 51 Ind. 14 (pl. abate.).

And in Reed v. State, 1 Tex. App. 1 (pl. abate.), it was held that objection to qualification can only be taken advantage of under Paschall's Dig. art. 363, which provides for objection by challenge at impaneling.

An objection by attorney that a party would be indicted and that the clerk said he would select disqualified grand jurors, and did, cannot be made as objection can only be made by one under prosecution. Hudson v. State, 1 Blackf. 317 (chal.).

And a similar ruling as to objector was made in Roes v. State, 1 Blackf. 360 (chal.).

And the grand jurors cannot show that evidence was heard by them while one of them was incompetent, although it was returned by a competent grand jury. Com. v. Skeggs, 8 Bush, 19 (mo. qu.; bond).

As to other cases on pleading and practice, where the objection was for some particular disqualification, see that subject.

XVI. Ignorance.

A Mexican elector unable to understand any language except Spanish may be a competent grand juror in Colorado. Re Allison, 10 L. R. A. 790, 13 Colo. 533 (hab. corp.).

Under Texas, Paschall's Dig. art. 1866, providing that no objection should be made that the grand jury was illegally constituted, the plea that twelve could not speak or understand English was insufficient. Mahl v. State, 1 Tex. App. 187 (pl. abate.).

XVII. Loyalty.

Under Act of Congress June 17, 1863, requiring oath of loyalty, the accused may challenge for that cause, although he is not in prison or out on bail. United States v. Blodgett, 35 Ga. 336 (chal.).

But a plea of this kind was properly overruled because indefinite as to time and place. United States v. Hammond, 2 Woods, C. C. 197 (pl. abate.).

And a plea of not guilty is a waiver of objections to the competency of the grand jurors where the plea was for excusing grand jurors improperly under the loyalty act. United States v. Gale, 109 U. S. 65, 27 L. ed. 387 (mo. ar.).

L. T.

shall be the duty of the officer drawing the jury to reject all superfluous names. It would be difficult for language to express more clearly the legislative intent to prevent the drawing of more than one juror from a township in counties or districts having as many townships as there are jurors to be drawn. It was the intent of the general assembly to secure impartial grand jurors, as free from local prejudice and undue influence as possible. Jurors are more likely to be influenced by the excitement and prejudice of their locality than are those who reside at a distance from it. If two jurors may be drawn for one township, the entire panel may so be drawn. Jurors prejudiced or unduly influenced by excitement may not only exercise an undue influence to secure indictments which should not be found, but also to defeat the finding of indictments which the evidence before the grand jury demands. It was no doubt to prevent such evils as these that the Statute of 1886 was enacted; but, under the construction contended for by the state, the legislative intent might, to a material extent, be defeated by careless or designing officers. Section 4260 of the Code authorizes a challenge to the panel when not drawn as required by law, but the defendants had no opportunity to make such a challenge. A motion to set aside an indictment may be made under section 4337 of the Code, and must be sustained when the grand jury "were not selected, drawn, summoned, impaneled or sworn as prescribed by law." It is clear that the grand jury in this case was not drawn as prescribed by law. Section 4538 of the Code provides that, "if the appeal was taken by the defendant from a judgment against him, the supreme court must examine the record, and without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands." But it cannot be said that the error in this case was purely technical, or that it appears that the substantial rights of the defendants were not affected. We conclude that a motion to set aside the indictment should have been sustained on the ground stated.

2. The remaining ground of the motion to set aside the indictment is that John Coulthard, a brother of James, was a member of the grand jury, and took part in its proceedings. That alone would not have been a sufficient cause for which to challenge the juror. Code, § 4261. Nor does the statute make it a ground upon which the indictment may be set aside. Id. § 4337. The motion as to that ground was properly overruled.

3. James Coulthard, the husband of Mrs. Russell at the time the offense charged is said to have been committed, was permitted to testify on the trial as a witness against the defendants. It is insisted that his testimony was not competent, because she had ceased to be his wife at the time it was given. The argument in support of that claim seems to be that, as section 4008 of the Code provides that "no prosecution for adultery can be commenced but on the complaint of the husband

or wife," the right to maintain the prosecution depends upon the continuance of the marriage relations; that the crime is against the injured party to that relation; and that public policy demands the discontinuance of the prosecution when that relation ends. It is only necessary that the prosecution be commenced by the husband or wife. After that is done, it may be continued without further appearance or action on the part of the one who commenced it. *State v. Briggs*, 68 Iowa, 419. If the offense was committed, the husband had the right to commence the prosecution, and the subsequent divorce and remarriage of the wife did not cancel the offense, nor bar the prosecution for it; and that is true whether the crime be regarded as against the husband or as against the state. The testimony of Coulthard was therefore properly received in evidence.

4. In view of the conclusions announced, it is unnecessary to consider other questions discussed by counsel. For the failure of the district court to set aside the indictment on the first ground of the motion which assailed it, *the judgment is reversed.*

STATE of Iowa, *ex rel.* David F. WITTER,
App.,

v.
J. L. FORKNER *et al.*

(.....Iowa.....)

1. The title of an act which says that it is to tax traffic in intoxicating liquors and regulate and control the same fairly expresses the purpose of the act and is not insufficient because the law may be in effect a license law without being so named.
2. A statute providing among other things that on consent of a city council to which the consent of a majority of the electors is a condition precedent, certain penalties of a prohibitory liquor law may be suspended, is not unconstitutional as a delegation of legislative power to the people.
3. A statute permitting certain penalties of a prohibitory liquor law to be suspended in any city or town upon filing the written consent of the city council and of the majority of the voters in cities of 5000 or more, but requiring the consent of 65 per cent of the voters of the smaller cities and towns, is not a local or special law, nor does it violate a constitutional provision for uniformity of operation or furnish a diversity of laws in different parts of the state.
4. The exercise of the pardoning power is not infringed by a statute which authorizes the suspension of certain penalties of a prohibitory liquor law in any city or town upon certain

NOTE.—The subject of delegation of power by permitting a local option as to the operation of a statute in that locality is so fully treated in the opinion and brief of the above case that no further discussion thereof by way of annotation seems desirable. As to the power of the legislature to make a statute contingent on approval by the vote of the people of the whole state, see *Re Municipal Suffrage to Women (Mass.)* 28 L. R. A. 112, and note.

conditions including the consent of a specified portion of the electors.

(*Kinne, J., dissents.*)

(April 2, 1895.)

A PPEAL by relator from a judgment of the District Court for Polk County in favor of defendants in a proceeding brought to abate an alleged liquor nuisance. *Affirmed.*

The facts are stated in the opinions.

Messrs. C. C. Nourse, C. L. Nourse, and Charles Mackensie, for appellant:

Chapter 62 of the Acts of the Twenty-Fifth General Assembly is unconstitutional in that its purpose and legal effect are to give to the people of certain cities the power to repeal or abrogate the provisions of the prohibitory law. This only can be done by an act of the general assembly of the state, expressed in a constitutional manner.

Gebrick v. State, 5 Iowa, 491; *State v. Benke*, 9 Iowa, 208; *State v. Weir*, 38 Iowa, 184, 11 Am. Rep. 115; *State v. King*, 37 Iowa, 462; *Parker v. Com.* 6 Pa. 507, 47 Am. Dec. 480; *Com. v. Lebanon County Quarter Session's Judges*, 8 Pa. 391; *Morgan v. State*, 81 Ala. 72; *Cooley*, Const. Lim. 120-124; *Mechmeier v. State*, 11 Ind. 482; *Thornton v. Territory*, 8 Wash. Terr. 482; *Rice v. Foster*, 4 Harr. (Del.) 479.

There is a broad distinction between the power of the legislature to confer upon cities, acting through their city council, the power to enact ordinances and an attempt to confer upon citizens, acting through the ballot or by petition, the power to repeal or abrogate a law.

Ex parte Wall, 48 Cal. 280, 17 Am. Rep. 425.

To suspend or repeal the penalties of an act is to repeal or abrogate the law.

1 Bl. Com. 57; *State v. Hipp*, 38 Ohio St. 230.

The act is void as not expressing its purpose in the title. It is in fact only a license law to license the sale of intoxicating liquors, and that purpose should have been expressed in the title.

State v. Hipp, 38 Ohio St. 199; *Youngblood v. Serton*, 33 Mich. 419, 30 Am. Rep. 660; *Cantrel v. Sainer*, 59 Iowa, 26; *State v. Bowers*, 14 Ind. 195; *Re Hauck*, 70 Mich. 396.

The act is unconstitutional because the governor alone can remit or suspend penalties.

State v. Fleming, 7 Humph. 153, 46 Am. Dec. 73; *Butler v. State*, 97 Ind. 874. Overrules cases, *State v. Speck*, 20 Ind. 211, and *State v. Shideler*, 51 Ind. 64; *Sterling v. Drake*, 29 Ohio St. 457, 23 Am. Rep. 673; *Atty. Gen. v. Brown*, 1 Wis. 518; *State v. Nichols*, 26 Ark. 74, 7 Am. Rep. 600; *Haley v. Clark*, 26 Ala. 439; *State v. Sloss*, 25 Mo. 291, 69 Am. Dec. 467.

Mr. A. A. Haskins for appellees.

Deemer, J., delivered the opinion of the court:

The plaintiff's petition is in the usual form of such papers, alleging that defendant Moore is the owner, and defendant Forkner the occupant, of a building in the city of Des Moines wherein intoxicating liquors were sold, and kept with intent to be sold, con-

trary to law, by the said Forkner, with the knowledge and consent of Moore. The petition further alleges: That chapter 62 of the Acts of the 25th General Assembly, familiarly known as the "Mulct Law," is unconstitutional and void in this: that the act is in conflict with article 6, section 1, article 4, section 16, and article 9, part 2, section 4, of the Constitution, and of an alleged amendment to the Constitution adopted June 27, 1882; that the said enactment is invalid because the operation thereof in Polk county is made to depend upon the consent of a portion of the citizens of Polk county, because it confers upon a portion of the citizens of Polk county the right to make the laws of Iowa, because it attempts to confer on a portion of the citizens of Polk county the right to suspend legal penalties and bar proceedings under the law prohibiting the sale of intoxicating liquors, and because the whole subject of the act is not embraced in the title. The petition further charges that a certain statement of consent, in pretended compliance with section 17 of the Act before referred to, has been filed in the office of the county auditor, but that such statement is not in compliance with the act, in that it is not in proper form, and is not verified as required by the statute, and that it is not signed by a majority of the citizens residing in the city of Des Moines who voted at the last preceding general election. It further alleges that defendant Forkner has paid the tax required by the act in question, and that he is not a registered pharmacist. The defendant Forkner admits in his answer that at the time of the commencement of this suit he was conducting a saloon at the place in question, but denies all other statements and conclusions in the petition, and avers that he is complying with all the provisions of the Act of the 25th General Assembly in question. The case, upon the issues thus joined, was tried to the court on the following stipulation of facts: "First. Defendants admit the establishment of a place for the sale of intoxicating liquors at the time and place charged in the first paragraph of plaintiff's petition, and the sale of intoxicating liquors, but denies that the same was illegal, and claims the right to establish said place for the sale of intoxicating liquors under the provisions of chapter 62 of the Acts of the 25th General Assembly of the state of Iowa. Second. The allegation of the petition that the petition filed with the auditor of Polk county was not signed by a majority of the legal voters voting at the general election held previous thereto is withdrawn, and no issue is made in relation thereto, and defendants shall not be required, for the purposes of this cause, to prove compliance with the said Act of the 25th General Assembly, except to the form and verification of the petition. It is further admitted that the petition or statement of consent filed with the county auditor consists of thirty-one parts, and that the form of verification attached to all but four of said parts is a typewritten, blank form, filled out by the notary public, and is in form as set out in defendant's amendment to their answer, and that, with-

out the petitions with the typewritten forms of verification, a majority of the resident voters' names would not be on said petition."

It appears that in the court below some question was made regarding the sufficiency of the statement of consent filed with the county auditor, under the provisions of the act in question. But the point is not referred to in the printed briefs, and was merely suggested by counsel for appellant in oral argument had before us at the time of submission of the cause. We do not understand counsel are insisting upon these alleged defects, in this court, and will give them no further consideration.

The questions presented by this appeal relate, then, solely to the constitutionality of the act under which defendant Forkner is conducting his business. We may premise our discussion of the case by saying that we undertake the solution of the problem presented with full knowledge of the grave responsibility cast upon us, and of the importance of the questions involved, and shall endeavor to look at the matter in the light of certain elementary principles, of which courts must ever be mindful. Among these are that legislative power is primarily plenary, and that state constitutions are not grants of, but limitations upon, that power, and he who would challenge a legislative enactment must be able to specify the particular provision of the constitution which deprives the legislature of the power to pass the act; that it is the duty of the court to reconcile statutes with the constitutions, when it can be done without doing violence to the language of either; and that in all cases of doubt the doubt must be resolved in favor of the constitutionality of the statute. It is likewise true that the constitution is a shield which the state, in its sovereign capacity, has provided for the protection of public and private rights; that unrestricted legislation is inimical to both public and private rights; and that it is our duty to see that no legislation is enacted which improperly intrenches upon the constitutional rights of the whole people, or of the individual, or his property.

Before entering upon a discussion of the specific objections made to the act, it is well to set out such of its provisions as are material to a full understanding of the questions presented. The act is entitled, "An act to tax the traffic in intoxicating liquors and to regulate and control the same." The first fifteen sections of the act relate to the assessment, levy, and collection of a tax of \$600 against every person engaged in selling, or keeping for sale, intoxicating liquors, and upon the real property, and the owner thereof, within or whereon intoxicating liquors are sold, and kept with the intent to be sold, in this state. The said tax is to be paid into the county treasury, one half to go to the general county fund, and the remainder to be paid to the municipality in which the business taxed is conducted. Section 16 is as follows: "Nothing in this act contained shall be in any way construed to mean that the business of the sale of intoxicating liquors is in any way legalized, nor is the same

to be construed in any manner or form as a license, nor shall the assessment or payment or any tax for the sale of liquors as aforesaid, protect the wrongdoer from any penalty now provided by law, except that on the conditions hereinafter provided certain penalties may be suspended." Section 17: "In any city of five thousand or more inhabitants, the tax hereinbefore specified may be paid quarterly in advance on the first day of January, April, July and October of each year, and after a written statement of consent signed by a majority of the voters residing in said city who voted at the last general election, shall have been filed with the county auditor, such payments shall upon the following conditions, be a bar to proceedings under the statute prohibiting such business. 1st. The person appearing to pay the tax shall file with the county auditor a certified copy of a resolution regularly adopted by the city council, consenting to such sales and a written statement of consent from all the resident freeholders owing property within fifty feet of the premises where such business is carried on." (The other provisions and conditions relate to the filing of a bond, and to the manner in which the business shall be conducted, and need not be set out.) Section 18: "In order that any city or town of less than five thousand inhabitants may come within the provisions of section 17 of this Act, the following additional condition must be complied with: A written statement of consent shall be filed with the county auditor signed by sixty-five per cent of all the legal voters who voted at the last preceding general election (as shown by the poll lists of said election); residing within such county and outside of the corporate limits of cities having a population of five thousand or over; but no such statement of consent shall be construed as a bar to proceedings against persons selling intoxicating liquors in incorporated towns situated in townships of which less than a majority of the voters of the township, including the incorporated town, have signed a statement of consent. Nor shall it be construed as a bar in any incorporated town in which a majority of the voters do not sign said statement of consent." Section 19: "Whenever any of the conditions of this act shall be violated, or whenever the city council or trustees of the incorporated town shall by a majority vote direct it, or whenever there shall be filed with the county auditor a verified petition signed by a majority of the voters of said city, town, or county, as the case may be, as shown by the last general election, requesting it, then and in such case, the bar to proceedings as provided in section 17 hereof, shall cease to operate as a bar, and persons engaged in the sale of intoxicating liquors as contemplated by this act, shall be liable to all the penalties provided for by chapter 6, title 11, of the Code and acts amendatory thereto. . . ." Section 24: "For the purpose of protecting the property of the corporation and its inhabitants, and of preserving peace and good order therein, cities and incorporated towns shall have power to levy and collect additional taxes and to adopt from time to time.

rules and ordinances for further regulating and controlling such traffic not in conflict with the provisions of this act." The act, being deemed by the legislature of immediate importance, went into effect from and after its publication, which occurred on the 3d and 4th days of April, 1894.

It is insisted that the act is unconstitutional because the title does not sufficiently express its purposes. Section 29 of article 3 of the Constitution provides that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be embraced within the title." It is conceded that the act embraces but one subject, and matters germane thereto; but it is contended that the subject is not expressed in the title, for the reason that the law is simply a license law, and that the purpose should have been expressed in the title. It seems to us there is no merit in this contention. The title says it is an act to tax traffic in intoxicating liquors, and to regulate and control the same. Does it do more than this, and is there anything in it not allied to the subject expressed in the title? We think not. The power to regulate is to lay down the rule by which a thing shall be done; to prescribe a rule by which a business or trade shall be conducted. And the power to control is to exercise a restraining or governing influence over; to check, to restrain or regulate. We can hardly conceive how more apt words could have been used to express the purposes of the act. It is not contemplated that anything more than general terms shall be used in the title, to express the object sought to be attained. It may be true, as claimed by counsel, that the act is, in effect, a license. But the title and the act itself call it by another name, and when the two are construed together there is no uncertainty in the title.

3. It is next insisted that the purpose and legal effect of this act are to give to the people of certain cities the power to repeal or abrogate the provisions of the prohibitory law, and that this can only be done by an act of the general assembly of the state, expressed in a constitutional manner. In other words, it is insisted that the question as to whether the prohibitory law shall be in force or not is left to a vote of the people, and that under our constitution such power is intrusted solely to representatives elected by the people, who can refer the question back to their constituents for determination. This contention is, it seems to us, based on a misapprehension of the legislation in this state relating to the traffic in intoxicating liquors. It must be borne in mind that the act in question is a general law, applicable alike to all localities of the state coming within its terms. It does not depend upon a vote of the people to give it vitality. It went into effect upon its publication, and was a complete and valid enactment at that time. If it repeals the general prohibitory laws in any particular, it does so only by implication, and the repeal is not made to depend upon the vote of the people. The act itself works the repeal of the old laws, if there is any inconsistency between them.

It is no doubt true that the general assembly cannot legally submit to the people the proposition whether an act shall become a law or not, for the people have no power, under our form of government, in their primary or individual capacity, to make laws. This they must do by their representatives. But the constitutional objection to the law is met if the act, when it came from the legislature, received the governor's approval, and was properly published, and was, of itself, a complete and perfect enactment. This distinction is made clear by *Mr. Justice Wright* in the case of *Dalby v. Wolf*, 14 Iowa, 228, wherein he says, in speaking of a like objection to what is known as the "Herd Law": "Neither of these positions is tenable. They utterly mistake the intention of the constitutional provision quoted, and misapprehend the scope and spirit of the decisions, in this and other states, which hold that the legislature cannot refer to the people the question whether a particular act shall become a law. In all the cases referred to, it will be found that . . . the question submitted was whether or not a proposed law should become operative. Thus, in the first case cited, it was provided by the statute, that 'the electors shall determine, by ballot, at the annual election to be held in November next, whether this act shall, or not, become a law.' If a majority voted against it, then it was to be null and void; if for it, then it was to take effect on the day named. And such legislation was expressly condemned by this court in *Santo v. State*, 2 Iowa, 165, 68 Am. Dec. 487, which was recognized and followed in *Geelrick v. State*, 5 Iowa, 491. The law in question, however, is not obnoxious to this objection. The popular will is expressed under and by virtue of a law that is in force and effect, and the people neither make nor repeal it. They only determine whether a certain thing shall be done under the law, and not whether said law shall take effect. The law had full and absolute vitality when it passed from the hands of the legislature; and the people, under the 'rule of action' therein given for their government, proceeded to act. The same rule—the same law—was given to all the people of the state, to all parts of it; the same method for taking the vote was presented for all the counties; the same penalties were attached. As a result of the vote, a different regulation, of a police nature, might exist in one county from what existed in another; just as, . . . one county might determine, by a popular vote, that a higher rate of tax should be levied than that provided by the general law." In the case of *Weir v. Cram*, 37 Iowa, 658, the principle announced in the foregoing opinion was reaffirmed, and the distinction we have drawn conserved. In the latter case it is said: "In the one case the people of the counties are permitted to make certain local police regulations, to have the force of law; in the other, a law is enacted by the legislature, which can have no force in any county until sanctioned by the vote of the people thereof." The act in question is complete in itself, requiring nothing further to give it validity.

and does not depend upon the popular vote of the people, or, if it does, depends upon this vote simply to determine the limits of its operation. The rule we have established, first announced in this state more than thirty years ago, is supported by the overwhelming weight of authority. See *Black, Intoxicating Liquors*, § 45, and cases cited; *State v. Parker*, 26 Vt. 357; *Com. v. Bennett*, 108 Mass. 27; *Com. v. Dean*, 110 Mass. 357; *Gloversville v. Howell*, 70 N. Y. 287; *State v. Gloucester County Circuit Ct. Judge*, 50 N. J. L. 585, 1 L. R. A. 86; *Savage v. Com.* 84 Va. 619; *Schulherr v. Bordeaux*, 64 Miss. 59; *Gordon v. State*, 46 Ohio St. 607, 6 L. R. A. 749; *State v. Pond*, 93 Mo. 606; *Fesk v. Bloomington Twp. Board*, 82 Mich. 393, 10 L. R. A. 69; *Territory v. O'Connor*, 5 Dak. 397, 3 L. R. A. 355; *Cooley, Const. Lim.* 6th ed. pp. 137-145, and cases cited. Some few cases are to be found announcing a contrary doctrine. See *Parker v. Com.* 6 Pa. 507, 47 Am. Dec. 490; *Maize v. State*, 4 Ind. 342; and *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 427. The case in Pennsylvania, however, was afterwards overruled in *Locke's App.* 73 Pa. 491, 13 Am. Rep. 716. And the case in Indiana is practically overruled in *Groesch v. State*, 42 Ind. 547. The California case has also been distinguished, and is weakened, as an authority, in the case of *People v. McPadden*, 81 Cal. 489. The case of *Santo v. State*, 2 Iowa, 203, 63 Am. Dec. 487, is not in conflict with the views we have expressed. Nor is the case of *Geebick v. State*, 5 Iowa, 493, as explained in *Dalby v. Wolf*, to be regarded as establishing a contrary doctrine. *State v. Bencke*, 9 Iowa, 203, simply follows the rule announced in *Santo v. State*. The case of *State v. Weir*, 33 Iowa, 134, 11 Am. Rep. 115, recognizes the doctrine announced in the *Geebick Case*, that "a law can no more be repealed than it can be made by a vote of the people."

In the case of *Des Moines v. Hillis*, 55 Iowa, 643, this court, in construing chapter 56, Laws 1878, authorizing cities to provide by ordinance for payment of salaries to their officers, in lieu of fees theretofore retained by such officers under prior statutes, held the act was not void as a delegation of the power of legislation to the cities, *Justice Beck* using this language: "Counsel insist that the act in question is void for the reason that the provisions as to the salary of the officers can only take effect upon the vote of the city council,—a law of the state thus made dependent upon the action of a municipality, which, it is insisted, is in conflict with the constitution. The statute confers authority, to be exercised at their discretion, upon city councils. They may execute the power conferred, or withhold its execution. That is all there is of it. The city has authority from the state to pass the ordinance. Surely, it cannot, with fairness, be said that the operation of, and validity of, the statute depend upon the action of the city." This, we believe, is the latest expression of this court on the subject now under consideration, and it is directly in line with the views heretofore expressed in this opinion.

That it is competent for the legislature to

empower municipalities to make ordinances and adopt regulations for controlling, licensing, or prohibiting the traffic in intoxicating liquors, is plain, and is not questioned in this case. It is entirely in accord with the principle of local self-government that the power to enact police regulations on matters so closely connected with the good order and prosperity of a city should be lodged with those best qualified to judge of measures adapted to meet the emergencies of these particular situations. And it is competent for the legislature, in its wisdom, to invest them with the authority necessary to the administration of the special purposes of their creation. As said by *Judge Cooley* in his work on Constitutional Limitations, 6th ed. pp. 144, 145: "Municipal charters refer most questions of local government, including police regulations, to the local authorities, on the supposition that they are better able to decide for themselves upon the needs as well as the sentiments of their constituents than the legislature can possibly be, and are therefore more competent to judge what local regulations are important, and also how far the local sentiment will assist in their enforcement. The same reason would apply in favor of permitting the people of the locality to accept or reject for themselves a particular police regulation, since this is only allowing less extensive powers of local government than a municipal charter would confer; and the fact that the rule of law on that subject might be different in different localities, according as the people accepted or rejected the regulation, would not seem to affect the principle, when the same result is brought about by the different regulations which municipal corporations establish for themselves in the exercise of an undisputed authority." See also, *State v. Noyes*, 30 N. H. 279; *Beach, Pub. Corp.* § 72; *State v. Wilcox*, 42 Conn. 364, 19 Am. Rep. 536; *Tiedeman, Pol. Powers*, p. 638; *Black, Intoxicating Liquors*, § 217; *Dill. Mun. Corp.* §§ 9, 44, and authorities cited. The policy of creating local public and municipal corporations for the management of local concerns runs back to the earliest period of our colonial history. It is exhibited in all our legislation, and expressly or impliedly guaranteed by our state constitutions. *Com. v. Roxbury*, 9 Gray, 503. See also, the learned opinion of *Judge Cooley* in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, wherein he treats of the history of towns and townships, their place in our system of government, and their rights of local self-government. See also, *State v. Pond, Com. v. Bennett*, and *Savage v. Com. supra*; and the learned decision of the subject in *State v. Gloucester County Circuit Ct. Judge, supra*; *Clarke v. Rochester*, 23 N. Y. 805. In the case of *Com. v. Bennett supra*, it is said: "It is equally within the power of the legislature to authorize a town, by vote of inhabitants, or city, by vote of the city council, to determine whether the sale of a particular kind of liquors within its limits shall be permitted or prohibited. This subject, although not embraced within the ordinary power to make by-laws and ordinances, falls within the class of police

regulations which may be intrusted by the legislature to municipal authority." It is useless to cite additional authorities, many of which are in the books, upon these propositions, for the doctrine is already the established rule in this state. In the case of *Morford v. Unger*, 8 Iowa, 82, the principle is recognized, and applied to a statute which provided that it should not go into effect until accepted by the city council of the city of Muscatine. And in the case of *State v. King*, 37 Iowa, 462, it is said: "Counsel maintain that the law conferring the power to pass the ordinance in question is, under the decision of this court, unconstitutional, on the ground that it is a delegation of legislative authority to cities and towns, enabling them to make law. And this it certainly is. But cities and towns do have legislative authority, and it is delegated to them by the state; yet ordinances made in pursuance thereof, if within the authority conferred, and not in conflict with the constitution, have always been sustained. It is the doctrine of this state that the general assembly cannot delegate to the people the right to make or repeal a law; that statutes or parts of statutes which are made to depend for their validity upon a popular vote are unconstitutional. But it never has been held that the state cannot delegate legislative power to municipal corporations, within proper bounds."

Turning now to the act under consideration, and we find that the bar to proceedings under the prohibitory liquor laws cannot become effective unless the saloon is located in an incorporated town or city, and not then unless the person who proposes to engage in the business has authority from the city council. What matters it that the saloon keeper must also have the consent of at least a majority of the electors who voted at the last preceding general election? Very many of the things authorized by the law to be done by a city council can only be done after petitions are presented, signed by a certain number of the inhabitants or property holders, and such provisions have never been questioned. Moreover, in some matters relating to local self-government, the council cannot act until a vote of the people of the municipality is had, authorizing them to do so. Such laws have never been doubted. It is unnecessary to cite these various enactments. They are familiar, not only to the profession, but to nearly every layman as well.

It is said by counsel for appellant that, notwithstanding the statement in the law itself that the business of selling intoxicating liquors is not legalized or licensed by the act in question, yet such is its effect. For the sake of argument, we grant the position, and yet it does not alter the principles of law applicable thereto, but rather strengthens them. Prohibition remains the general rule, and license, or a bar to the proceedings against violation of it, the exception. To obtain this license or bar to proceedings, it is necessary that the city council, in the exercise of the power conferred upon it for local regulation, give per-

mission to the conduct of the business, and this it can do only upon certain conditions, which are set forth in the act. The city council also has power to levy and collect additional taxes, and to adopt further rules and ordinances for regulating and controlling the traffic; clearly indicating that the whole matter is one of police regulation, delegated to the city council, which had the power to, but is not required to, do those things which remove the bar.

The objection that the consent of a majority of the electors is needed before the consent of the city council can be given, and that for that reason the whole matter is submitted to a vote of the people, who are to determine whether a particular law is to be in force or not, is fully met in the learned opinion of Judge Van Syckel in the case of *State v. Gloucester County Circuit Ct. Judge supra*. As we have already said, the consent of a majority of the electors, if obtained, does not, of itself, create the bar. This is obtained simply as a condition precedent to the city council's acting in the matter. When this is obtained, the council may grant its permission or not, as it sees fit. The whole matter is left with it to determine,—not only whether the bar shall be created or not, but also the conditions upon which it may be created. *Ea parte Christensen*, 85 Cal. 208; *State v. Morris County Common Pleas Ct.* 36 N. J. L. 72; *Groesch v. State, supra*. It should be remembered, too, in the discussion of this matter, that the questions of whether the mulct law shall be in force or not, and as to whether it shall be operative in a particular locality, are not submitted to the whole people, but only to those who, in the judgment of the legislature, were to be affected by the establishment of the saloon. The vote of the whole people of the state upon the expediency of a general statute may be, and probably is, essentially an act of legislation. But the vote of a local constituency is an assent or a dissent to an act of grant or deprivation done by the legislature, but affecting themselves. This distinction is well illustrated in the case of *Bank of Chenango v. Brown*, 26 N. Y. 467.

The statute in question is not a local or special law. Nor does it furnish a diversity of laws in different parts of the state, so as to be obnoxious to the constitution. Nor is it a violation of the constitutional requirement that all laws of a general nature shall have a uniform operation throughout the state. *State v. Pond and Gordon v. State, supra*; *State v. Schroeder*, 51 Iowa, 197; *Hoswell v. State*, 71 Ga. 224, 51 Am. Rep. 259; *Creekmore v. Com.* 11 Ky. L. Rep. 566; *Bronson v. Oberlin*, 41 Ohio St. 476, 52 Am. Rep. 90.

8. Lastly, it is insisted that the act is unconstitutional because it grants to the people of a particular locality, or to the city council of cities or incorporated towns, the pardoning power, and that this power is lodged, by our fundamental law, in the governor. The constitutional provision with reference to this subject is as follows: "Art. 4, § 1. The governor shall have power to grant reprieves, commutations and pardons

after convictions of all offenses except treason and cases of impeachment. . . . He shall have power to remit fines and forfeitures. . . . And shall report to the general assembly . . . each case of reprieve, commutation, or pardon granted, and the reasons therefor; and also all persons in whose favor remissions of fines and forfeitures shall have been made, and the several amounts remitted." It is clear, the act we are examining does not remit any fine or forfeiture, for none is imposed in the locality where the act is in operation. *Harbin v. State*, 78 Iowa, 265. It simply bars proceedings which might result in a fine or forfeiture, if allowed to continue. There is no constitutional inhibition against this, unless it amounts to a pardon. No doubt, a pardon, in its strict sense, contemplates a remission of guilt, both before and after a conviction. *Ex parte Wells*, 59 U. S. 18 How. 809, 15 L. ed. 423; *Ex parte Garland*, 71 U. S. 4 Wall. 333, 18 L. ed. 366; 4 Bl. Com. 316. See also, a full discussion of the question, found in the opinion of Justice Gray in the case *Com. v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699.

But our constitution, in terms, says the governor's right to pardon exists only after conviction. It is clear to our minds that the only objection to the act now under consideration is not tenable. We have a number of statutes on our books, somewhat similar in character, which have passed unchallenged for years, thus indicating that the bench and the profession generally have never regarded a bar to proceedings created by statutes as an exercise of the pardoning power. For instance, it is provided in section 1548 of the Code that, when a person is tried and convicted for intoxication, he may be discharged, and his fine remitted, upon giving information, under oath, stating when and where, and from whom, he purchased the liquor which produced the intoxication, upon certain conditions not necessary to be stated here. Again, it is provided in section 3868 of the Code that if, before judgment upon an indictment for seduction, the defendant marry the woman, it is a bar to any further proceedings in the offense. Again, it is allowable, under sections 4708 and 4709 of the Code, for the defendant and the person injured to compromise certain offenses, with leave of the court; and, when so compromised, proceedings are stayed, and a bar is created to another prosecution for the same offense. The power to pardon must not be confounded with the power of dispensation or suspension. The former is undoubtedly a prerogative of the executive, while the latter must be exercised by the legislative department of the government. The student of history will remember that one of the main causes for the English revolution in 1688 was the unlawful and corrupt assumption by James II. of the power of dispensation or suspension of the test-oath statutes. In order that his course might receive judicial sanction, he corrupted his courts by the removal of those judges whom he could not control, and appointed in their places hirelings who would do his bidding. The people rebelled, and one of the first statutes

passed after the revolution (1 W. & M. St. II. chap. 2) declared that the pretended power of suspending or dispensing, with laws, or the execution of laws, by legal authority, without the consent of parliament, is illegal. See 1 Bl. Com. p. 142. Blackstone declares that "not only the substantial part of judicial decisions of the law, but also the formal part, or method of procedure, cannot be altered but by parliament; for, if once these outworks were demolished, there would be an inlet to all manner of innovations in the body of the law itself." In view of these historical facts, it certainly cannot be contended that the executive has power to bar proceedings under, or suspend the operation of, any of our laws. Should he attempt to exercise such powers, it would as certainly lose him his title as it did James II. his crown.

We have, as best we may, discussed and disposed of every objection urged to the constitutionality of the act in question; and, while we are aware that there are some respectable authorities holding to a different rule from that announced in this opinion, yet we think that they are founded on a mistaken assumption as to the law, and fail to recognize proper distinctions between the delegation of power to make a law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. We are thoroughly convinced that all questions raised on this appeal have heretofore been determined by this court, or that, at least, principles have been announced which, when applied to the facts of this case, determine all of the objections urged against the validity of the act. It is manifest, too, from the citations we have made, that the great weight of authority in this country supports our views. We have no doubt about the constitutionality of the law. But, had we any question about it, it would be our duty to resolve our doubts in favor of sustaining the act. With the policy or expediency of this enactment, we have nothing to do. This is solely a question for the legislature, which has seen fit to place it upon the statute books; and to it must we look for its repeal, if it proves expedient. We grant that statements have been made in some of the earlier opinions of this court somewhat in variance with the views herein expressed. But we think a careful examination of these cases will disclose that there is no real conflict.

From what has been said, it follows that the judgment and decree of the District Court are affirmed.

Kinne, J., dissenting:

1. I am unable to concur in the opinion of the majority, in so far as it holds that the act in question is not a delegation of powers of the legislature to the people, to repeal and enact laws, and therefore not unconstitutional. I am deeply impressed with the duty devolving upon courts, in passing upon the validity of statutes, to uphold them, if possible. I agree that the statutes should not be set aside save when they are palpably in

violation of either the letter of the constitution, or of those underlying fundamental principles upon which our fabric of government rests. In determining the validity of a statute, we cannot consider or give weight to our judgment as to the necessity for, or the propriety or expediency of, the legislation in question. It is not for the court to determine what the law should be, and thus, under the guise of judicial judgment, create law, but its province is to declare what is the law. It is unfortunate that the legislation touching a subject which so engrosses the attention of the people, and upon which the convictions of men are so decided and antagonistic, should afford any just reason for questioning its constitutionality. When it is so clearly apparent that the real purpose which the legislators had in mind, in the attempted enactment of this statute, could have been so easily and certainly accomplished by the passage of a proper law, which would have had the force and effect of a completed act of legislation when it left their hands and had been approved by the governor, it seems incomprehensible that they should have abdicated their powers as a law-making body, and deliberately violated a solemn duty devolved upon them by the constitution of the state. The importance of the question, as well as the wish I have had to reach a conclusion in harmony with my brethren,—a result always desirable, and especially so in a case like this, which so deeply affects the well-being of all the people of the state,—has led me to give much time and consideration to the question presented. After a careful consideration of the views of the majority, and a thorough investigation of the authorities bearing upon the question, I am impressed with the conviction that some of the provisions of the act are clearly in violation of the constitution of the state, and are a direct assault upon the very fundamental principles upon which our form of government is based. I cannot, therefore, either assent to the views of the majority, nor can I content myself without, as briefly as I may, expressing my views touching this question. I shall not set forth the act in detail, itself. I shall refer to so much of it as is set out in the opinion of the majority, and hereafter state such other of its provisions as may be necessary to a full understanding of my views. The act, as will be seen, undertakes to tax the business of selling intoxicating liquors, through the person of the seller, the owner of the property where the business is carried on, and also the property in which the business is conducted. It then provides, in section 16, that "nothing in this act contained shall be in any way construed to mean that the business of the sale of intoxicating liquors is in any way legalized, nor is the same to be construed in any manner or form as a license, nor shall the assessment or payment or any tax for the sale of liquors, as aforesaid, protect the wrongdoer from any penalty now provided by law, except that on conditions hereinafter provided certain penalties may be suspended." After thus announcing that they were not legalizing the business, and not conferring authority to

license the traffic, they proceed, by sections 17 and 18 of the Act, to make provision for legalizing the business and exacting a license, at the option of a certain number of legal voters, and of the city council in cities, and boards of trustees in incorporated towns, upon the performance of certain acts by the one desiring to sell, and of certain other citizens. The act also provides for the suspension of the penalties of the existing prohibitory laws, and bars all proceedings under such laws, upon the petition and action heretofore referred to being procured and had. Section 19 of the Act provides that the bar to proceedings under the existing law, created by the performance of the acts before mentioned, shall cease to operate in favor of the party whenever he violates the conditions, at the option of the city council, or trustees of a town, or whenever it is so petitioned by a majority of the citizens. In all such cases the liquor seller becomes liable to all of the penalties of the prohibitory law. But in no case, according to the wording of the act, are proceedings under the prohibitory law suspended or barred, or penalties suspended, unless the requisite number of legal voters petition therefor. The ingenuity of the law-making power has often been severely taxed in the preparation and promulgation of prohibitory license, tax, and local-option liquor laws; but it is safe to say that the act in controversy is, in many of its features, unlike anything to be found in any statute relating to intoxicating liquors.

2. It is a rule everywhere asserted, and nowhere denied, that the power of the legislature to enact and repeal laws cannot be delegated to the people; that the people, in their primary capacity, have no power to either enact or repeal a law. *State v. Wilcox*, 42 Conn. 369, 19 Am. Rep. 536; *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425; *Locke's App.* 72 Pa. 491, 18 Am. Rep. 716; *Felt v. State*, 42 Md. 90, 20 Am. Rep. 83; *Parker v. Com.* 6 Pa. 518, 47 Am. Dec. 480; *Mates v. State*, 4 Ind. 342; *People v. Collins*, 8 Mich. 848; *State v. Copeland*, 3 R. I. 35; *Rice v. Foster*, 4 Harr. (Del.) 479; *State v. Young*, 29 Minn. 474; *State v. Swisher*, 17 Tex. 441; *People v. Stout*, 28 Barb. 358; *State v. Bond*, 93 Mo. 606; *Fresh v. Bloomingdale Twp. Board*, 82 Mich. 398, 10 L. R. A. 69; *Santo v. State*, 2 Iowa, 202, 68 Am. Dec. 487; *Geebrick v. State*, 5 Iowa, 491; *State v. Benaks*, 9 Iowa, 208; *State v. Weir*, 83 Iowa, 184, 11 Am. Rep. 115; *State v. King*, 87 Iowa, 467.

This doctrine is fully recognized in the majority opinion. The contention arises over the question as to what, in a given case, constitutes such a prohibited delegation of power. The argument of the majority is based upon the claim that the act being complete in form, and so framed that its provisions may be taken advantage of by the people of any portion of the state, it is not dependent upon the action of the people for its validity, and that, if it operate to repeal the prohibitory laws such repeal is not dependent upon the action of the people, but is accomplished by the law itself. In my judgment, not one of these claims is well founded. It must be understood that I am

not now dealing with the taxing features of this so-called law, but with that part of it which undertakes to suspend—or, more properly speaking, repeal—the provisions of the prohibitory liquor laws upon petition of a certain number of citizens and the action of the council or board of trustees, as the case may be, which may be had only after such a petition has been filed, and after the performance of certain other acts provided for, whereby the sale of liquors is licensed and attempted to be legalized, and the further provisions of which act undertake, upon the said petition of citizens and other acts done thereunder, to revive or reinstate such prohibitory laws in all respects as if the same had never been suspended or repealed.

I maintain that, in so far as the act in question relates to those matters, it is of no more efficiency than a blank sheet of paper. It is not a legislative act. It is, at most, a mere proposition submitted by the legislature to the people, of which they may avail themselves at their will, by the petition, thereby giving force and vitality to the act. True, in form it is an act of the legislature; that is, it bears the signature and approval of the proper officers,—and in that sense only can it be said to be a completed act. The same thing may be said of any other act which may nevertheless be in fact in plain violation of the constitutional provisions. In arriving at a determination of this question, we may be aided by a consideration of what constitutes some of the essentials of a law. Law is a rule of action prescribed by the supreme power of the state, commanding what is right and prohibiting what is wrong. Hence, the act, to be valid, must be more than a mere proposition submitted to the people. It must command something. As is said in the case of *Geedrick v. State*, 5 Iowa, 497: "The legal legislative power must command. It must not leave to the people the choice to obey or not to obey its requirements. It is not a law enacted according to the requirements of the constitution, if there is left to the action and choice of the people upon whom it is to operate the determination of a question which may result in a want of uniformity in the operation of a law of a general nature." True it is, by this act the power is granted to the citizens to petition, but it is a mere privilege or power, not a command. Hence, in this respect, the act lacks this essential element of a law. The grant of power is to the people, by petition, in conjunction with the act of the council or board of trustees, to put in force certain proposed legislation, and repeal existing statutes, in cities and towns, when they may elect so to do; and the election of the people, thus expressed, is, by the act, made an absolute prerequisite to the change in the law. The suspension or repeal of the existing prohibitory liquor laws, and the putting in force, in their stead, of a license law, and the protection of the liquor seller from the provisions and penalties of such prohibitory laws, are all based solely upon, and initiated by, the petition of the requisite number of citizens in a certain community. They, and they alone, by the petition, make it possible

for the city council or board of trustees to create a rule and penalty. In the absence of the petition, there is no rule and no penalty, as the provisions of the act in that respect command nothing, and do not become vitalized into life until the requisite petition is presented, and certain other steps are taken thereunder. No rule of law and no penalty is created, then, until the people have petitioned, and not then unless the council or board of trustees act in furtherance of the wishes of the petitioners. What, then, gives effect and vitality to these provisions of the act? Manifestly, not the law itself, but the petition and the action had thereunder. The so-called legislative act is, in these respects, lifeless, ineffective, without force in and of itself, but life is breathed in the act by the petition and the acts thereunder. The old law is suspended or repealed, not by the act of the legislature, for we must remember that that act commands nothing, requires no act of the people to be done, but the suspension and repeal of existing laws is accomplished as I have stated. Not only is the old law thus repealed, but the new order of things established; but the law thus enacted by the people themselves may be set aside without the intervention of the legislature, and the prohibitory law re-established by petition of the people, or by act of the council. So the prohibitory law may be repealed in one locality, and remain undisturbed in another locality, and yet, in the face of all these facts, it is contended that the law, as an act of legislation, is effective in and of itself. If the petition and acts had thereunder do not operate to suspend or repeal the prohibitory law; if such action does not give life and efficacy to an enactment which, in the absence of these acts, is a statute in form only, having no force,—why is it that the act in question may be in force in one locality and lifeless in another? Clearly, then, it is the petition and the acts thereunder which repeal the prohibitory law. The legislature has not commanded the repeal of the law, but has said to the people of the several communities, "By your petition and certain other action shall the law be repealed." The law-making power remits to the people the task of repealing the law, and thereby invests them with its own legislative authority,—delegates it to them, abrogates its prerogative, and undertakes to confer it on a body not authorized by the constitution to make laws. It is contended that the act itself works the repeal of the old law. How can that be when, as we have seen, the act commands nothing,—not even a vote. It is, in that respect, not mandatory, but a grant to petition for a law. The theory may be plausible, but, in my judgment, is not tenable. As is well said in the dissenting opinion of Reed, J., in *State v. Gloucester County Circuit Ct. Judge*, 50 N. J. L. 535, 1 L. R. A. 86: "If this statute, as I have already remarked, delegated to the people the power to do that which is legislation, then, it does not matter how perfect its form, it is void. . . . The assumption that the vote is the result of the law, and not the law of the

vote, is only a half truth. The vote is the result of the law, and the law is the result of the vote. Unless a scheme framed by the legislature had provided for a vote, of course, there would be no vote. So the votes grow out of the statute. But because the vote is, in this sense, a part of the scheme of legislation, it is no less true that all the people, as a legislative body of last resort, is intrusted with the determination of the final question,—law or no law. It adds to those bodies to which the constitution confides the approval of law another body. It makes the validity of the framework which the legislature has drafted to depend upon another mind than the legislature itself. Both the legislature and the people concur in the work, but because each contributed to the perfection of the statute makes none the less the act of each legislation."

The argument of the majority opinion amounts to this: That, while the legislature cannot pass a law to take effect upon its approval by a vote of the people, it may pass a law whereby the people of the various localities of the state may, by vote or petition, avail themselves of its provisions. To my mind, the last scheme is no less an invasion of the provisions of the constitution than is the former, for, it must be admitted, in the latter case the act has no force and effect until its proposed benefits are accepted in the manner provided herein. As is said by Morse, J., in *Feek v. Bloomingdale Twp. Board*, *supra*: "I have no appreciation of such an argument. It amounts to this, and this only: The legislature says to the people, 'Do you want this law or not? If you want it, you can have it. If you don't want it, you can't have it. Now, meet at your polling places, and vote upon it, and make your choice.' If in such a case, the people do not, by an election, make the act a law or reject it, then I am obtuse. This would be a convenient thing for a legislature wishing to shirk their responsibility,—to submit all their laws to the vote of the people, for if they can submit one they can all; but it is not the way provided by our constitution for the enactment of laws." Acts conferring powers upon municipalities are upheld because of the fact that they are complete and valid laws when they come from the hands of the legislature, and the happening of the contingency or event which furnishes the occasion for the exercise of the power gives no additional efficacy to the law itself. Touching this matter, I quote approvingly the language of Wagner, J., in *Lammert v. Lidwell*, 53 Mo. 192, 21 Am. Rep. 411: "It derives its whole vigor and vitality from the exercise of the legislative will, and not from the vote of the people."

It must operate by virtue of the legislative authority, and not depend upon popular action or the people's suffrages for its vitality." And Sherwood, J., in *State v. Pond*, 93 Mo. 606, says: "In certain classes of cases . . . relating to mere local or municipal objects, it is perfectly competent for the legislature, by a law complete in itself,—one denouncing penalties for its violation,—to submit to the people of certain

localities to determine by their votes whether some small minor regulation, incident to, but not necessary to, the existence of the law itself, shall be adopted. But if the law is not complete, if it has no self-enforcing penalty, when it leaves the hands of the legislature; if it is a mere proposal to the people of certain localities to determine whether certain printed matter which appears on the statute books shall become a law or no,—then such a proposal is a clear delegation of legislative power, and for that reason unconstitutional." It is said that the legislature may pass a law to take effect upon contingency. That is true. In that respect I approve of the rule laid down by Reed, J., in *State v. Gloucester County Circuit Ct. Judge*, *supra*, where he says: "The difference between the statutes based upon a valid contingency and those based upon a contingency void as a delegation of legislative power, may, I think, be clearly stated. The first is a statute ordaining a fixed rule of civil conduct, applying to a certain prescribed condition of fact, which may arise *in futuro*. The last is a statute which leaves to the people the power to say whether, when such a rule has been enacted, it shall ever become operative. One leaves the rule a law ready to operate upon the subject-matter whenever it arises. The other leaves it to another to say whether the rule shall ever become a law." It would be an interesting study to review and comment upon very many cases touching what is a delegation of legislative power, but the length of this opinion forbids. I can only say that the rule I contend for finds abundant support in the following cases (I do not claim that they are all exactly in point, under a state of facts such as we have in the case at bar, but in principle they recognize the doctrine upon which this dissent is based): *Parker v. Com.* 6 Pa. 507, 47 Am. Dec. 480; *Maize v. State*, 4 Ind. 342; *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425; *People v. Collins*, 3 Mich. 343; *Rice v. Foster*, 4 Harr. (Del.) 479; *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506; *State v. Swisher*, 17 Tex. 441; *People v. Stout*, 23 Barb. 356; *State v. Young*, 29 Minn. 474; *State v. Copeland*, 3 R. I. 85; *Fell v. State*, 42 Md. 90, 20 Am. Rep. 83; *Locke's App.* 72 Pa. 491, 18 Am. Rep. 716 (dissenting opinions of Reid and Sharswood, J.J.); *Santo v. State*, 2 Iowa, 203, 63 Am. Dec. 487; *State v. Beneke*, 9 Iowa, 203; *Geebick v. State*, 5 Iowa, 493; *State v. Weir*, 33 Iowa, 184, 11 Am. Rep. 115, and many other cases. It is said in the majority opinion that the first three cases cited above have been overruled, or otherwise weakened as authority. This is a misapprehension, as will be seen from the able dissenting opinion of Sherwood, J., in *State v. Pond*, *supra*. Another thing worthy of mention in this connection is that the opinions much relied upon in the majority opinion, in the cases of *State v. Gloucester County Circuit Ct. Judge*, *State v. Pond*, and *Feek v. Bloomingdale Twp. Board*, were rendered by divided courts, there being able dissenting opinions in each of those cases.

3. It is said that this question is settled by our own decisions, though it is conceded that

"statements have been made, in some of the earlier opinions of this court, somewhat in variance with the views herein expressed." The concession was very proper, as, in my judgment, the rule I contend for has found frequent recognition in the opinions of this court. In fact, as I read the cases, there have never been but one or two departures from the rule. One was in the case of *Dalby v. Wolf*, 14 Iowa, 228, wherein an attempt was made to distinguish the case from the line of cases before that decided by the court. It was said in *Weir v. Cram*, 87 Iowa, 653: "In the one case the people of the counties are permitted to make certain local police regulations, to have the force of law; in the other, a law is enacted by the legislature which can have no force in any county until sanctioned by the vote of the people thereof." It occurs to me that the attempted distinction is more imaginary than real. Furthermore, I have endeavored to show that in fact the act in question can and does have no force without the action of the people. Upon a careful examination of the cases of *Des Moines v. Hillis*, 55 Iowa, 648; *Morford v. Unger*, 8 Iowa, 82; and *State v. King*, 87 Iowa, 462,—it will appear that none of them came properly within the rule applicable to the case at bar. It has always been held permissible to delegate to municipal corporations certain powers of legislation. So it is not disputed that the legislature may make a grant of power, as of a charter (in the absence of constitutional prohibition), the acceptance of which might involve certain liabilities, and such acceptance may be conditioned upon a vote of the people. Nor do I dispute that administrative powers may be granted to a municipality, dependent upon a vote of the people. The case of *Weir v. Cram*, 87 Iowa, 653, is, in principle, like that at bar. The act (stock act) was made to depend on the vote of the people, and was held unconstitutional. The rule I contend for has found frequent recognition in cases from this state heretofore cited. But, whatever construction may be placed upon some of the decisions of this court which seem to sustain the views of the majority, I am unwilling to recognize or give effect to a rule which I deem so plainly in violation of the constitution. I have dis-

cussed but one objection to this law,—that it was an unwarranted delegation of the law-making power. I think there are other and all-sufficient reasons for holding it unconstitutional, but I am admonished that the length of this opinion precludes their consideration. Nor is it necessary, as, for the reason that it is a delegation of legislative power, the act is void. I do not wish to be understood as now passing upon the question as to whether the taxing features of this act may be upheld, notwithstanding the void provisions of the act which I have been considering. If the law, as to the tax provisions, should be held constitutional, it would add those provisions to the existing prohibitory law. That question is not discussed on this appeal, and it will be time enough to pass upon it when it is properly raised. What I do hold is that in so far as the act undertakes to submit to the people, by petition, the question as to whether it shall become effective, and by such petition, and other action contemplated in the act to be based thereon, to repeal the existing prohibitory laws, and legalize and license the sale of intoxicating liquors, it is unconstitutional, as a clear evasion of legislative responsibility, and a delegation of the power to pass laws, which rests exclusively in the legislature. Let it be understood that I have no doubt of the power of the legislature to pass a general license law or a general prohibitory law, but I affirm that they cannot pass such a law, and make its taking effect dependent upon a vote or petition of the people. I think the rule of the majority opinion is full of peril, opens wide the door, and invites members of the legislature to put aside the discharge of the duties properly devolving upon them, removes the personal responsibility which, under our form of government, must ever rest upon the law-making power, and takes away the constitutional safeguards against unwise, ill-considered, and hasty legislation. In brief, it is a long step towards a government of the town meeting, and tends strongly to encourage the very evils in legislation which our representative form of government was created to correct.

The judgment below should be reversed.

INDIANA SUPREME COURT.

BALTIMORE & OHIO & CHICAGO R.
CO., *Appl.*,
v.

Frank S. PAUL.

(.....Ind.....)

1. A railroad company is not liable for an injury received on its road by a

NOTE.—Authorities on the subject of a liability to the public for acts of lessees and others using a franchise are found in a note to *Hawver v. Whalen* (Ohio) 14 L. R. A. 829. The distinction in the above case between the general public and employes is one of interest and importance although few precedents can be found on the subject.

38 L. R. A.

brakeman in the service of another railroad company and caused by the negligence of his fellow servant on a train owned and operated by their employer.

2. A general verdict for plaintiff in an action for negligent injuries under a complaint based on the theory that a brakeman was employed by defendant is overthrown by special answers to interrogatories to the effect that plaintiff was not in defendant's employ but in the employ of another railroad company which owned, controlled, and operated the train which injured him.

(April 22, 1896.)

A PPEAL by defendant from a judgment of the Circuit Court for Steuben County in

favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been received by plaintiff by reason of a defect in defendant's appliances and unskillfulness of its servants. *Reversed.*

The facts are stated in the opinion.

Mr. J. H. Collins for appellant.

Messrs. W. L. Penfield and R. W. McBride for appellee.

Hackney, J., delivered the opinion of the court:

The distinct theory of the appellee's complaint was that the appellant was the owner and operator of a line of railway, in the operation of which it employed him as a brakeman; that in the course of his said service the appellant negligently supplied to him certain defective appliances, and negligently employed a reckless and incompetent engineer; that by reason of such negligence of the appellant the appellee sustained injuries, for which he sought damages. A jury returned a general verdict in favor of the appellee, and answered certain interrogatories. One question in this court arises upon the action of the circuit court in overruling the appellant's motion for judgment in its favor notwithstanding the general verdict. The parties agree in the conclusion that, if the answers to the special interrogatories stand in irreconcilable conflict with the general verdict, the verdict must go down, and the appellant should succeed; otherwise, that upon this question the appellee should succeed. It is also agreed that in passing upon the alleged conflict the court should indulge, in favor of the general verdict, every reasonable hypothesis consistent with the issues, and without reference to the evidence. The propositions in which the parties thus concur are of constant application, and admit of no doubt. Upon the general verdict and the special answers of the jury there is no dispute that the appellant owned the railway upon which the appellee was injured, but the bitterest conflict arises between the parties as to the issues that the appellant was operating the line, and that the appellant was the employer of the appellee, or in any manner responsible for his misfortune. Of the special answers returned by the jury were the following: "(7) Are there two separate and distinct railroad corporations, one called the Baltimore and Ohio and Chicago Railroad Company and the other the Baltimore and Ohio Railroad Company? *A. Yes.*" "(8) Did one of said railroad companies operate, own, and control the train of cars by which the plaintiff was injured? *A. Yes, the Baltimore and Ohio Railroad Company.*" "(10) Did the Baltimore and Ohio and Chicago Railroad Company own, operate, or control the train of cars by which the plaintiff was injured? *A. No.*" "(11) What railroad company, if any, paid the plaintiff for his labor? *A. The Baltimore and Ohio Railroad Company.*" The thirteenth, fourteenth, and fifteenth answers find that the train master of the Baltimore & Ohio Railroad Company employed the appellee, and that when injured he was in the service of that company. Reducing these special answers

to their exact import, they find that there were two distinct corporations, the appellant and the Baltimore & Ohio Railroad Company; that the latter company, and not the appellant, owned, controlled, and operated the train by which the appellee was injured, and that the appellee was employed by, was serving, and was paid by the latter company. Here is an apparent conflict. The general verdict finds, presumptively, that the appellant was the master of the appellee, and as such owed him the duty of protecting him against its negligence in supplying defective appliances and reckless or unskillful co-employees. This was, as we have shown, the theory of the action, and the issue submitted. But the jury find specially that the appellant was not the master of the appellee, and that another owed the duty charged, and found generally against the appellant. Can this conflict be reconciled upon any reasonable presumption consistent with the issues? The appellee's counsel urge several supposed contingencies in which the facts specially found would not stand in conflict with the general verdict. They say: "Our contention is that, unless the special findings show by what right or authority the Baltimore & Ohio Railroad Company operates this railroad in Indiana, and show that such right or authority is conferred by a statute empowering one railroad company, a domestic corporation, to abrogate and abandon the sovereign franchise delegated to it by the state, and transfer to another corporation the attribute of sovereignty delegated to it, in such a manner, so prescribed by statute, as to exonerate the proprietor of the railroad from liability for the acts of the other corporation in operating its road, whether as assignee, servant, agent, partner, stockholder, lessee, licensee, or trespasser, the proprietary corporation remains jointly or severally liable, at the option of the plaintiff, precisely the same as if it continued in the sole rightful and lawful management of its railroad." If this were an action by a stranger to the operating company, this argument would appear to possess much strength, and we are not prepared to say that the charter company could, by any of the methods suggested, escape liability for an injury done by one permitted to employ its functions to another, a member of the general public, to whom the charter company owes duties arising as the consideration for charter privileges, without having delegated those functions by virtue of and pursuant to authority under the law. Here we have no such question. Whatever the attitude of the operating company, that also is the attitude of the appellee, since he was an operative of the operating company; and the appellant, so far from any liability, owed him no duty whatever, unless possibly that of doing him no willful injury. By the answers to interrogatories we learn that the companies were distinct; that the appellant was not the appellee's master; that the Baltimore & Ohio Railroad Company employed him, paid him, and owned, controlled, and operated the train that injured him. If the latter company operated as a trespasser or a licensee, no lia-

bility could exist as against the appellant. *Parker v. Pennsylvania Co.* 134 Ind. 673, 23 L. R. A. 552; *Faris v. Hoberg*, 134 Ind. 269; *Woodruff v. Bowen*, 136 Ind. 431, 22 L. R. A. 198. This conclusion is reached by the ordinary rule, but have we here an exception to the ordinary rule? This appellee's contention has strong support in authority if it has application to the case in hand. The rule so contended for, and its reason, are tersely stated in 19 Am. & Eng. Encyclop. Law, p. 899, as follows: "The lessor, in consideration of the grant by its charter of extraordinary rights and privileges has assumed a quasi public character, and becomes subject to unusual obligations towards the public, and public policy requires that it should not be allowed to release itself therefrom by transferring its rights and franchises to a lessee, without express legislative consent. Many cases are cited in support of the text. In all of the cases and text-writings we have examined the rule has been stated with reference to the obligations of the charter company to the public, and which are created by the enactment of state legislatures or by the franchise; as where some duty is enjoined upon such company by the charter or laws of the state as to the maintenance of a right of way, the regulation of speed of trains, the protection of travelers upon highways crossing the railway, the charges as a common carrier of passengers or freight, the protection of live stock by fences along the line of way, and other obligations to the public not involving a mere private contractual relation. With this rule we have no disagreement, but we do deny its application to the case in hand.

Our researches have discovered but two cases where the owning company was sought to be made liable for an injury to the servant of the operating company, resulting from negligence of the master. In the case of *East Line & R. R. Co. v. Oulberson*, 72 Tex. 875, 8 L. R. A. 567, the conductor of the operating company's train was injured by the alleged negligence of such company in supplying a defective engine and employing a careless engineer. The suit was against the owning company, and at the trial it offered to prove that the conductor was in the employ of another company at the time using the defendant's railway. The offer was excluded. There was no offer to prove that the operating company was a lessee by virtue of any statutory authority, and in considering the question the court treated the operating company as possessing no valid lease. The court stated the question presented in these words: "We have, then, the question of the right of a servant of a railway company operating without authority or statute a road belonging to another corporation to recover of the owner damages for personal injuries resulting to him in the course of his employment through the negligence of his employer or of its officers or agents." In the course of the opinion it was said: "There have been numerous decisions in other states holding the lessor liable, when the lease is unauthorized, for injuries to live stock, and to persons crossing the track, caused by the negli-

gence of its lessees. So it may now be considered the accepted and settled doctrine that in all cases where one railroad company is operating trains upon the road of another without authority of law the owner of the road remains responsible for the discharge of its duties to the public, and becomes liable for injuries resulting from the lessee's failure to perform those duties. The lessor, by accepting its charter, assumes the obligation to carry passengers safely over its line. If it intrusts that duty to another company, and a passenger is injured, it is responsible. It binds itself to carry all freight offered to it, and to deliver it safely. Should its lessor fail to do this, it is liable. It assumes to operate its road safely and carefully, so as not negligently to destroy or damage property, and not to injure persons who have the right to pass on or near the track. Should its lessee negligently do damage to property, or inflict personal injuries upon wayfarers crossing the road, this is a failure of duty on its part, and it is responsible for the wrong. But the duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arise the reciprocal obligations from one to the other. It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road; and it may be asked, Does the latter owe him the duty of a master of his servant, or guarantee that the master with whom he has voluntarily contracted will perform its obligation to him? It may be that, if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But, if it were true that the injury was caused entirely by another company operating the owner's road and was inflicted upon one of its own employés, by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable merely because it owned the road. In the case proposed to be made by the evidence offered it seems to us that the liability of the deceased's employer would have been precisely the same on the defendant's road as if the train had been running upon its own road at the time of the accident. The act of the Missouri, Kansas & Texas Company in operating the road without a license from the legislature, if such was the fact, was merely illegal in the sense that it was unauthorized; and the object in holding the lessor responsible in such a case is certainly not to impose a mulct or fine by way of punishment. The reason for the rule is the protection of the public who need the protection. The passenger and the shipper of goods have no option, but must avail themselves of the services of the lessees, whether the lease is

authorized or not. The law will not permit the owner of the road to shirk its duty to them by turning over its road to another company; nor will it permit it to deny its liability where it has allowed such other company, without authority of law, negligently to injure wayfarers over the track or property along the line. There is no privity between the persons injured in such a case and the operating company. It is not so with an employé who voluntarily enters the service of the latter company with a knowledge of the facts, and participates knowingly in the wrong, if wrong it be. Where in similar cases a recovery has been permitted against a lessor, it has usually been allowed upon various considerations of public policy. First, because the franchises granted are in the nature of a personal trust, and sound policy demands, so far as the general public is concerned, that the corporation receiving the grant should be held responsible for the proper execution of the powers granted; and, second, for the reason that to deny the responsibility of the lessor would enable a railroad to shirk its responsibility, and to injure the public by placing its property under the control of irresponsible parties; and, third, because a person who has received an injury at the hands of the operating company, and was ignorant of the relations between that company and the owner of the road, might be at a loss to determine against which to bring his action, and thereby placed at a disadvantage in seeking redress of his wrongs. None of these reasons apply to the case of the servant of a lessee who is injured through the neglect of his employer. He needs no protection as one of the general public, because he can enter the service or not, as he chooses. He is under no compulsion to take employment from an irresponsible company, and he certainly knows whom to sue for a wrong inflicted through his employer's neglect for the latter is certainly liable to him in such a case. The reason of the rule which holds the lessor liable fails in case of an employé of the lessee and we think that to follow it in a case like this would be to give it arbitrary, and not a reasonable, application."

The case of *Macon & A. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678, is cited by some of the text-writers as in conflict with the last-cited case. There the president of the company was also a member of a construction company engaged in constructing the road. He required the plaintiff, a servant of the latter company, to act as fireman on a locomotive which was to carry him to a distant station. *En route* the locomotive collided with a train carrying officers of the railway company in the opposite direction. In the collision the plaintiff was injured, and he sued the railroad company. The court held that the railroad company was negligent in running the official train at high speed over a new line, without schedule, and without warning. It held also that the injured servant, while acting under the special direction of the president of the railway company, was the servant of that company. After thus establishing the liability of the

railway company, it was said: "It cannot, as it seems to us, be presumed that it was within the intent of the legislature to grant to this corporation this extraordinary privilege of flying through the country, across the public roads, puffing and screaming and rattling, so as to disturb the public quiet, and force everybody to get out of their way, with the additional privilege of turning the right over to any other person at its pleasure." Upon the intent thus determined the court applied the rule for which the appellee here contends, but it was not with an apparent consciousness that the rule had no application if the injured plaintiff could be considered as a servant of the company whose negligence directly caused the injury. Nor was it seemingly observed that, if a servant of the construction company, the negligence of the railway company having directly caused the injury, the recovery was against the latter company, regardless of the rule as to others using the way. Considering the decision in the light of the rule, and unembarrassed by the inconsistencies suggested its reasoning does not commend itself to our judgment with the force of the case of *East Line & R. R. Co. v. Oulberson*, *supra*.

The answers to interrogatories preclude any possible joint or servant relations between the operating company and the appellant. If the Baltimore & Ohio Railroad Company operated under a lease, a presumption of the invalidity of the lease would not, as we have shown, affect the question; while if, that company was a licensee or a trespasser, the liability of the appellant would be but the further removed. It is urged by one of the appellee's learned counsel that the question as to the relationship existing between Paul and the appellant is immaterial, and that the important inquiry must be as to relationship existing between the alleged negligent engineer and the appellant. Thus it is intended, we presume, to argue that it was possible that the engineer was the appellant's servant, and that, if so, indulging all reasonable presumptions in favor of the general verdict, that presumption would support the general verdict. The answers to the ninth and tenth interrogatories, above quoted, find that the train was owned, controlled, and operated by the Baltimore & Ohio Railroad Company, and was not owned, operated, or controlled by the appellant. In the light of the issue made by the pleadings and of these answers it is not a reasonable presumption that the engineer was a servant of the appellant. Another weakness in this position is found in the familiar rule of practice that the pleadings must outline some single definite theory upon which the action is based, and that the parties are bound by that theory. Here, as we showed at the outset, the theory of the case was not only that the negligent engineer was a servant of the appellant, but that the violated duty of the appellant to the appellee was in neglecting to protect him, as its servant, from unassumed risks of the service in which it engaged him. Now, when confronted with a finding that he was not an employé of the appellant, and that that company owed him no duty as his

master, it is not consistent with that theory to say that the engineer was a servant of the appellant, and that company must respond for his negligence, though the appellee was not an employe of the appellant, and that company owed him but the duty owing to any mere stranger. In our opinion, the

special answers of the jury were irreconcilably in conflict with the general verdict, and the lower court erred in giving judgment for the appellee.

The judgment is reversed, with instructions to sustain the appellant's motion for judgment *non obstante*.

MISSISSIPPI SUPREME COURT.

R. H. WILDBERGER, *Appt.*,
v.
HARTFORD FIRE INSURANCE CO.

(.....Miss.....)

A policy of insurance issued by an insurance agent of his own motion to himself as receiver of the property insured is invalid by reason of his occupying inconsistent positions, unless the insurance company consents to the policy.

(February 26, 1895.)

A PPEAL by defendant from a decree of the Chancery Court for Coahoma County in favor of complainant in a suit brought to cancel a fire insurance policy and to enjoin the bringing of a suit to enforce payment of it. *Affirmed.*

Wildberger had been agent for the insurance company at Clarksdale, Miss. He was required to make daily reports to the general agent of the company of all insurance effected by him. At the beginning of 1893 attachment writs were issued against Harris Brenner followed by bills in equity, and Wildberger was made receiver of Brenner's property and Brenner made an assignment to him under order of the court. Soon afterwards Wildberger as agent of the insurance company issued to himself a policy covering the property in his hands as receiver. He mailed a statement of it in due time, but before it was approved the property was destroyed by fire, and the company rejected the policy and denied liability on it. Wildberger brought suit to enforce it and the company then instituted this suit.

Further facts appear in the opinion.

Mr. Sam C. Cook for appellant.

Messrs. Miller, Smith & Hirsch for appellee.

Whitfield, J., delivered the opinion of the court:

The cases mainly relied on by counsel for appellant are *Thompson v. Phoenix Ins. Co. of Brooklyn, N. Y.* 136 U. S. 287, 34 L. ed. 408, and *Northrup v. Germania F. Ins. Co.*, 48 Wis. 420, 38 Am. Rep. 815. The former is wholly inapplicable. Kearney never was the agent of the insurance company, nor was Thompson. But Kearney, being receiver, was approached by the agent of the insurance company, and solicited to insure the trust property, which he did, and paid the pre-

mium out of the trust funds, prior to any order directing him to do so, and the company set up as one defense that he had no authority so to use the trust funds in paying the premium before such order, and that the contract was void as to the company on that ground, which defense was of course scouted. The cases are utterly unlike. The court held that the title of property in a receiver's hands is in its owner's, and the possession is the possession of the court; but these matters are aside from the real point under discussion. In the other case the owner of the property insured sent his son to the insurance agent, Edwards, to get insurance, and, after it was gotten, put the insurance agent in charge, to guard and watch it, and without compensation, so far as appears. The insurance agent was not the general agent of the owner of the property. That this case is understood to hold that the guarding the property was a collateral matter, aside from the insurance, is shown by what Mr. Biddle says about this case in section 497, vol. 1, of his work on Insurance, when he observes: "Of course, a mere employment by the other party, in another matter, would not be material." The opinion in the case confines it within its own limits, and cites no authorities. We have examined all the authorities cited in 1 Am. & Eng. Encyclop. Law, pp. 800, 801, *note 1*, and find them to be cases where a "middle man" receives commissions from both parties merely for bringing them together. He was not the agent of either party in the contract made by and between them after they met. Of this class of cases, *Dixon, Ok. J.*, is quoted in *Barry v. Schmidt*, 57 Wis. 174, 46 Am. Rep. 85, as saying: "A broker, whose undertaking merely to find a purchaser at a price fixed by the seller, or at a price which shall be satisfactory to the seller when he and the purchaser meet, is in reality only a 'middle man,' whose duty is performed when the buyer and seller are brought together, and as to whom the policy of the law which excludes double compensation has been considered inapplicable." But where the agent of the seller is the agent of the buyer in the sale itself, a different principle obtains, as is clearly shown in *Rupp v. Sampson*, 16 Gray, 401, 77 Am. Dec. 416. The true doctrine governing here is thus expressed in an elaborate note at page 281, 7 Am. St. Rep.: "Therefore it is an undisputable rule of law that unless, with the free and intelligent consent of his principal, given after full knowledge of all the facts and circumstances, the agent cannot, in the same transaction, act for both principal and the adverse party." This

NOTE.—On the general question, when an insurance agent is the agent of the insured, see *note* to *Michigan P & Co. v. Michigan Fire & Marine Ins. Co. (Mich.)* 20 L. R. A. 277.
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See also 33 L. R. A. 698.

in the principle which must control here. The receiver here, of his own motion, issued these policies to himself, as receiver, acting in their issuance as the agent of the companies. The companies knew nothing of it till after the property was destroyed. A receiver is not an agent. The very term "receiver" negatives such an idea. He is an indifferent person, holding property for the parties ultimately entitled. But he receives a commission as receiver, which gives him a direct, personal, pecuniary interest. As agent of the insurance company, it is his duty to look with the clearest and most critical eye to the risk, moral and physical. As a receiver, it is his personal interest to keep in existence the property in his custody, so as to increase his commissions by the increased labor bestowed upon the property. Besides, it is to be noted in this case that an assignment was executed to Wildberger as assignee, and he therefore had the legal title and possession for the purposes of the trust, under the assignment, in addition to the possession which he had as receiver, which last is really the possession of the court.

Counsel on neither side have furnished us with an identical case, and we have been unable to find one. It may very well be that the general principle set forth in *Mechem on Agency* (secs. 66-68) so manifestly covers the case at bar that it has not been seriously questioned. It was very pertinently observed by Sir W. M. James, *L. J.*, in *Panama & S. P. Teleg. Co. v. India Rubber, Gutta Percha & Teleg. Works Co.*, *L. R. 10 Ch. 515*, 14 *Moak, Eng. Rep. 759*: "The clearer a thing is, the more difficult it is to find any express authority, or any *dictum* exactly to the point." We are clearly of opinion that an insurance agent, who has been appointed receiver of property, cannot, of his own motion, without the consent of his principal, issue as such agent, to himself as such receiver, a policy of insurance valid against such principal, because his duties of the two positions are inconsistent, and he does have a direct personal interest to the extent at least of his commissions. "A contrivance," it has been pithily put, "which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, un-

less the principal chooses afterwards, and with knowledge of all the circumstances that affect his possessions, to ratify the act of his agent." *Mercantile Mut. Ins. Co. v. Hope Ins. Co.* 8 *Mo. App. 411*, cited 7 *Am. St. Rep. 281*, note, *supra*.

The two parties principals here are the insurance company and Wildberger acting for himself. And it may with equal force be said that the same human being, subject to the temptations springing from that self-interest which leaves the balance so "rarely right adjusted" in the best of men, cannot by some magical process, separate himself into two wholly distinct characters, and in one character, as agent of an insurance company, contract with himself in another character, as receiver or otherwise, having always a personal interest in the contract adverse to his principal. It would require a faculty for judicial analysis which could

"Sever and divide

A hair twixt north and north-west side."

—a casuistry too refined and sublimated for the practical affairs of business life to find in a doctrine that would uphold such a contract a rule of action safe for common-sense dealing. "No man can serve two masters."

The decree is therefore affirmed.

Cooper, Ch. J., specially concurring:

I concur in the result announced in this case, for the reason that, in my opinion, Wildberger, as agent of the insurance company, could not contract with himself as receiver, unless the contract should be approved by his principal with full knowledge of all the facts. In the opinion of my Brother Whitfield, I think too much prominence is given to the fact that Wildberger, as receiver, was entitled to commissions on the property administered by him as receiver. That fact is not, in my opinion, influential. *Badley v. Ladd*, 70 *Miss. 688*. If the receiver was not entitled to any commission, the same rule of disqualification to make the contract would control. The opposing interests represented by him, the adverse duties he owed under the circumstances, in my opinion, precluded him from making the insurance contract sued on, without regard to whether he was or was not entitled to compensation as receiver.

ARKANSAS SUPREME COURT.

M. D. HUNTON et al., Receivers of Bocquin & Reutzel, *Appls.*,

vs.
Cornelia P. LUCE.

(.....Ark.....)

A creditor may remit a portion of his debt by voluntary credits in order to bring his

claim within the jurisdiction of an inferior court.

(January 5, 1895.)

A PPEAL by defendants from a judgment of the Circuit Court for Sebastian County in favor of plaintiff in an action brought to enjoin the collection of a justice's judgment and

NOTE.—*Voluntary credits to bring debt within jurisdiction of court.*

While there is a decided conflict of authority on the question of the right of a plaintiff to voluntarily remit a part of his claim to bring it within the jurisdiction of an inferior court, there is a preponderance in favor of the rule adopted by the principal case and courts as well as legislatures

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to have the same declared void and set aside. *Reversed.*

The facts sufficiently appear in the opinion. **Mr. Joseph M. Hill**, for appellants:

The amount claimed by the plaintiff is the test of the jurisdiction of a justice court, so far as the amount in controversy is concerned.

Berry v. Linton, 1 Ark. 252; *Dillard v. Noel*, 2 Ark. 449; *Lafferty v. Day*, 7 Ark. 261; *Chatten v. Hegley*, 21 Ark. 313; *Sherrill v. Wilson*, 29 Ark. 384; *Little Rock, M. R. & T. Railway v. Maness*, 44 Ark. 100.

The amount claimed by the plaintiff is the

sum in controversy and determines the jurisdiction.

Heilman v. Martin, 2 Ark. 188; *Dillard v. Noel*, *supra*; *Hempstead v. Collins*, 6 Ark. 533.

A great majority of the courts have held that a voluntary remission of part of a claim, so as to give jurisdiction, is proper and legal, and it confers jurisdiction upon the court to try the case after the remittitur is made.

Herren v. Campbell, 19 Vt. 28; *Perkins v. Rich*, 12 Vt. 595; *Boutwell v. Mason*, Id. 608; *Danforth v. Streeter*, 28 Vt. 490; *Hempler v. Schneider*, 17 Mo. 268; *Denny v. Eckelkamp*,

have in a number of instances displayed a tendency toward departure from the more rigid rule previously adopted. Some of the states, however, have steadily clung to the opposite rule, that a voluntary remission for that purpose cannot be permitted.

I. The rule permitting remission.

II. The rule as affected by the character of the claim.

a. Actions for an uncertain amount.

b. Actions for an amount certain.

c. Actions in which jurisdiction depends upon the value of the property in suit.

III. Remission of interest.

IV. Rule denying the right to remit.

V. What constitutes a remission.

VI. When made.

I. The rule permitting remission.

It has been frequently held that a creditor may voluntarily relinquish a part of his demand for the purpose of bringing it within the jurisdiction of an inferior court whose jurisdiction is limited to cases in which the amount in controversy or the amount claimed does not exceed a designated amount. *Carpenter v. Wells*, 65 Ill. 451; *Witt v. Hereth*, 6 Blm. 474; *Matlack v. Lare*, 32 Mo. 262; *Denny v. Eckelkamp*, 30 Mo. 140; *Hempler v. Schneider*, 17 Mo. 268; *Phillips v. Fitzpatrick*, 34 Mo. 278; *Bowditch v. Salisbury*, 9 Johns. 368; *Carraway v. Burton*, 4 Humph. 108; *Barber v. Kennedy*, 18 Minn. 218.

And that he may waive the excess over the jurisdictional limit of the inferior court and maintain an action therein for the balance. *Wharton v. King*, 69 Ala. 365; *King v. Dougherty*, 2 Stew. (Ala.) 487; *Litchfield v. Daniels*, 1 Colo. 268; *Lebanon Min. Co. of New York v. Consolidated Republican Min. Co.*, 6 Colo. 371 (*dictum*); *Hapgood v. Doherty*, 8 Gray, 373.

And in *Denny v. Eckelkamp*, *supra*, the motive inducing the abatement was held to be immaterial.

But see South Carolina and West Virginia cases set out *supra* under heading, *Rule denying the right to remit*, in which the purpose to confer jurisdiction is deemed a material reason for the adoption of the opposite rule.

Thus the holder of a note the amount of which exceeds the jurisdictional limit of a justice of the peace may credit it with an amount which will reduce it within such limit and sue in justice's court for the balance. *Nibbs v. Moody*, 5 Stew. & P. (Ala.) 198; *Litchfield v. Daniels*, and *Witt v. Hereth*, *supra*.

And he may indorse a debt which he owes the maker thereon and thereby reduce his claim so as to bring it within the jurisdiction of a justice of the peace though his indebtedness to the maker is not yet due. *Korsooki v. Foster*, 20 Ill. 32.

And the same rule applies to actions of *indebitatus assumpsit* and debt upon executed contracts. *Carraway v. Burton*, *supra*.

So the balance of an open account originally more than the jurisdictional limit of a justice's court, but which has been reduced within the limit

by credits, is recoverable in that court. *Baird v. Nichols*, 2 Port. (Ala.) 198.

And a plaintiff in an action on a running account may reduce his claim by admitting just enough of the defendant's counterclaim to bring it within the jurisdiction of a justice where it does not appear that the defendant's claim as it originally stood would be determinable in any other form than that selected by the plaintiff. *Shreve v. Skoele*, 31 Mo. 218.

So a claimant on the argument of a motion before a justice of the peace against a constable for failure to make a return in which a sum greater than the limit of the justice's jurisdiction is claimed may remit a part thereof so as to bring it within the jurisdiction. *Henderson v. Plumb*, 18 Ala. 74.

And the plaintiff in an action in which an attachment is issued by and returnable before a justice of the peace in which the sum claimed exceeds the jurisdiction of the justice, may on such return release the excess against the defendant's objection and thus bring the case within the justice's jurisdiction. *Solomon v. Ross*, 49 Ala. 198.

So in *Wilhelms v. Noble Bros.*, 36 Ga. 599, the county court was held to have jurisdiction of an action on a note for \$125, in which the plaintiff claimed only \$100 to be due him in his declaration under Georgia County Court Acts 1865-6, p. 66, conferring jurisdiction thereon in all civil cases in which not more than \$100 is claimed as damages or principal sum due.

And the holder of a promissory note exceeding in amount the jurisdictional limit of the county court in Georgia may remit the excess by an entry on the note and bring suit for the balance in that court, and this right is not taken away by Ga. Act 1889, which omits the provision of a previous statute on the same subject expressly allowing a creditor to reduce his demand, whether the jurisdiction is to be exercised at the monthly or the semi-annual session. *Stewart v. Thompson*, 35 Ga. 829.

But see Georgia cases cited *supra* under heading, *Actions for an amount certain*.

So a defendant in justice's court is authorized by Ohio Justice's Code 1853, § 103, to withhold the amount of his claim which is in excess of the justice's jurisdiction and make the amount withheld the subject of a separate action, but this relates only to liquidated claims. Where the claim is unliquidated the whole excess must be remitted in order to confer jurisdiction. *Woollever v. Stewart*, 36 Ohio St. 146, 38 Am. Rep. 599.

And the plaintiff in an action in the district court of New Jersey may, under Act April 4, 1881, N. J. Rev. Supp. p. 220, § 9, waive the excess of his claim so as to reduce it to \$200 from a judgment for which an appeal will lie but which cannot be reviewed by certiorari under N. J. Rev. Supp. p. 261, § 13. *Quimby v. Hopping*, 52 N. J. L. 117.

So in Wisconsin the holder of a note may reduce his claim so as to bring it within the jurisdiction of a justice of the peace by the indorsement of a credit thereon though no actual payment was made. *McCormick v. Robinson*, 2 Pinney, 276.

30 Mo. 140; *Malone v. Hopkins*, 40 Mo. App. 331; *Koroski v. Foster*, 20 Ill. 32; *Raymond v. Strobel*, 24 Ill. 118; *Wright v. Smith*, 76 Ill. 216; *Cilley v. Van Patten*, 68 Mich. 80; *Stone v. Murphy*, 2 Iowa, 85; *Oulbertson v. Tomlinson*, Morris (Iowa) 404; *Bush v. Elson*, Id. 317; *Hynds v. Fay Bros.* 70 Iowa, 438; *Farley v. Gibbs*, 23 N. Y. S. R. 94; *Clark v. Denure*, 8 Denio, 319; *Putnam v. Shelop*, 12 Johns. 435; *Solomon v. Ross*, 49 Ala. 198; *House v. Lassiter*, 49 Ala. 307; *King v. Dougherty*, 2 Stew. (Ala.) 457; *Long v. Bakefield*, 43 Ala. 608; *Wharton v. King*, 60 Ala. 365; *Culley v. Laybrook*, 8 Ind.

285; *Remington v. Henry*, 6 Blackf. 68; *Hapgood v. Doherty*, 8 Gray, 373; *Carraway v. Burton*, 4 Humph. 108; *Wallace v. Brown*, 25 N. H. 217; *Litchfield v. Daniels*, 1 Colo. 268; *Felt v. Felt*, 19 Wis. 195; *Woolever v. Stewart*, 36 Ohio St. 146, 88 Am. Rep. 569; *Branley v. Finch*, 97 N. C. 91; *Froelich v. Southern Rsp. Co.* 67 N. C. 1; *Wiseman v. Witherow*, 90 N. C. 140; *Noville v. Dew*, 94 N. C. 48.

Georgia is cited on both sides of this question.

Nichols v. MoAbbe, 30 Ga. 8; *Cox v. Stanton*, 58 Ga. 406.

And in *Lester v. French*, 6 Wis. 530, it was held that a judgment of a justice of the peace in excess of the amount claimed in the *ad damnum* will be reversed unless a remittitur is entered.

In *Evans v. Head*, 7 Wis. 399, however, it was held that the plaintiff in an action on a due-bill for upwards of \$1,000 before a justice of the peace cannot after issue joined and the testimony closed indorse a reduction of his demand thereon so as to bring it below \$15 as that would deprive the defendant of the right to appeal.

And an offer by the plaintiff to release all of the note in suit above the limit of the justice's jurisdiction in an action thereon entered upon the back of the note by the justice when it was filed with him is not an indorsement of a payment or credit on the note which will authorize the justice to render judgment thereon as required by Wis. Rev. Stat. chap. 120, § 6. *Felt v. Felt*, 19 Wis. 194.

The above rule does not apply to actions on account in Wisconsin as the amount of the account and not that sought to be received is made the test of jurisdiction. See *infra*, Wisconsin cases, under heading, *Rule denying the right to remit*.

Dicta are to be found in many other cases which turn upon other questions sustaining the doctrine of the above cases.

Thus in *Crahtree v. Clatt*, 23 Ala. 181, it was held that a justice of the peace cannot render judgment for an amount within the limit of his jurisdiction on a note which with the legal interest accrued thereon exceeds such limit unless the plaintiff enters a credit for the excess or otherwise releases it before or at the time of its rendition.

And in *Hall v. Biever*, Morris (Iowa) 112, holding that the amount claimed and not the whole of the plaintiff's account is the criterion of the jurisdiction of a justice of the peace, the court said if the account has been reduced by payment or allowable offsets to the prescribed limit, or if the plaintiff will voluntarily relinquish all over that amount, he is entitled to sue in justice's court.

And in *Dalton v. Webster*, 32 N. C. 379, it was held that a justice of the peace has no jurisdiction of an action in which the principal sum demanded exceeds the limit of his jurisdiction unless the plaintiff remits the excess and the same is entered of record.

And the same was held in an action of replevin in *Thornily v. Pierce*, 10 Colo. 250.

And in *Noville v. Dew*, 94 N. C. 43, it was said that a plaintiff may remit a part of his cause of action to bring it within the jurisdiction of a justice.

See also *Mabry v. Little*, 19 Tex. 339, in which the question whether the holder of a promissory note can voluntarily relinquish the excess of his demand above the limit of the jurisdiction of a justice of the peace for the purpose of bringing an action before him was raised but not decided.

And see also cases cited *infra* under heading, *What constitutes a remission*, nearly all of which at latest inferentially support the above doctrine 28 U. R. A.

II. The rule as affected by the character of the claim.

Some of the cases make the character of the claim the criterion as to the right to remit a part of it.

Thus in *Perkins v. Rich*, 12 Vt. 565, the rule is laid down that when the amount of damages is wholly uncertain and subject to estimation the plaintiff may choose his court by limiting his claim for damages, but when the contract itself stipulates the quantum of damages and this appears either from the declaration or the evidence, the jurisdiction is determined thereby.

So the plaintiff in an action in a justice's court on a note which together with the attorney's fee claimed was more than the limit of the justice's jurisdiction cannot after the defendant had entered his exception and plea to the jurisdiction and while insisting upon the attorney's fee, reduce his claim so as to bring it within the jurisdictional limit, though it was said that perhaps he might have abandoned his attorney's fee which was distinct and severable from the principal of the note. *Burke v. Adoue*, 3 Tex. Civ. App. 494.

a. Actions for an uncertain amount.

On the one hand it has been held that the plaintiff in an action for unliquidated damages may limit the amount of recovery by the demand he makes to a sum within the jurisdiction of a justice of the peace and bring his action in justice's court although the injury or trespass complained of may be to property of a value beyond the limit of the justice's jurisdiction. *De Camp v. Miller*, 44 N. J. L. 617.

Thus in *Tyler Cotton Press Co. v. Chevalier*, 56 Ga. 494, the jurisdiction of the city court was sustained in an action for damages for wrongful discharge of an employé where the amount demanded was within its jurisdiction but the proof showed that the amount due on the contract in suit was more than the limit, the court saying that "a plaintiff may lay his damages at what he pleases and can recover no more."

And the holder of a claim in assumpsit may abandon a portion of it so as to reduce it to an amount within the jurisdiction of a justice of the peace and maintain an action for the balance before him upon the ground that as the identity of the claim does not depend upon the amount demanded there can be no objection to such an abandonment of a part of it. *Danforth v. Streeter*, 23 Vt. 490.

So one who has an account against another which exceeds the jurisdictional limit of a justice's court may receipt that account for the excess and bring suit for the balance in that court. *Fuller v. Sparks*, 32 Tex. 133.

This case was distinguished in *Burke v. Adoue*, 3 Tex. Civ. App. 494, on the ground that in this the court was not without jurisdiction and it was sought to attack the judgment collaterally.

Nor is a justice's jurisdiction ousted by the fact that there is another item in the account sued on which the plaintiff might have claimed and which if claimed would have made the account exceed

The rule has undergone something of a change in Texas.

Fuller v. Sparks, 39 Tex. 188; *Odle v. Frost*, 59 Tex. 687; *Burke v. Adoue*, 8 Tex. Civ. App. 494.

The general rule is that a demand of a creditor against his debtor which in the first instance was beyond the jurisdiction of the justice may be reduced by fair and honest offsets or credits, or by remittitur so that the amount claimed may be within the jurisdiction of the justice and he may entertain a suit for the recovery thereof; but there are exceptions to the rule.

his jurisdictional limit in amount. *Stone v. Winslow*, 7 Vt. 238.

Or by proof at the trial of an action for money had and received in which the amount demanded was within his jurisdiction, of an indebtedness beyond the limit. *Stevens v. Pearson*, 5 Vt. 508.

And a justice of the peace is not deprived of jurisdiction of an action in the nature of a *quantum meruit* for work done or services performed in which the amount of the demand is within his jurisdiction by proof that the services rendered were worth more than the amount at which his jurisdiction was limited as a person may demand less than his services are worth. *Goldthwaite v. Dent*, 3 McCord, L. 206.

So in *Wightman v. Carlisle*, 14 Vt. 206, in which there were two counts each setting forth a breach of warranty to the damage of the plaintiff in the sum of \$100 demanding judgment for that sum which was the limit of the court's jurisdiction, the rule was laid down that the plaintiff need not ask for all he is entitled to recover but may demand less and thereby confer jurisdiction though the case upon its merits would belong to a higher court. Nothing was said, however, to indicate whether one of the counts was remitted or whether both were for the same breach.

And in *Alexander v. Thompson*, 38 Tex. 538, it was held that jurisdiction attaches in an action on an account where the amount for which judgment is prayed is within the jurisdictional limit though the aggregate of the items would have exceeded it.

And the same rule was applied to an action of assumpsit in *Keegan v. Singleton*, 5 Wis. 115.

But there was nothing in either of these cases concerning a remission or waiver of the balance.

b. Actions for an amount certain.

On the other hand in *Burke v. Adoue*, 8 Tex. Civ. App. 494, it was said that "when the amount to which the plaintiff appears from his allegations to be entitled is a fixed sum and is beyond that which the law has empowered the court to adjudicate, the plaintiff should not be permitted to entered a fictitious credit for the avowed purpose of giving jurisdiction."

And in *Thompson v. Colony*, 6 Vt. 91, it was held that the *ad damnum* clause of a complaint does not decide the question of jurisdiction in the first instance where the declaration shows a cause outside of the jurisdiction of the court in which it is brought and to which the *ad damnum* is fitted.

In *Herren v. Campbell*, 19 Vt. 23, however, it was held that an indorsement on a promissory note as a payment of a sum which will reduce it within the jurisdiction of a justice of the peace when no such payment was ever made, for the express purpose of conferring jurisdiction upon the justice, is not fraudulent or injurious as against the debtor and does not prevent the justice's jurisdiction from attaching.

So the holder of a promissory note cannot bring his claim thereon within the jurisdiction of a justice's court by entering a credit thereon without

12 Am. & Eng. Encyclop. Law, p. 428.

Messa. Humphrey & Warner, for appellee:

In *Collins v. Collins*, 37 Pa. 387, *Mr. Justice Woodward* said, where the plaintiff's claim has not been reduced by payments to the statutory standard, he cannot give the justice jurisdiction by remitting part and suing for the balance.

Bower v. McCormick, 73 Pa. 437; *Peter v. Schlosser*, 81 Pa. 459.

In *Simpson v. McMillion*, 1 Nott & McC. 192, the court said: "It is an acknowledged principle of law that consent cannot give ju-

the consent of the debtor as the note was an entire contract. *Cox v. Stanton*, 58 Ga. 406.

And in *Tyler Cotton Press Co. v. Chevalier*, 56 Ga. 494, it was said that a plaintiff cannot reduce a demand resting on contract so as to confer jurisdiction.

But see contrary rule adopted in Georgia cases cited *supra* under heading, *The rule permitting remission*.

Cox v. Stanton, *supra*, distinguishes *Wilhelms v. Noble Bros.*, 38 Ga. 599, upon the facts, but does not indicate wherein they are unlike and both that case and *Tyler Cotton Press Co. v. Chevalier*, are overruled by *Stewart v. Thompson*, 85 Ga. 829, at least so far as they might be deemed applicable to county courts.

c. Actions in which jurisdiction depends upon the values of the property in suit.

As a general rule the doctrine of remission is not deemed applicable to actions in which the value of the property in suit is made the test of jurisdiction.

Thus, a justice's jurisdiction may be defeated in an action for the recovery of specific property under a statute making it dependent upon the value of the property by showing that its value would exceed the limit though it is alleged to be below it. *Butler v. Irvie*, 30 Mo. 478.

And an action of claim and delivery for the recovery of specific property in which the value thereof is found to be more than \$50 is not one that can be brought within the jurisdiction of a justice by remittitur as in that case the value of the property constitutes the criterion of jurisdiction under N. C. Code, § 382. *Noville v. Dew*, 94 N. C. 42.

A plaintiff in an action of replevin in which the value of the property sought be recovered is in excess of the jurisdiction of a justice of the peace cannot confer jurisdiction upon him by demanding judgment for a sum within the jurisdictional limit in case possession cannot be had. *Shealor v. Amador County Super.*, Ct. 70 Cal. 564.

And a remittitur of all the alternate value of chattels beyond the amount over which a justice of the peace is given jurisdiction in an action for the recovery thereof or what is the same thing averring a value which does not exceed it, is not a relinquishment of a part of the cause of action which will bring it within the justice's jurisdiction under Ala. Code 1876, § 757, subsec. 1, confining their jurisdiction to cases in which the value of the property sued for does not exceed \$50. *Carter v. Alford*, 64 Ala. 236.

So a justice of the peace has no jurisdiction of an action for forcible entry and detainer under Cal. Const., art. 6, § 11, conferring jurisdiction in such cases where the rental value does not exceed twenty-five dollars per month, and Cal. Code Civ. Proc., § 113, containing the same limit, where the complaint alleges that the rental value did not exceed that sum, but the overwhelming weight of evidence shows that it did exceed it. *Ballerino v. Bigelow*, 90 Cal. 500.

risdiction, much less can the act of one party do so. It has been often determined that a plaintiff cannot release a part of his demand to bring his case within an inferior jurisdiction."

Bent v. Graves, 3 McCord, L. 280, 15 Am. Dec. 632; *Todd v. Gates*, 20 W. Va. 464; *James v. Stokes*, 77 Va. 225; *Hansbrough v. Stinnett*, 22 Gratt. 593; *Froelich v. Southern Exp. Co.* 67 N. C. 1; *Wiseman v. Witherow*, 90 N. C. 140; *Cox v. Stanton*, 58 Ga. 406; *Houser v. McKennon*, 1 Baxt. 287; *Askeu v. Askeu*, 49 Miss. 806; *Ross v. Natchez, J. & C. R. Co.* 61 Miss. 15; *Fenn v. Harrington*, 54 Miss. 738; *Eacrit v. Keen*, 4 N. J. L. 208; *Howell v. Burnett*, 20 N. J. L. 265.

In *Henderson v. Desborough*, 28 Mich. 170, however, it was held that a justice of the peace is not deprived of jurisdiction in an action of replevin in which the declaration states the value of the property sought to be recovered at a figure within his jurisdiction by the testimony of the defendant upon the trial showing its value to be more than the jurisdictional limit.

And in *Burt v. Addison*, 74 Mich. 730, it was held that the jurisdiction of a justice of the peace in replevin does not depend upon the value of the property in fact but upon the value as alleged.

So in *Thornhill v. Pierce*, 10 Colo. 250, it was held that an action of replevin should be dismissed where on appeal from justices' court a judgment for an amount in excess of the justices' jurisdiction is rendered and the plaintiff does not offer to remit the excess.

III. Remission of interest.

The rule that the excess of a claim over the jurisdictional limit of the court may be remitted is usually applied to interest, the remission of which is sometimes allowed in states in which a remission of a part of the principal is not permitted.

Thus in Pennsylvania a plaintiff may remit a part of the interest on his claim so as to bring it within the jurisdiction of a justice. *Wood v. Lovett*, 1 Pennyp. 51; *Kraus v. Bickhart*, 1 Chester Co. Rep. 264.

And in *Bower v. McCormick*, 73 Pa. 427, it was said that interest is a mere incident which may be waived but no part of the principal can be thrown away.

And in *Evans v. Hall*, 45 Pa. 235, it was said that a nonclaim of interest is very unlike a voluntary reduction of the principal.

So a justice of the peace has jurisdiction of an action upon a note for just the amount of his jurisdictional limit where the plaintiff does not claim interest. *Simpson v. Updegraff*, 2 Ill. 594; *Bates v. Bulkley*, 7 Ill. 289; *Bentley v. Wright*, 3 Ala. 607.

And the holder of a note may remit the interest and thereby bring his claim within the jurisdiction of a justice of the peace and sue for the principal in his court where the interest added would raise the amount above the jurisdictional limit. *Raymond v. Strobel*, 24 Ill. 112.

Or he may remit all the interest thereon which would make the claim exceed the jurisdiction of the court, and maintain his action for the balance. *Wright v. Smith*, 76 Ill. 216; *Evans v. Hall*, 45 Pa. 235; *Griffith v. Clute*, 9 N. J. L. 329.

And a notice issued by a justice of the peace stating that the plaintiff claimed \$300 upon a promissory note with 10 per cent attorney's fees thereon, and jurisdiction given in said note to any justice of the peace, gives the justice jurisdiction under Iowa Code, § 333, providing for jurisdiction by consent to the amount of \$300 as the provision for attorneys' fees will be regarded as descriptive and

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In *Berry v. Linton*, 1 Ark. 252, Lacy, J., said: "Can the plaintiff, by uniting several demands in one count, not only evade the express provisions of the constitution, but commit what is termed in law a fraud upon the instrument itself, and thereby confer a jurisdiction upon the circuit court, which it was never intended it should possess? Certainly not."

In *Fisher v. Hall*, 1 Ark. 276, the court said: "To assume, then, for any legal tribunal, a jurisdiction greater or less than is conferred upon it by the constitution, or as is given by its plain and obvious intent, is virtually to abrogate and destroy all the distinctions and di-

not as asking judgment for that amount. *Long v. Loughran*, 41 Iowa, 543.

So interest on an open account may be waived by a failure to claim it and the action may be thus brought within the jurisdiction of a justice of the peace where with the interest added it would exceed the jurisdictional limit. *Kirk v. Grant*, 67 Md. 418.

It is optional with the owner of an account whether he will claim interest on it or not and when he does not claim it the jurisdiction of the justice of the peace before whom an action thereon is brought, is not affected by the fact that by adding the interest the account would amount to more than his jurisdictional limit. *Murfs v. Harding*, 6 Port. (Ala.) 121; *Paige v. Morgan*, 28 Vt. 555; *Catlin v. Aiken*, 5 Vt. 177.

Nor is the jurisdiction of a justice of the peace of an action on a book account affected by the accrual of interest during its pendency so as to raise the demand above the jurisdictional limit where it was within it at the time the action was brought, as the interest is a mere incident of the claim which can be waived. *Phelps v. Wood*, 9 Vt. 339.

In New Jersey, however, and perhaps in some of the other states, the right to remit interest was made to depend upon the question as to whether the right to interest is a part of the contract or transaction by which the right to the principal indebtedness is acquired or a mere incident to it.

Thus in *Howell v. Burnett*, 20 N. J. L. 265, the court laid down the rule that where a person enters into an express contract to pay a certain sum of money on a given day with interest, the contract is entire and the creditor cannot voluntarily and without the consent of the debtor relinquish any part of it either principal or interest in order to give jurisdiction to a justice, but where interest is not provided for in the contract or the indebtedness consists of a running account upon which the law would allow interest by way of damages for failure to pay he may or may not at his option demand it.

So, a justice has jurisdiction of an action against the inhabitants of a town for a balance for maintaining paupers thereof which would with interest at 7 per cent exceed \$100 where the plaintiff demands no more interest than with the principal would amount to that sum. *Saddle River, Bergen County, v. Colfax*, 6 N. J. L. 139.

And a holder of a promissory note payable a specified time after date which makes no provision for interest may relinquish his claim for damages for detention of the debt in violation of the contract and sue for the principal only so as to bring it within the jurisdiction of a justice of the peace. *Howell v. Burnett*, 20 N. J. L. 265.

So in *Hopper v. Steelman*, 3 N. J. L. 463, it was held that a creditor may take any rate of interest less than the legal rate in order to bring his claim within the jurisdiction of a justice of the peace. But in this case it did not appear whether the demand in suit was payable with interest or not.

visions of each separate constitutional jurisdiction between the several and respective courts, and thus by intentment and construction, *pro tanto*, to ordain a wholly different will, or rule of action, from the one laid down and enjoined by the constitution."

Fitzgerald v. Beebe, 7 Ark. 809, 46 Am. Dec. 285; *Gregory v. Williams*, 24 Ark. 177; *Wilson v. Mason*, 8 Ark. 496; *Hanna v. Morrow*, 43 Ark. 111.

Riddick, J., delivered the opinion of the court:

This was an action brought by the appel-

lee Cornelia P. Luce, to declare void, and enjoin the collection of, a judgment in favor of appellants, and against one Sallie Falconer. The judgment complained of was rendered by a justice of the peace April 20, 1891, upon a promissory note executed by said Sallie P. Falconer on July 8, 1888, for the sum of \$308.50, with interest at 10 per cent. A transcript of this judgment having been filed with the clerk of the circuit court, as provided by law, it is claimed by appellants that said judgment is a lien upon certain land which appellee purchased from Sallie Falconer after said transcript was filed.

In *Van Gleeen v. Van Houten*, 5 N. J. L. 822, however, it was held that if a note is not paid when due interest must be added and if it amounts to more than \$100 a justice of the peace has no jurisdiction of an action thereon.

But this case was criticised and said to be overruled in *Howell v. Burnett*, *supra*.

The New Jersey rule is undoubtedly changed by N. J. Rev. Supp. p. 260, approved April 4, 1884. See *Quimby v. Hopping*, 52 N. J. L. 117, under heading, *Rule denying the right to remit*.

So in *Parkhurst v. Spalding*, 17 Vt. 527, it was held that a judgment creditor may waive his claim for interest and maintain an action upon the judgment alone before a justice of the peace where the amount of the judgment is within the limit of his jurisdiction, but with the interest added it would be beyond it, as such a case would be different from one in which the payment of interest was a part of the contract itself.

So in South Carolina a plaintiff could not entitle himself to an action in a court of limited jurisdiction by voluntarily releasing the interest on a promissory note where the interest and principal would exceed the limit of the court's jurisdiction, though the court said the rule is different where bona fide payments are made. *St. Amand v. Gerry*, 2 Nott & McC. 437.

And interest after a promissory note became due though it was not stipulated on the face of the note was held a part of the contract which the court had no discretion to refuse and which the holder could not abandon so as to bring his claim within the jurisdiction of an inferior court, in *Simpson v. McMillion*, 1 Nott & McC. 132.

These cases, however, are based upon the former South Carolina doctrine, denying all right to remit.

IV. Rule denying the right to remit.

A number of the earlier cases, however, deny all power on the part of the plaintiff to affect jurisdiction by remission or voluntary credits. But that rule has been changed by statute or otherwise in a number of the states though some of them still cling to it.

Thus under the earlier Illinois decisions a justice of the peace had no jurisdiction in an action on a note for an amount in excess of his jurisdictional limit though it had been reduced below it by credits. *Simpson v. Rawlings*, 2 Ill. 28.

Or of an action upon an account under Ill. Act 1827 limiting the jurisdiction to cases in which the whole amount of the accounts of either party shall not exceed \$100 where the plaintiff's original claim exceeded that amount though it was subsequently reduced by credits to less than that sum. *Clark v. Cornelius*, 1 Ill. 21; *Blue v. Weir*, Id. 238.

And a credit given by a creditor to his debtor for rent of lands which he had never occupied with the assent of the debtor was held not a bona fide credit by which the amount of the indebtedness 28 L. R. A.

might be reduced so as to bring it within the jurisdiction of a justice's court, in *Sands v. Delap*, 2 Ill. 168.

In *Huginin v. Nicholson*, 2 Ill. 575, however, it was held that a credit might be allowed upon an indebtedness so as to bring it within the jurisdiction of a justice of the peace under Illinois Act March 2, 1833, though the account had not been liquidated between the parties.

And in *Raymond v. Strobel*, 24 Ill. 112, it was said that the cases holding the former rule arose before the passage of the Act of 1833, conferring jurisdiction where the sum, though originally above the jurisdiction of a justice, had been reduced by fair credits to a sum within it. See also subsequent Illinois cases cited *supra*, under heading, *The rule permitting remission*.

So in South Carolina it was formerly held that a plaintiff could not give the defendant a credit without his consent so as to reduce the demand against him within the summary jurisdiction of an inferior court as this would be conferring jurisdiction by his own act. *Bent v. Graves*, 8 McCord, L. 230, 15 Am. Dec. 632.

And in *Ramsay v. Court of Wardens of Charleston*, 2 Bay, 180, it was held to be a legal fraud for which a writ of prohibition would lie to prevent the inferior court from taking cognizance of the case.

See also *St. Amand v. Gerry*, 2 Nott & McC. 437, and *Simpson v. McMillion*, 1 Nott & McC. 132, set out under heading, *Remission of interest*.

In *Melton v. Ellison*, 2 Brev. 309, however, holding that a justice of the peace could not give judgment for an amount in excess of his jurisdictional limit though the excess consisted of interest which accrued after the suit was brought, it was said that judgment might have been rendered for a sum within the limit if the plaintiff had been willing to remit the excess as the justice had jurisdiction at the commencement of the action.

And under S. C. Code, § 71, giving trial justices jurisdiction in actions upon contract or for the recovery of money when the sum claimed does not exceed \$100, a justice is not deprived of jurisdiction because the plaintiff reduced the amount of his cause which was in excess of that amount so as to bring it within his jurisdiction. *Catawba Mills v. Hood* (S. C.) Sept. 17, 1894.

So the early rule in North Carolina was that a plaintiff could not give a justice of the peace jurisdiction by entering a fictitious credit upon a bond without the consent and against the wishes of the defendant as it would be a fraud upon the law. *Moore v. Thomson*, 44 N. C. 221, 59 Am. Dec. 550.

And antedating a credit on a note so as to have the effect of reducing the amount due thereon to a sum within the jurisdiction of a justice of the peace would be an evasion and would not confer jurisdiction. *Ramsour v. Barrett*, 50 N. C. 409.

Remission of a part where the principal sum demanded exceeds the jurisdictional limit, how-

Before the commencement of this suit against Sallie Falconer, appellants, in order to give the justice of the peace jurisdiction, remitted a portion of the amount due on the note, by placing thereon the following indorsement: "Credit by amount remitted, \$7.50." The justice of the peace treated this as a remission of that amount from the principal of the note, and issued a summons to the defendant Sallie Falconer to appear and answer the claim of appellants for the sum of \$399 and interest due upon said note. Sallie Falconer failing to appear on the return day, the

justice of the peace rendered judgment against her for the amount sued for, \$399 and interest. As it is stated in the agreed statement of facts that the object of this remission of \$7.50 was to give jurisdiction to the justice of the peace, and as the justice and the parties before him looked at it in that light, and treated it as a remission of a portion of the principal of the note, we feel convinced that such was the intention of the appellants in making the same, and shall consider it as a remission of so much of the principal of the note as exceeded \$399. The

ever, is expressly provided for by N. C. Code, § 835.

Under this provision it is only where the principal sum demanded exceeds the jurisdictional limit that the plaintiff is required to remit the excess in order to give a justice of the peace jurisdiction, and where the demand is within the limit an account filed by the plaintiff showing a larger sum to be due does not require a remission. *Brantley v. Finch*, 97 N. C. 91.

But a remission under the North Carolina constitutional provision restricting the jurisdiction of justices of the peace must be of all the excess over the jurisdictional limit absolutely. A defendant cannot be permitted to set up a counterclaim for so much as will extinguish the plaintiff's claim and recover an amount equal to the jurisdictional limit. *Derr v. Stubbs*, 83 N. C. 539.

So in New Jersey a credit was formerly required to be real and according to the truth to reduce a demand so as to bring it within the jurisdiction of an inferior court. *Souders v. Stratton*, 3 N. J. L. 118; *Coiwell v. Parcell*, 3 N. J. L. 143; and see *dictum* in *La Rue v. Boughaner*, 4 N. J. L. 104.

In *Souders v. Stratton*, *supra*, the credit was one for services performed and considerations of friendship and good-will which was disallowed.

And in *Farley v. McIntire*, 13 N. J. L. 190, the right to reduce a demand so as to affect jurisdiction seems to have been confined to cases of fair and real credits and off-sets.

N. J. Rev. Supp. 290, approved April 4, 1884, however, authorizes a party to an action in a district court to waive any part of his claim in excess of the jurisdictional limit. *Quimby v. Hopping*, 52 N. J. L. 117.

So in Mississippi the test of jurisdiction in an action for the value of property destroyed or injured is the sum sued for unless such amount has been intentionally diminished for the purposes of giving the court jurisdiction. *Ross v. Naches, J. & C. B. Co.* 61 Miss. 15.

And a justice's court has no jurisdiction of an action to recover damages for the loss of a mule alleged to be worth \$150 but which is proved on appeal to be worth \$200 under Miss. Code 1571, § 1232, conferring jurisdiction where the amount of the demand does not exceed \$150. *Askew v. Askew*, 49 Miss. 303.

So in Wisconsin a justice has no jurisdiction in an action upon an account for a sum larger than his jurisdictional limit, though it has been reduced below it by payments or credits, as the amount of the account sued on and not the balance due is the test of jurisdiction. *Woodward v. Garner*, 2 Pinney, 23.

And in Pennsylvania credits which will reduce the demand in controversy so as to bring it within the jurisdiction of a justice of the peace must amount to and be admitted as payments. *McFarland v. O'Neil*, 155 Pa. 260.

No jurisdiction is conferred upon an inferior court by a premeditated remission of a part of the claim for the purpose of giving jurisdiction which

is not an actual credit but a mere throwing off of part. *Bower v. McCormick*, 73 Pa. 427; *Peter v. Schlosser*, 81 Pa. 439; *Collins v. Collins*, 87 Pa. 387; *James v. Frick*, 12 Phila. 443; *Carey v. Branch No. 2*, 1 Legal Chronicle, 170; *Baer v. Garrett*, 3 Luzerne Legal Reg. 120, 2 Legal Chronicle, 207; *Torbert v. Yocum*, 3 Legal Chronicle, 818.

And in *Moore v. White*, 11 W. N. C. 206, it was held that a plaintiff cannot remit a portion of an entire claim so as to bring the residue within a justice's jurisdiction.

In *Bower v. McCormick*, *supra*, and *Stroh v. Uhrich*, 1 Watts & S. 571, the rule is laid down that where the plaintiff's claim is reduced within the limits of a justice's jurisdiction by direct payments or dealings which amount to or are admitted to be actual payment the justice has jurisdiction, but where it is not thus reduced by payment jurisdiction cannot be given by remitting a part.

So the receipt by a creditor of wood and coal from the debtor under an agreement to allow for it what was right cannot be regarded as a payment or set-off by which the creditor's claim may be reduced so as to bring it within the jurisdiction of a justice of the peace. *James v. Frick*, *supra*.

And one having a demand exceeding the limit of the jurisdiction of a justice of the peace cannot confer jurisdiction upon a justice by allowing a set-off or counterclaim so as to reduce it within the limit where the allowance does not consist of an actual payment or something accepted as such. *Stroh v. Uhrich*, *supra*; *James v. Frick*, 8 W. N. C. 291.

But to oust a justice's jurisdiction there must be a positive averment that the credit given was fictitious and merely for the purpose of giving jurisdiction. *Williams v. Shields*, 2 W. N. C. 176.

In *Cleaden v. Yeates*, 5 Whart. 94, however, it was held that the court of common pleas has jurisdiction upon an appeal from an alderman in an action on a demand for a sum less than \$100 although the plaintiff had a right to recover more, where he chooses to reduce his demand below that sum, the court saying that "it never has been doubted that a plaintiff may reduce his demand to the standard of a limited jurisdiction by lopping off the excess."

And in *Darrah v. Warnock*, 1 Penn. & W. 21, it was said that a plaintiff may reduce his demand so as to bring it within the jurisdiction of an inferior court.

And in *Hoffman v. Dawson*, 11 Pa. 230, the jurisdiction of the justice was upheld on a demand for \$99.50 where the account was for \$410 on which there were credits to the amount of \$310.50 on the ground the demand was under \$100. But there was nothing to show whether the credits were voluntary or not.

The three cases last above cited, however, would appear to have been overruled by cases subsequently decided. See Pennsylvania cases cited *supra*, and in *Bower v. McCormick*, 73 Pa. 427, they were compared with the cases holding the opposing doctrine and the latter were followed.

So the West Virginia statute giving a justice

question for us to determine is whether jurisdiction can be conferred upon a justice of the peace in that way.

The decisions of the different states upon the question whether a plaintiff may, by remitting a portion of the amount due him on a note or contract, bring his case within the jurisdiction of an inferior court, are very conflicting. This court, so far as we know, has never passed directly upon this question; but, in several cases touching the question of jurisdiction, its reasoning is along the lines adopted by those courts that sustain the right of the plaintiff to bring his action within the

jurisdiction of an inferior court by remitting a portion of his claim. Our constitution provides that justices of the peace shall have jurisdiction "exclusive of the circuit court in all matters of contract when the amount in controversy does not exceed the sum of one hundred dollars, excluding interest; and concurrent jurisdiction in matters of contract, when the amount in controversy does not exceed the sum of three hundred dollars, exclusive of interest." It will be seen that the jurisdiction of a justice of the peace in matters of contract depends upon the amount in controversy, exclusive of interest. In

jurisdiction where the amount claimed does not exceed \$100, and authorizing a party in whose favor a finding is made in excess of such amount to release the excess and have judgment for the residue, is held not to authorize or permit the plaintiff to reduce his claim by feigned credits for the purpose of giving the justice jurisdiction. *Todd v. Gates*, 30 W. Va. 464.

And while the amount claimed in the summons is the criterion of jurisdiction in justices' court an action therein will be dismissed whenever it appears by the evidence or otherwise that the demand of the plaintiff has been reduced by feigned credits or otherwise to bring it within the justices' jurisdiction. *Ibid.*

V. What constitutes a remission.

The limitation by a plaintiff of his claim in the *ad damnum* clause of his complaint to a sum within the jurisdiction of the court in which he brings his action operates *per se* as a remittance of whatever may be due in excess thereof. *Litchfield v. Daniels*, 1 Colo. 288; *Sanborn v. Contra Costa County Super. Ct.* 60 Cal. 425; *Butcher v. Smith*, 29 Ohio St. 604.

In England, however, the opposite rule that it is not an abandonment *per se* of the excess, obtains. *Vines v. Arnold*, 14 Jur. 350, 7 Dowl. & L. 377, 8 C. B. 632, 19 L. J. C. P. 93.

The plaintiff must do some act in court at the trial indicating his intention to abandon the excess. *Ibid.*

But this rule would appear to have been changed, or at least modified, by County Court Rule 35 of 1856, an abandonment of the excess being required to be entered in the particulars before service. See English cases cited *supra* under heading, *When made*.

Plaintiff is presumed to have remitted the excess of a claim which exceeds the jurisdictional limit of the court in which he sues in amount where he demands judgment for an amount within such limit. *Bowditch v. Salisbury*, 9 Johns. 388; *Remington v. Henry*, 6 Blackf. 63.

But the abandonment must have been the act of the plaintiff or some one acting for him and by his authority; it cannot be done by the judge on his own authority. *Hill v. Swift*, 1 Jur. N. S. 187, 10 Exch. 723, 24 L. J. Exch. 187.

Thus a justice of the peace has jurisdiction of an action in which the amount demanded and sought to be recovered is within the jurisdictional limit though the indebtedness sued on exceeds it. *Cahill v. Dolph*, 1 Johns. Cas. 338; *Bowditch v. Salisbury*, *supra*; *Hapgood v. Doherty*, 3 Gray, 372; *Mo-Vey v. Johnson*, 75 Iowa, 165; *Culley v. Laybrook*, 6 Ind. 286; *Culley v. Van Patten*, 65 Mich. 80; *Wilhelms v. Noble Bros.* 36 Ga. 601; *Barber v. Kennedy*, 18 Minn. 217; *Keegan v. Singleton*, 5 Wis. 115.

And in *Cahill v. Dolph*, *supra*, it was held that the plaintiff need not set out the credit given to reduce the indebtedness.

This rule was applied to an action for conversion in which the complaint alleged the property taken

to be of the value of \$250 and that plaintiff was damaged by the detention in the sum of \$50 praying judgment for \$200, \$1 less than the jurisdictional limit in *Sanborn v. Contra Costa County Super. Ct.* 60 Cal. 425.

And to an action for damages for negligence, in *Stewart v. Baltimore & O. R. Co.* 33 W. Va. 63.

And to an attachment proceeding in which the affidavit showed an indebtedness largely in excess of the jurisdictional limit of the justice, in *Bennett v. Ingersoll*, 24 Wend. 113, overruled on other grounds in *Wood v. Randall*, 5 Hill, 264.

And to a declaration consisting of several counts aggregating more than the amount limited, in *Stillson v. Sanford*, 3 Cal. 174; *Tuttle v. Maston*, 1 Johns. Cas. 25.

And to one demanding a balance of account within the jurisdictional limit where the demand exceeded it but did not exceed the limit applicable to the whole amount, in *Cahill v. Dolph*, and *Tuttle v. Maston*, *supra*.

In *Thompson v. Colony*, 6 Vt. 61, however, it was held that the *ad damnum* will not give jurisdiction where the subject-matter declared on shows that it does not exist.

So, a court has jurisdiction of an action upon a bond the penalty of which exceeds its jurisdictional limit where the plaintiff demands judgment for a sum within it. *Washburn v. Payne*, 2 Blackf. 216; *Anderson v. Farns*, 7 Blackf. 342; *Stone v. Murphy*, 3 Iowa, 35; *Culbertson v. Tomlinson*, *Morris* (Iowa) 404; *Cavender v. Ward*, 26 S. C. 470; *Fowler v. McDaniel*, 6 Heisk. 529; *State v. Lambert*, 24 W. Va. 399; *Boomer v. Laine*, 10 Wend. 525; *Ginter v. Greeley*, 1 Del. Co. Rep. 354.

It is to be observed that the courts of Pennsylvania and West Virginia do not permit remission of a part of a claim to confer jurisdiction upon an inferior court. See *supra*, heading, *Rule denying the right to remit*.

The opposite rule, however, that a justice cannot entertain an action on a bond the penalty of which exceeds his jurisdictional limit though the damages claimed for the breach thereof are within it is maintained in some of the states. *Coggins v. Harrell*, 36 N. C. 317; *State v. Rousseau*, 71 N. C. 194; *State v. Porter*, 60 N. C. 140; *Morris v. Saunders*, 85 N. C. 129; *Pitman v. Dwyer*, 3 Mo. App. 570; *Bishop v. Freeman*, 43 Mich. 533; *Durfee v. Dean*, 53 Mich. 367.

In *Coggins v. Harrell*, *supra*, which was an action upon a constable's bond, this doctrine was placed upon the ground that as the bond is held by the state as trustee for all persons that might be injured by a breach of its conditions, one of such persons can remit no part of the penalty thereof.

And the penalty of the bond sued upon and not the damages claimed, is the sum demanded within the North Carolina constitutional provision limiting the jurisdiction of justices of the peace. *Hedgecock v. Davis*, 64 N. C. 650.

So in *Stephenson v. Porter*, 45 Mo. 363, it was held that the account sued on and the specific items claimed, and not the amount stated in the

Lafferty v. Day, 7 Ark. 360, it was held that "the amount claimed by the plaintiff is the sum in controversy, and determines the jurisdiction," and that, if the amount sued for be within the jurisdiction of a justice of the peace, the defendant cannot defeat the jurisdiction by showing that he owes the plaintiff more than he has sued for. In *State v. Scoggin*, 10 Ark. 328, Judge Scott, discussing a question concerning the jurisdiction of a justice of the peace, refers to the point raised here as follows: "So, upon a like foundation, it has been repeatedly held by the supreme court of Alabama that, although an

open account for an amount beyond the jurisdiction of a justice cannot be broken up so as to ground several actions before him, yet the plaintiff may elect to proceed for an amount within his jurisdiction, by discarding so much of his account as may be beyond the justice's jurisdiction, and proceed only for such items as may amount to the sum of that jurisdiction; and also of a note or bond, after being reduced by voluntary credits,—the recovery, in all such cases, going to the whole contract, and extinguishing all claim to that which was discarded." He concludes, on this point, that a contract originally be-

prayer for judgment, must be taken as showing the debts or balance sued for in suits instituted before justices of the peace.

So a set-off for a sum greater than the limit of the jurisdiction of a justice of the peace interposed in an action for a sum within his jurisdiction upon which the defendant asks for the dismissal of the complaint with costs but for no affirmative relief does not deprive the justice of jurisdiction. *Murphy v. Evans*, 11 Ind. 517.

And the same was held of a set-off for a sum largely in excess of the justice's jurisdictional limit upon which the defendant prayed judgment for the amount that might be found due not to exceed the limit in *Pate v. Shafer*, 19 Ind. 173.

So a court is not deprived of jurisdiction of an action in which the plaintiff claims an amount within the jurisdiction by the fact that the evidence shows that the defendant is indebted to him in an amount in excess of his jurisdictional limit. *Long v. Bakesfield*, 48 Ala. 603; *Ellis v. Snider*, 1 Ill. 263; *Velvin v. Hall*, 78 Ga. 136; *Tyler Cotton Press Co. v. Chevalier*, 56 Ga. 494; *Lafferty v. Day*, 7 Ark. 360; *Farley v. Gibbs*, 22 N. Y. S. R. 94; *Hecklin v. Eas*, 16 Minn. 51; *Bodger v. Nicholls*, 28 L. T. N. S. 441.

And an account stated and exhibited upon the trial of an action in justice's court which shows a demand for a sum above the limit of the justice's jurisdiction does not deprive him of jurisdiction when he did not demand by the summons or insist on the trial upon more than the jurisdictional amount. *Brantley v. Finch*, 97 N. C. 91.

And in *Farley v. Gibbs*, *supra*, it was held that no objection to the jurisdiction of a justice of the peace will be entertained because the evidence shows that the amount due exceeds his jurisdictional limit where the plaintiff elects to take judgment for a sum within it.

And in *Putsam v. Shelop*, 12 Johns. 435, it was held that a plaintiff in an action in justice's court sounding in damages who proves damages in an amount beyond the jurisdictional limit of the justice may waive his claim for the excess and take judgment for the balance.

So the jurisdiction of a justice's court is not defeated by a verdict for damages in excess of the jurisdictional amount where the amount laid in the summons or declaration is within it. *Velvin v. Hall*, 78 Ga. 136.

And the plaintiff in an action in justice's court may before judgment remit any part of the sum found in his favor by the verdict of the jury in order to bring it within the jurisdiction of the justice and take judgment for the residue if it does not exceed such jurisdiction or the sum claimed by the declaration. *Clark v. Denure*, 3 Denio, 319; *Barber v. Rose*, 5 Hill, 75; *Giles v. Spinks*, 64 Ga. 205; *Louisville, N. A. & C. R. Co. v. Breckenridge*, 64 Ind. 113.

In *Ware v. Fambro*, 67 Ga. 515, however, it was held that a defendant who interposes a counterclaim within the jurisdiction of the court upon

which a verdict is rendered for an amount in excess thereof cannot be allowed to write off the excess and have judgment for the balance, under Ga. Code, § 4161, providing for the set-off of the one claim against the other.

And a plaintiff in an action upon an account in excess of the court's jurisdiction who receives a verdict for an amount in excess of the limit cannot confer jurisdiction by remitting the excess. *Barker v. Baxter*, 1 Pinney, 407.

VI. When made.

While a remission of a part of a claim is usually made by a voluntary credit before suit or by bringing suit for a less amount than the whole, it may as a general rule be made during the pendency of the action as well as before its commencement.

Thus in *McPhail Bros. v. Johnson*, 115 N. C. 296, it was held that a remittitur by the plaintiff of the excess of his claim over the limit of the justice's jurisdiction made before the justice sufficiently shows jurisdiction where the summons did not state the amount sued for.

And an admission by the defendant who had filed a counterclaim in an action in justice's court for more than the jurisdictional amount made to the justice, that he only claimed a balance which was within the jurisdictional limit, is sufficient to sustain the jurisdiction. *West v. Hatfield*, *Morris* (Iowa) 493.

And a justice of the peace before whom an action of replevin is brought in which the property seized was returned to the defendant because of the failure of the plaintiff to give bond when it proceeded as an action for damages only, and the damages were ascertained at a sum in excess of the limit of his jurisdiction, may permit the plaintiff to remit the excess and upon such remission he has jurisdiction to render judgment for the part not remitted. *Hill v. Wilkinson*, 25 Neb. 103.

And in *Bodger v. Nicholls*, 28 L. T. N. S. 441, it was held not to be necessary in an action for tort in which the evidence showed damages in excess of the jurisdictional limit, that the plaintiff should have abandoned the excess before trial.

So a justice of the peace has power to allow an amendment of a writ returnable before him before the trial reducing the *ad damnum* to a sum within his jurisdiction where he has jurisdiction of the parties and subject-matter. *Hart v. Wake*, 3 Allen, 532 (trespass to real estate); *Dix v. Huntress*, 3 Allen, 534 *note*, (action on contract); *Converse v. Damariscotta Bank*, 15 Me. 421.

And the same is held of the court of common pleas in Indiana. *Brown v. Lewis*, 10 Ind. 232; *Harvey v. Ferguson*, 10 Ind. 303.

And where the court acquires jurisdiction by the service of a summons which does not state the amount sought to be recovered it has power to amend the complaint by reducing the amount demanded so as to bring it within its jurisdiction. *Van Cleaf v. Van Vechten*, 130 N. Y. 371; *McDonald v. Truesdell*, cited in 17 Hun, 65.

yond the jurisdiction of a justice may be properly brought within it by credit, if the balance only be claimed. A large number of cases by the courts of the different states on this question may be found collated in an opinion by *Chief Justice* Bleckley in a case lately decided by the supreme court of Georgia. After saying that "whether a creditor whose demand is created by express contract, such as a promissory note, can voluntarily abandon a part of his claim, or enter a credit upon it for the express purpose of reducing it within the jurisdiction of a given court, is a question upon which authorities differ," he adds that "it is probable the weight of decisions is with the affirmative." *Stewart*

v. Thompson, 85 Ga. 830. The authorities on this question may also be found collated on pages 61 and 62 of "Courts and Their Jurisdiction," a book by *Judge Works*, where the author states the rule as follows: "A plaintiff may bring his action for less than is due him, remitting the balance, and thus bring his case within the jurisdiction of an inferior court." See also *note to Grayson v. Williams*, 12 Am. Dec. 569, where the editor cites a number of cases holding, in substance, that it is not the amount of the plaintiff's claim, but the sum that he actually demands, which determines the jurisdiction.

We have been favored by briefs from the counsel representing the different parties to

The amendment in *Van Clief v. Van Vechten*, *supra*, was made to conform the pleadings to the proof, and nothing with relation to remission appears in the case.

In *House v. Lassiter*, 49 Ala. 307, it was held that a plaintiff in an action for the recovery of personal property *in specie* originating in justice's court, in which the complaint did not show the value but which on appeal to the circuit court was alleged to be an amount in excess of the justice's jurisdiction, should be allowed to amend his complaint in the circuit court by reducing the amount so as to bring it within the limit.

And in *Lamberton v. Raymond*, 22 Minn. 129, where the complaint was amended by reducing the amount demanded so as to bring it within the justice's jurisdiction and both parties proceeded with the trial, it was held that the conduct of the parties after the amendment conferred jurisdiction.

But an allowance in a bill of particulars in an action setting forth a claim for services in excess of the jurisdictional limit of the county court in England, will not aid the jurisdiction thereof where there was no evidence of an account stated or of an agreed balance and the defendant did not admit the amount allowed as constituting a part payment. *Ayards v. Rhodes*, 8 Exch. 312, 22 L. J. Exch. 106, 17 Jur. 71.

So in *Dwyer v. Rathbone*, 17 N. Y. S. R. 443, the rule that an amendment may be allowed where the court has acquired jurisdiction was applied to a complaint alleging a demand for \$1,000 or thereabouts, \$1,000 being the jurisdictional limit, upon which only \$500 or thereabouts had been paid, praying that an account be taken and judgment rendered for whatever remained due, an amendment being allowed making the demand for a sum certain on the theory that the original complaint contained no demand for a definite sum of money.

So a writ of prohibition will not issue to an inferior court on the ground that the debt in suit in an action before it is greater than its jurisdictional limit where the plaintiff will remit all beyond the jurisdictional amount. *People v. Marine Court of New York*, 36 Barb. 341.

A summons issued by a justice in an action of trespass on the case placing the damages at a figure beyond the limit of his jurisdiction, however, confers no jurisdiction over the defendant and does not authorize the plaintiff to take judgment on default for a sum within the jurisdictional limit. *Yager v. Hannah*, 6 Hill, 621.

And a summons placing the damages at a figure beyond the limit of the court's jurisdiction cannot be amended by reducing it to a figure within the limit. *McIntyre v. Carriere*, 17 Hun, 64.

And a justice of the peace before whom an action is brought in which the notice claims an amount in excess of his jurisdiction does not acquire jurisdiction by the subsequent filing of a petition therein

after a demurrer to the jurisdiction has been filed, claiming less than the jurisdictional amount. *Hynds v. Fay Bros*, 70 Iowa, 438.

Nor can a writ brought in a police court with an *ad damnum* beyond its jurisdiction be amended on appeal by inserting an amount within it. *Mo-Quade v. O'Neil*, 15 Gray, 52, 77 Am. Dec. 350; *Dunbar v. Bittle*, 7 Wis. 143.

And an offer to remit the excess of a judgment over the jurisdictional limit of a justice of the peace in an action tried by him will not cure error in overruling a motion to dismiss the action upon the filing of a second paragraph of the complaint during the pendency of an appeal by which the demand for judgment was raised above the jurisdictional limit. *Pritchard v. Bartholomew*, 45 Ind. 219.

And the defendant in an action in justice's court cannot on motion to dismiss his certiorari to review the justice's judgment on the ground that he claimed a set-off of more than \$50 and that therefore an appeal would lie, write off his claim so as to reduce it below \$50 for the purpose of upholding jurisdiction by certiorari. *McDonald v. Dickens*, 58 Ga. 77.

So in *Plunket v. Evans*, 2 S. Dak. 434, it was held that a defect in jurisdiction due to the fact that the summons claimed a sum with interest which would amount to more than the limit of the court's jurisdiction is not cured by a written consent filed at the time of the trial remitting the excess, but it was said that a party might undoubtedly reduce his claim to an amount within a justice's jurisdiction by credits or otherwise provided it was done before the commencement of the suit and the sum claimed was within the court's jurisdiction.

In England the rule is that payment of part of a claim in order to reduce the amount below 100s so that the action can be sent from the high court to the county court must have been made before the action was commenced. *Hodgson v. Bell*, L. R. 24 Q. B. Div. 535.

But the jurisdiction for the purpose of ordering an action brought in the English high court to be tried in the county court under the English County Courts Act 1888, § 65, providing therefor where the claim indorsed on the writ does not exceed 100s or is reduced by payment, set-off, or otherwise to a sum not exceeding 100s, is not defeated by a counterclaim for unliquidated damages. *Guliford v. Lambeth* [1895] 1 Q. B. 92.

And before the County Court Rule 35 of 1886 requiring an abandonment of the excess of the jurisdictional limit to be entered on the particulars before service, it might be made at any time before the hearing provided it was by some act in court, and a minute of the abandonment made by the judge at the hearing gave him jurisdiction. *Isaac v. Wyld*, 2 L. M. & P. 676, 7 Exch. 163, 21 L. J. Exch. 43, 15 Jur. 1135.

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this cause, in which the cases upon this question by the courts of the different states have been discussed and commented upon in an able and admirable way, but it would serve no useful purpose to further discuss such cases. We will only announce our conclusion that the appellants had the right to bring their case within the jurisdiction of the justice of the peace by remitting a portion of the principal of their note. We do not see that it is any violation of the rights of a debtor to allow his creditor to remit by voluntary credits a portion of his debt, and thus bring his claim within the jurisdiction of an inferior court. After the judgment of the inferior court is rendered upon the reduced claim, the part remitted is completely extin-

guished, and can never afterwards be asserted against the debtor. If the creditor desires to avail himself of the speedy justice furnished by these inferior courts, at the expense of a portion of his claim, he should be allowed to do so. We therefore conclude that the judgment of the justice of the peace against Sallie Falconer for \$299 and interest was valid.

The decree of the Circuit Court declaring said judgment void, and enjoining the collection of the same, is therefore reversed, and the cause remanded.

Hughes, J., being absent, did not participate.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

CHEMICAL NATIONAL BANK OF NEW YORK

v.

David ARMSTRONG, Receiver of the Fidelity National Bank.

(69 Fed. Rep. 372; 65 Fed. Rep. 573.)

1. **The fact that an officer authorized to borrow money for a bank is engaged in defrauding it** will not prevent the liability of the bank on a loan obtained by him for the bank from another bank, which has no knowledge of his fraud.
2. **The claims of creditors of an insolvent national bank cannot be reduced** by any credit for collections from collateral made after the declared insolvency of the bank, whether before or after proof of claims.
3. **Interest cannot be allowed on dividends** from an insolvent national bank between the time when they are declared and the subsequent presentation of claims, although the creditor's delay in proving claims was due to an erroneous belief that collateral held by the creditor was applicable to these claims.
4. **The refusal of a creditor of a national bank to accept dividends** under an offer by the receiver of the bank of a certain amount, made without prejudice to the creditor's claims, will prevent claiming interest on the amount of the dividend thus offered, but interest may be collected on the excess of the dividend to which the creditor was entitled above the amount offered.
5. **For a reasonable time taken** by a receiver of an insolvent bank to reject or accept a claim, which in this case was twenty days, no interest should be allowed on a dividend upon the claim.
6. **To charge a national bank on a loan of money**, the persons making it must see that the officer or agent acting for the bank had

NOTE.—The above decision is of great importance on the subject of collections from collateral security as affecting the amount of claims against insolvent national banks. The precedents are very fully presented in the report of the case.

For exceptions, to prohibitions of preferences by national banks, see note to *Elmira Sav. Bank v. Davis* (N. Y.) 35 L. R. A. 544, 36 L. R. A.

See also 30 L. R. A. 380.

special authority to borrow money or that his act was ratified.

7. **The effect of an offer to pay dividends** upon a part of a claim against an insolvent bank, in preventing the running of interest in case the offer is rejected, will be destroyed by an absolute denial of liability in a subsequent suit to compel the allowance of the entire claim.

(November 12, 1893.)

CROSS-APPEALS from a judgment of the Circuit Court of the United States for the Southern District of Ohio in a proceeding brought to establish a claim against an insolvent bank, the plaintiff appealing from so much of the decree as refused to allow the claim to the full amount and defendant appealing from so much as refused to reduce the claim to the amount designated by the receiver. *Reversed.*

The facts are stated in the opinions.

Before Brown, *Circuit Justice*, and Taft and Lurton, *Circuit Judges*.

Mr. William Worthington, for plaintiff:

The proper rule for ascertaining dividends is to ascertain the amount due upon the claim at the date of the creation of the trust in favor of general creditors (*i. e.*, in this instance, the suspension of the bank), regardless of collaterals, and pay dividends upon this basis, until by dividends and collections from collaterals the claim has been paid in full, or the assets are exhausted.

U. S. Rev. Stat. §§ 5234-5236, 5242, and section 1, of the Act of June 30, 1876, 19 Stat. at L. 68, Supp. to Rev. Stat. 1st ed. p. 216, and 2d ed. p. 107, create a trust in favor of creditors of an insolvent bank, and this trust has its inception, not in the appointment of the receiver, but in the commission of the act of insolvency which led to that appointment.

First Nat. Bank of Selma v. Colby, 88 U. S. 21 Wall. 609, 23 L. ed. 687; *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059.

Holders of circulating notes have a first lien; only the balance is available for distribution among other creditors. The distribution must be "ratable" that is, upon one rule or proportion, applicable alike to all, and neces-

sarily must have reference to the amount due the creditor.

The statute fixes a time, and one time, with reference to which all calculations are to be based. The dividend must be "ratable." It cannot be ratable, that is, in the same ratio of proportion, unless the same basis is adopted for all claims, that is, unless they are all estimated at the same point of time.

This can be attained only by estimating every claim, once for all, as it stood when the trust in favor of creditors arose; that is, in this case, when the bank suspended payment.

United States v. Knox, 111 U. S. 784, 28 L. ed. 603.

The giving of collateral is not a payment or satisfaction. The debtor who has given collateral security remains a debtor, notwithstanding, to the full amount of the debt.

Lewis v. United States, 92 U. S. 623, 28 L. ed. 514.

The amount due upon the claim when the insolvency of the bank is declared is not affected by the fact that the claim was secured.

Eastern Townships Bank v. Vermont Nat. Bank, 22 Fed. Rep. 186.

The statute furnishes a complete code for the distribution of the effects of an insolvent national bank, and its provisions cannot be departed from.

Cook County Nat. Bank of Chicago v. United States, 107 U. S. 445, 448, 27 L. ed. 537, 538.

Although, for purposes of ascertaining the rights of creditors *inter se*, and their several proportions of the moneys to be distributed *pro rata* as dividends, interest is computed to the declaration of insolvency, yet as to the insolvent bank and its stockholders interest subsequently accruing is a debt, and must be paid in full before any part of the assets is divided among the stockholders.

National Bank of the Commonwealth of New York v. Mechanics Nat. Bank of Trenton, 94 U. S. 437, 24 L. ed. 176; *Richmond v. Irons*, 121 U. S. 27, 64, 30 L. ed. 864, 876.

All dividends must be computed upon the amount due on the day of insolvency.

Miller's App. 35 Pa. 481; *Patten's App.* 45 Pa. 151, 84 Am. Dec. 479; *Brough's Estate*, 71 Pa. 460; *Graeff's App.* 79 Pa. 146; *Miller's Estate*, 82 Pa. 118, 22 Am. Rep. 754; *Morton v. Caldwell*, 8 Strobb. Eq. 162; *Allen v. Danielson*, 15 R. I. 480; *Midgely v. Slocumb*, 82 How. Pr. 423; *Findlay v. Homer*, 2 Conn. 850; *Moses v. Ranlet*, 2 N. H. 488; *Brown v. Merchants & Farmers Nat. Bank*, 79 N. C. 244; *Logan v. Anderson*, 18 B. Mon. 114; *Citizens Bank of Paris v. Patterson*, 78 Ky. 291; *Re Bates*, 118 Ill. 524, 59 Am. Rep. 388; *Third Nat. Bank of Detroit v. Haug*, 11 L. R. A. 327, 82 Mich. 607; *Kellogg v. Miller*, 22 Or. 416; *Matthews v. Fidelity Title & Trust Co.* 52 Fed. Rep. 687.

Interest should be allowed on dividends.

Armstrong v. American Exch. Nat. Bank, 138 U. S. 433, 33 L. ed. 747.

The proposition was not in fact without prejudice, but unequal, and burdensome to the Chemical Bank, and its acceptance might result in the loss of actual rights of substantial value.

The refusal of that offer has not forfeited
28 L. R. A.

the right to interest thereafter accruing upon unpaid dividends.

Moore v. Norman, 18 L. R. A. 359, 52 Minn. 88.

On rehearing.

For a tender to be efficacious in stopping interest the following things, among others, must appear: An offer to pay, made absolutely and unconditionally, except as to requiring a voucher for the sum proposed to be paid. The sum offered must be the full amount due on some particular claim. The sum offered must be actually produced and tendered in legal tender money, unless the actual production, or objection to the kind of money offered, be waived. The offer must be kept open, and always ready for acceptance.

Dixon v. Clarke, 5 C. B. 865; 4 Benjamin, Sales, 4th Am. ed. by Bennett, pt. 8, chap. 2, §§ 712-728; 2 Chitty, Pl. *480; 1 Saunders, Pl. & Pr. 38, note 2; 2 Greenl. Ev. §§ 600-608; 1 Sutherland, Damages, *443-474, §§ 280-278; *Keys v. Roder*, 1 Head, 19.

In courts of equity the rules are the same.

2 Dan. Ch. Pr. *1393-1396; 2 Jones, Mortg. §§ 886-902; *Gammon v. Stone*, 1 Ves. Sr. 339; *Bishop v. Church*, 2 Ves. Sr. 872; *Garforth v. Bradley*, Id. 678; *Webster v. French*, 11 Ill. 254; *McCalley v. Otey*, 90 Ala. 802; *Brock v. Hidy*, 18 Ohio St. 306; *Kortright v. Cady*, 21 N. Y. 843, 78 Am. Dec. 145; *Tuthill v. Morris*, 81 N. Y. 100; *Werner v. Tuch*, 127 N. Y. 217.

Armstrong's offer falls far short of complying with the requirements of the law as to how a tender should be made.

Thomas v. Evans, 10 East, 101; *Pourney v. Blomberg*, 8 Jur. 746; *Dixon v. Clark*, *supra*; *Searles v. Sedgrave*, 5 El. & Bl. 639; *Phillipotts v. Clifton*, 10 Week. Rep. 135; *Graham v. Linden*, 50 N. Y. 547; *Wolverton's App.* (Pa.) 1 Cent. Rep. 397.

A tender must be clear, certain, and definite; if it be obscure, if there be doubt as to what would be the position of the creditor if he accepted it, it has no virtue, and its refusal cannot be urged against him.

Potts v. Plaisted, 30 Mich. 149; *Proctor v. Robinson*, 35 Mich. 284.

Mr. John S. Herron, for defendant:

The claim of the Chemical Bank is the amount actually due; that is what must be proved or allowed, or judicially adjudicated by a court of competent jurisdiction.

Re Puleifer, 14 Fed. Rep. 247.

According to the proper construction of the national banking act a dividend is payable only upon the amount actually due; upon the amount for which a judgment would be rendered if suit be brought against the bankrupt; the insolvency of the bank, if it takes no rights from the creditor, adds none to his claim; and the doctrine that a particular time is established at which all claims must be valued, applies only to matters in which all are interested alike, and not to matters such as payments on particular claims, and is established in the interest of equality among the creditors, and not to destroy equality.

It was the duty of the Chemical National Bank to collect the collateral paper as it matured, and to apply whatever it received to the

satisfaction *pro tanto* of the debt as security for which it was given. The effect of payments received from collaterals remained the same. Such payments should be applied to the satisfaction of the debt afterwards, as before.

Wheeler v. Newbould, 16 N. Y. 398; *Greenwood v. Taylor*, 1 Russ. & M. 185; *Mason v. Bogg*, 2 Myl. & C. 443; *Kellock's Case*, *Re Xeres Wine Shipping Co.* L. R. 8 Ch. 779; *Amory v. Francis*, 16 Mass. 309; *Farnum v. Bouelle*, 13 Met. 159; *Sohier v. Loring*, 6 Cusb. 537; *First Nat. Bank of Boston v. Eastern R. Co.* 124 Mass. 524; *Midgeley v. Slocumb*, 82 How. Pr. 423; *Knowles' Petition*, 13 R. I. 90; *Re Harris*, 3 Nat. Bankr. Reg. 105; *Third Nat. Bank of Baltimore v. Lanahan*, 66 Md. 461; *Wheat v. Dingle*, 8 L. R. A. 375, 32 S. C. 473; *Re Frasch*, 5 Wash. 344. See *Wurts v. Hart*, 13 Iowa, 515; *Story*, Eq. Jur. § 633.

Taft, Circuit Judge, delivered the opinion of the court:

These are cross-appeals from a decree of the circuit court for the southern district of Ohio directing the receiver of the insolvent and defunct Fidelity National Bank of Cincinnati to allow a claim of the Chemical National Bank of New York against the assets in his hands for \$205,450. The Chemical Bank, the complainant below, objects to the decree on the ground that the claim should have been allowed for \$300,000 and interest, while the receiver objects to the decree because the claim as allowed was not reduced by about \$10,000.

On March 2, 1887, the Chemical Bank placed to the credit of the Fidelity Bank \$300,000, the proceeds of a call loan, as collateral for which a number of bills receivable had been pledged. E. L. Harper, vice-president of the Fidelity Bank, who secured the loan, directed that this credit be transferred on the books of the Fidelity Bank to his individual account. This was done, and the money was checked out by Harper.

On June 21, 1887, the Fidelity Bank suspended payment. Its doors were closed by order of the comptroller of the currency upon that day, and on the 27th of the same month the comptroller appointed the defendant, Armstrong, its receiver. None of the collaterals on the \$300,000 loan had been collected by the Chemical Bank before the receiver took possession of the Fidelity Bank. Subsequently three notes made by J. W. Wilshire, and indorsed by John V. Lewis, for \$25,000 each, which were among the collaterals for the \$300,000 loan, were collected by the Chemical Bank; and another note, having the same maker and indorser, for another \$25,000, could have been collected, had the Chemical Bank not been negligent in failing to demand payment and to notify the indorser, for, though Wilshire the maker was insolvent, Lewis the indorser was able to pay. The Chemical Bank had made other advances to the Fidelity Bank upon which it had received other collateral. In the belief that it was entitled to use all the collateral in its hands to pay all the obligations of the Fidelity Bank to itself without regard to the

particular loans upon which particular collateral had been deposited, the Chemical Bank had gone on making collections, and had applied the proceeds of the collateral indiscriminately to the aggregate debt, so that it had paid the entire indebtedness of the Fidelity Bank owing to it, and had on hand a balance of \$33,000, which it turned over to the receiver. The receiver objected to the "massing" of the collateral, and insisted that the Chemical Bank could not use collateral, given to secure one obligation, to pay another. This resulted in litigation, in which the receiver was successful, and obtained \$286,000 from the Chemical Bank.

And so it happened that on the 25th of April, 1890, and not until then, the Chemical National Bank presented its claim for \$300,000 on the loan already referred to. The receiver objected to the claim, on the ground that \$75,000 which the bank had collected on the collateral before proving its claim, and about \$9,000 thereafter collected, and the \$25,000 which, through its negligence, it had failed to collect, should be credited on the claim.

The answer of the receiver made the defense that the Fidelity Bank could not be held liable for the \$300,000 loan, because Harper had negotiated it without the knowledge of the other officers of the bank, and had fraudulently appropriated the proceeds of the loan to his own uses. The defense has not been pressed on us by counsel for the receiver, and certainly cannot be sustained. The evidence is undisputed that the Chemical National Bank had no knowledge that Harper was engaged in defrauding the Fidelity Bank, and dealt with him as an authorized officer of that bank, and the money was placed to its credit. The debt was, therefore, the debt of the Fidelity Bank.

The next question is, Shall creditors of an insolvent national bank, in proving their claims, be required to allow any credit for collections from collateral made subsequent to the declared insolvency, and before proof of claim? If so, shall the claims as proven be also subsequently reduced by collections from collateral made, after proof, and before dividends are declared, thus varying the basis of distribution from dividend to dividend? Or shall the rule in bankruptcy be followed, by which the creditor holding collateral shall be required to reduce his claim by the actual collections and the estimated value of his uncollected collateral?

The court below held that the creditor should be required to allow a credit of all collections made before filing his proof of claim, but not of those made thereafter. The receiver contends that the rule in bankruptcy is the proper one, while the complainant bank maintains that it should be allowed to prove its claim as it existed at the moment of declared insolvency.

It is singular that in the years during which the national banking act has been in force the foregoing questions have not been settled by a decision of the supreme court. It is, for the federal courts, a new and important question, and has received at our hands the consideration it deserves. We have

been greatly assisted by the elaborate and able written and oral arguments of counsel for both parties, in which all the many decided cases presenting the same or analogous questions have been industriously reviewed and discussed.

By section 5234, Rev. Stat., and section 1 of the Act of June 30, 1876 (19 Stat. at L. 63), it is made the duty of the comptroller of the currency to appoint a receiver to wind up a national banking association whenever the comptroller shall, after examination, have become satisfied of its insolvency. It is the duty of the receiver thus appointed to take possession of the books and effects of the bank, liquidate its assets, and pay the money thus realized into the treasury of the United States.

Section 5235 makes it the duty of the comptroller thereupon to give notice by public advertisement for three months, calling on all persons having claims against the association to present the same, and to make legal proof thereof.

Section 5242 declares void all transfers of its property by the national bank after the commission of the act of insolvency, or in contemplation thereof, to prevent distribution of its assets in the manner provided in said national banking act, or with the view to prefer any creditor, except in payment of its circulating notes. And it further provides that no judgment or injunction shall be issued against the bank or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court.

Section 5236 provides that, after making full provision for the redemption of the circulating notes of the association, "the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated, and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association or their legal representatives in proportion to the stock by them respectively held."

The suspension of the bank, and its seizure by the comptroller and his appointee, the receiver, work, by operation of law, a transfer of the title to the assets of the bank from the bank to the comptroller and receiver, in trust to reduce the assets to money, and apply them, as directed by the national banking act—first, to the redemption of the circulating notes of the bank; and, second, in ratable distribution to the creditors of the bank. *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059; *United States v. Knox*, 111 U. S. 784, 28 L. ed. 603.

It is manifest that it would utterly defeat the object of the banking act if, after the suspension, the assets remained subject to levy, execution or attachment and, therefore, that the passing of the assets into the hands of the receiver removes all the property of the bank from liability to process to

secure satisfaction of judgments. *First Nat. Bank of Selma v. Coby*, 88 U. S. 21 Wall. 609, 22 L. ed. 687.

The right which a creditor of the bank had before suspension of levying an execution to satisfy his judgment is gone, and for it is substituted a fixed and definite interest in the assets as a security for the payment of his debt, which it is the purpose of the banking act to reduce to money, and apply on his debt, with all convenient speed. We see no reason why this does not apply as well to creditors who hold collateral as to those who are unsecured. It is well settled that the holding of collateral does not prevent a creditor from enforcing his claim in the ordinary way by judgment and execution against a debtor without any deduction for his collateral. *Lewis v. United States*, 92 U. S. 618, 23 L. ed. 518.

When the secured creditor is required by the transfer of the assets in trust for winding-up purposes to forego his right to satisfy his entire debt out of the property of the bank by levy and execution, why should there be substituted for that right anything less than that which the unsecured creditor gains by yielding up the same right? Take the case of two creditors of the bank for \$1,000 each, one with collateral and the other unsecured. Before suspension, the one has two modes of collecting his debt—first, by levy and execution for \$1,000; and, second, by reducing and applying the collateral. The other has but one,—that of a levy and execution for \$1,000. When the bank suspends, the unsecured creditor acquires, in exchange for his right to levy on the property of the bank to make \$1,000, an undivided interest in the assets held by the receiver, after the circulating notes are paid, which bears the same ratio to the entire assets of the bank as \$1,000 does to the entire indebtedness. If so, why should not the secured creditor, who, before the suspension, had also the right to make \$1,000 by levy on the property of the bank, receive the same ratable interest in the assets held by the receiver? The suspension of the bank, and its seizure by order of the comptroller, have no effect to change the rights of the creditor with reference to his collateral. He enjoys precisely the same advantage over the unsecured creditor, with respect to the collateral, that he did before the suspension. With reference to obtaining satisfaction out of the general assets of the bank before suspension, their rights were equal. So must their rights be, after the sequestration of the assets for ratable distribution. Illustrations are put to show the injustice of the view we are advocating. A. has a claim of \$1,000 against the bank, for which he holds bonds, worth \$500, as security. B. has a claim of \$500. A dividend of 50 per cent is declared, and A. receives \$500 on his claim, leaving \$500 due, which he subsequently satisfies out of the collateral. A. is thus paid in full, while B. receives but \$250. Now, it is said that A. who had a claim of \$500 which was unsecured, has had his unsecured claim paid in full, while B., who also had an unsecured claim for the same amount, has only received \$250, which must

be unjust and inequitable. The fallacy in this argument is in assuming that A. had an unsecured claim for \$500. He had a claim for \$1,000, secured by \$500 of collateral, all of it applicable to every dollar of the debt. No part of the debt was unsecured. The same thing was true of his interest in the assets of the bank. That was applicable to every dollar of the \$1,000. He had two securities for the payment of his debt, one of which he held in common with all the creditors, the other of which he had obtained by lawful contract from his debtor. It is a rule of equity that, where a creditor holds two securities, one of which he has in common with others, and the other of which he holds for his sole use, he may be required to collect his debt first out of the security for his sole benefit, so that those who hold in common with him may have more to apply to their debts. But this rule can never be invoked where he who has the two securities cannot pay himself in full out of both. He was given the two securities to pay his debt, and he cannot be deprived of his primary equity for the benefit of some one else who is less fortunate in his security. 3 Pom. Eq. Jur. § 1414; Story, Eq. Jur. § 564b.

The national banking act was framed to secure equality of distribution among the creditors, so far as is consistent with the previous contract rights of those creditors. If one creditor secured collateral for his loan when made, that produced an inequality between him and the other creditors who have no collateral which it cannot have been the purpose of the banking act, in its provisions for winding up the insolvent bank, to modify, reduce, or defeat.

It is true that under the bankruptcy act it was provided that a secured creditor, if he would prove for his full claim, must surrender his collateral, or else be content to prove for the difference between his full claim and the value of his collateral. Rev. Stat. § 5075. The bankruptcy law is not now in force, however, and it was expressly held in the case of *Cook County Nat. Bank of Chicago v. United States*, 107 U. S. 445, 21 L. ed. 587, that the priorities and method of distribution under the bankrupt law had no application to the winding up of insolvent national banks. It was said that the national banking act contained within itself a complete system for distributing the assets and determining the priorities, and that a priority secured to the United States under the bankrupt law would not be enforced in their favor under the banking act. In delivering the opinion of the court, Mr. Justice Field, referring to the bankruptcy law, said: "That enactment was dealing with the estates of persons adjudged to be insolvent under that law, and covers only the distribution of their estates. It has no further reach."

The rule in bankruptcy was not the rule in equity, because it ignored the rights belonging to the secured creditor before the bankruptcy took place, and materially modified and reduced the advantage over unsecured creditors which, in the original contract of pledge, the debtor had intended to secure him.

The question we are discussing is one which has arisen in determining the proper ratable distribution of assets under nearly all acts for the settlement of insolvent estates and for the winding up of insolvent corporations.

In Massachusetts (*Amory v. Francis*, 16 Mass. 309), in Iowa (*Wurtz v. Hart*, 18 Iowa, 515), in South Carolina (*Wheat v. Dingle*, 32 S. C. 473, 8 L. R. A. 875), and in Washington (*Re Frasch*, 5 Wash. 344), it was held that the rule in equity is the same as the rule in bankruptcy, and that the secured creditor can prove only for the balance of his debt after the collateral shall have been applied. It was so held by Sir John Leach, master of the rolls, in *Greenwood v. Taylor*, 1 Russ. & M. 185. In *Amory v. Francis*, *supra*, Chief Justice Parker repudiates the view that the secured creditor should be allowed to prove for his full claim, without deduction for collateral, on the ground that he "would in fact have a greater security than that pledge was intended to give him; for, originally, it would have been security only for a proportion of the debt equal to its value; when, by proving the whole debt, and holding the pledge for the balance, it becomes security for as much more than its value as is the dividend which may be received on the whole debt." With much deference to the great jurist who advanced this argument, we think that it quite incorrectly states the effect of the contract of pledge, which is that the collateral shall be security for the whole debt, and every part of it, and therefore is as applicable to any balance which remains after payments from other sources as to the original amount due. The view of the supreme judicial court of Massachusetts was adopted into a statute which deprives the subsequent cases in that state of much bearing upon the question before us. The other cases cited, and especially *Greenwood v. Taylor*, seem to rest on the rule in equity requiring a creditor with two funds as security, one of which he shares with others, to exhaust his sole security first. As already said, the rule has no application when its operation would prevent the creditor from paying his whole claim.

The great weight of authority in England and this country is strongly opposed to the view that a creditor with collateral shall be thereby deprived of the right to prove for his full claim against an insolvent estate. *Greenwood v. Taylor* was questioned by Lord Cottenham in *Mason v. Bogg*, 2 Myl. & C. 448, 449, and was expressly repudiated as authority in the court of chancery appeals in *Kellock's Case*, L. R. 3 Ch. 769,—a case which, upon this point, is cited with approval in *Lewis v. United States*, 92 U. S. 618, 23 L. ed. 518. In this country, the Massachusetts doctrine was dissented from by the supreme court of New Hampshire in the early case of *Moses v. Ranlet*, 2 N. H. 488. Other cases which fully support the views we have expressed are: *People v. Remington*, 121 N. Y. 328, 8 L. R. A. 458; *Re Bates*, 118 Ill. 524, 59 Am. Rep. 833; *Findlay v. Hosmer*, 2 Conn. 350; *Logan v. An-*

derson, 18 B. Mon. 114; *Citizens Bank of Paris v. Patterson*, 78 Ky. 291; *Brown v. Merchants & Farmers Nat. Bank*, 79 N. C. 244; *Kellogg v. Miller*, 22 Or. 406; *Miller's Estate*, 82 Pa. 113, 22 Am. Rep. 754; *Graeff's App.* 79 Pa. 146; *Patten's App.* 45 Pa. 151, 84 Am. Dec. 479; *Miller's App.* 85 Pa. 481; *Allen v. Danielson*, 15 R. I. 480; *Third Nat. Bank of Detroit v. Haug*, 82 Mich. 607, 11 L. R. A. 827; *West v. Bank of Rutland*, 19 Vt. 408. Compare also, *Kortlander v. Elston*, 2 C. C. A. 657, 53 Fed. Rep. 180; *Bank Cases*, 92 Tenn. 487.

The exact point which is common to all the foregoing authorities, and which they all sustain, is that a creditor who has proved his claim against an insolvent estate under administration can collect his dividends without any deduction from his claim as proven for collections made from collateral after his proof of claim is filed. There is one authority, and only one, which upholds the view that a creditor who has once proved his claim shall reduce that claim by all collections made before the declaration of each dividend, on the theory that he is entitled to a ratable distribution on his debt as it is at the time of distribution, and the collections made after proof of claim and before each dividend must reduce the debt *pro tanto*. This authority is *Third Nat. Bank of Baltimore v. Lanahan*, 66 Md. 461. The argument *ab inconvenienti* would weigh strongly against following this case, even if its conclusion were not wrong in principle. The rule it lays down would require a readjustment of the basis of distribution at the time of declaring every dividend, and would involve endless labor and confusion. But the rule cannot be sustained, because its adoption proceeds on the theory that the claim of the creditor in reference to the sequestered assets of the debtor and the debt against the debtor are and continue to be one and the same thing. This is a fundamental error. The amount of the claim as proven is a mere measure of the creditor's right and interest in the fund realized from the assets. The claim as proven is a claim *in rem*, and not *in personam*. This may be illustrated in respect to interest. As against the insolvent bank the debt of the creditor continues to bear interest. As against the assets, interest is calculated only to the date of the suspension and the vesting of the title of the assets in the receiver. *United States v. Knox*, 111 U. S. 784, 28 L. ed. 608; *Richmond v. Irons*, 121 U. S. 27, 64, 30 L. ed. 864, 876; *Warrant Finance Co's Case*, L. R. 4 Ch. 643; *Re Joint Stock Discount Co.* L. R. 5 Ch. 86.

It is true that if the assets are more than sufficient to pay all debts, then the creditors are allowed dividends to pay the interest due from the debtor bank (*National Bank of the Commonwealth of New York v. Mechanics Nat. Bank of Trenton*, 94 U. S. 437, 24 L. ed. 176), but in the measuring of the share of each creditor in the fund, interest beyond the date of suspension is not calculated. It will not do to say that the date fixed for stopping of interest on all claims is a mere matter of convenience in calculation, which works no injury to any one, because all are

treated alike. The creditor with a debt bearing 8 per cent interest is very injuriously affected in comparison with the creditor whose debt bears but 4. The contract of the former against the debtor entitled him to double the compensation for delay in payment which the latter was to receive, and yet in the distribution of the assets, for which they both may have to wait several years, the former has no advantage over the latter. If the ratable share of creditors in the assets must vary with the increase or decrease of the debt against the debtor, the refusal to allow interest on claims beyond the date of suspension would be a gross injustice to those who are entitled by contract to the higher rates of interest. The only principle upon which the rule adopted by the Supreme Court in *United States v. Knox*, 111 U. S. 784, 28 L. ed. 603, and by the court of chancery appeals in *Warrant Finance Co's Case*, L. R. 4 Ch. 643, can be supported is that, upon the transfer of the assets by operation of law to a trustee for creditors, the rights of creditors in the assets are fixed, and are to be determined as of that date, and are not affected by what may subsequently affect the debt by reason of which they acquire their interest therein, subject always to the limitation that the amount to be received by them from all sources shall not exceed their original debt and interest. Said Chief Justice Waite in *United States v. Knox*, *supra*: "The business of the bank must stop when insolvency is declared. Rev. Stat. § 5238. No new debt can be made after that. The only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him, or by adjudication of a competent court, to have had their origin in something done before the insolvency. It is clearly his duty, therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution."

This principle, thus applied to interest, must have equal application to credits from collections on collateral.

The cases we have already cited fully confirm the foregoing view as to credits after the filing of the proof of claim. It is vigorously contended, however, that they do not countenance the view that credits shall not be allowed on claims for collections made after insolvency declared and before proof of claim. The exact point has been passed upon in but a few cases. In *Kellock's Case*, L. R. 8 Ch. 769, the court of chancery appeals adopted the rule that collections on collateral before filing proofs of claim in proceedings to wind up an insolvent company should be deducted, but that subsequent collections should not be.

The supreme court of Pennsylvania, in *Miller's App.*, 85 Pa. 481, in *Patten's App.*, 45 Pa. 151, 84 Am. Dec. 479, and in several subsequent cases; and the supreme court of Rhode Island, in *Allen v. Danielson*, 15 R. I. 480,—took the contrary view, and held that no collections made on collaterals after the transfer of the assets in trust could be used to reduce the claims of secured creditors, whether made before or after filing proof

of claim. In *Morton v. Caldwell*, 8 Strobb. Eq. 163, the chancellor, in a most convincing opinion, reached the same result; but in *Wheat v. Dingle*, 32 S. C. 478, 8 L. R. A. 375, the supreme court of South Carolina destroyed the authority of that case in that state by adopting the rule in bankruptcy as to the claims of secured creditors.

A careful consideration of the question and of the principles which must govern its decision satisfies us that there is no logical basis for any distinction between the effect of collections made after insolvency and before filing proof, and of those made after filing proof. Either they must both reduce the claim before dividend, or they must be given no effect. The theory upon which all the cases refusing to reduce the claim by collections subsequent to filing proof must be supported, is that, at the time of filing proof, the interest of the claimant in the assets is a fixed one, not to be varied by subsequent increase or decrease in the debt against the original debtor. What reason is there for fixing the date of filing proof as the time when the interest of creditors in the assets is to be determined? That is a date varying with each creditor, and dependent on all sorts of contingencies. The time when a man's interest is fixed and limited in property is when the act is done by which either the legal or the equitable title is transferred to him. As we have seen, the time for fixing the amount of the claim, so far as stoppage of interest is concerned, is the date of the declared insolvency. The same date, by the closest analogy, must be taken as the date for stopping reduction of the claim by credits from collections on collateral. That is the time when the creditor is deprived of his usual remedy of suit, judgment, and execution, and his equitable interest in the assets is substituted therefor. Upon that date each creditor becomes the owner, for the purpose of securing his debt, of that part of the assets of the bank which bears the same ratio to the whole property as his debt bears to the aggregate indebtedness. This interest in the assets remains fixed and constant until his debt is paid. In *Miller's App.*, 85 Pa. 481, a debtor executed a general assignment for the benefit of creditors. Subsequently the assignor became entitled to a legacy, which was attached by a creditor. It was held that such creditor was, notwithstanding, entitled to the dividend out of the assigned estate on the whole amount of his claim from the time of the execution of the assignment. Justice Strong, afterwards of the Supreme Court of the United States, said: "In the deed of assignment the equitable ownership of all the assigned property passed to the creditors. They became general proportioners, and each creditor owned such proportionate part of the whole as the debt due to him was of the aggregate of the debts. The extent of his interest was fixed by the deed of trust. It was, indeed, only equitable; but, whatever it was, he took it under the deed, and it was only as a part owner that he had any standing in court when the distribution came to be made. It amounts to very little to argue . . . that Miller's re-

covery of the legacy operated with precisely the same effect as if a voluntary payment had been made by the assignor after the assignment; that is, that it extinguished the debt to the amount recovered. No doubt it did, but it is not as creditor that he is entitled to the distributive share of the trust fund. His rights are those of the owner by virtue of the deed of assignment. The amount of the debt as to him is important only so far as it determines the extent of his ownership. The reduction of that debt, therefore, after the creation of the trust, and after his ownership had become vested, it would seem, must be immaterial."

The theory of the rights of creditors, secured and unsecured in the assets, so admirably stated by Mr. Justice Strong, is the only one which will support the many cases we have cited above in which collections after proof of claim were not credited in reduction of dividends. In no one of them is there any limitation of the ratio *decidendi* inconsistent with our view, excepting in *Kellock's Case*, L. R. 8 Ch. 769, and perhaps in the language of the supreme court of Vermont in *West v. Bank of Rutland*, 19 Vt. 403. In the cases cited from New York, New Hampshire, Connecticut, Kentucky, North Carolina, Illinois, Oregon, and Michigan the only reason why the exact point here raised was not decided as we have decided it was because in those cases no collections had been made between insolvency and proof of claim. In *Kellock's Case*, after deciding on principle that the rule in bankruptcy as to collateral is not the rule in equity, the learned lord justices fix the date of filing proof of claim as the date after which claims should not be reduced by proceeds from collateral. They do this as if they were making a rule of court, and do not base their conclusion on any argument as to the rights of the creditor, but chiefly on the ground of convenience. Under the companies' acts, the court of chancery was vested with a large discretion in formulating rules for the winding up of insolvent companies. The conclusion in *Kellock's Case* on this point is what Lord Justice Giffard, in the *Warrant Finance Co's Case*, L. R. 4 Ch. 643, 647, calls "judge-made" law. The American cases in Pennsylvania and Rhode Island fix the claim of the creditor as a constant quantity from and after the declared insolvency. They argue out this result as a matter of right, and not as a rule of convenience. We fully concur in the conclusion reached for the reasons stated, and we are of opinion that, even as a matter of convenience, the date of declared insolvency is the better date from which to estimate all claims. The date is the same for every creditor. It is fixed for him, and depends on no volition of his. It is pressed upon us that under this rule much inequality will result. It is said that a man who collects his collateral the day before the declared insolvency will have the right to prove and receive dividends on but a part of the original debt, while the man who collects his collateral the day after the declared insolvency can use his full claim to draw dividends. We see no anomaly or injustice in this. It grows out

of the nature of the transfer in trust for the benefit of both. It is much more logical to have such a difference created by operation of law or by deed of assignment and change of title than by the mere voluntary act of the creditor in filing proof of claim.

Our conclusion upon this main question in the case makes it unnecessary for us to consider other questions discussed by counsel, which were material only in the view taken by the court below on the issue just considered. If the Chemical Bank should receive from dividends and collections payment of the debt, principal and interest, now owing to it by the Fidelity Bank, the question would arise whether it could not properly be charged with the note for \$25,000 which, through negligence, it failed to collect. It is quite clear, however, that dividends declared and to be declared, together with all collections from collaterals, including, as such, the note just referred to, will fall far short of paying the \$300,000 and interest due the Chemical Bank on the original debt. The question suggested, therefore, does not arise on the facts of the case.

The decree of the court below is reversed, with instructions to enter a decree ordering the receiver to allow the claim of the Chemical National Bank for \$300,000, with interest to the day when the Fidelity Bank suspended and was taken charge of by the agent of the comptroller.

A rehearing was subsequently had after which on January 2, 1894, *Taft, Circuit Judge*, delivered the following opinion:

In the opinion already filed in this case consideration was not given to the question of interest upon dividends due to the Chemical National Bank. Dividends on claims against the Fidelity National Bank were declared by the comptroller of the currency as follows: October 31, 1887, 25 per cent; June 15, 1889, 10 per cent; June 30, 1890, 10 per cent; and August 5, 1891, 5 per cent.

Although the receiver took charge of the assets of the Fidelity Bank in June, 1887, the Chemical Bank did not present its claim for allowance until April 5, 1890. The delay was due to the fact that the Chemical Bank had in its hands when the Fidelity Bank suspended payment a large amount of bills receivable belonging to the Fidelity Bank, the proceeds of which the Chemical Bank supposed it could lawfully apply on this claim, and pay it in full.

On April 25, 1890, the receiver made the following offer to the attorney for the Chemical Bank:

"The receiver of the Fidelity National Bank hereby rejects the accompanying claim for the amount stated, he claiming that all sums realized or which should have been realized on the collaterals left with the Chemical National Bank as security for this loan should be credited on the same, and said claim reduced in that amount; and that all sums that may hereafter be realized on said collateral should be used to reduce the amount of this claim. He is willing, and now offers, to accept a proof of claim from the Chemical National Bank for the sum of

two hundred thousand dollars, and to pay to it the dividends heretofore paid and to be hereafter paid to other creditors thereon, without prejudice to its rights to sue upon the balance of said account not so allowed; with this stipulation, however: that should the court hold in any action that the receiver is right in his said claim, and is entitled to have all sums realized or which should have been realized on said collaterals credited on said claim, and a dividend paid only on the balance of the same, then, and in that case, all sums hereafter realized from said collaterals shall be applied to reduce the amount of said claim herein offered to be allowed, and the same percentage on such collections accounted for, by the Chemical National Bank, to the receiver, as have been paid to it by them.

"David Armstrong,

"Receiver Fidelity National Bank."

The offer thus made was not accepted.

We are of the opinion that no interest can be allowed on any dividends due the Chemical Bank for the period intervening between the time when such dividends were declared payable and the presentation of the claim of the bank. The damage to the Chemical Bank from this delay was self-imposed. The money applicable to such dividends lay during this period of two years and six months in the treasury of the United States drawing no interest. It would be manifestly unjust to the other creditors to reduce their share in the assets of the defunct bank to compensate the Chemical Bank for a loss of its own making. However bona fide its belief may have been in its power to pay its debt in another way, we do not see why the other creditors should be made to suffer for its mistake.

The question whether the Chemical Bank should receive interest on the dividends to be paid on the \$200,000 which the receiver offered to allow, turns on the further question whether he affixed to his offer to pay these dividends a condition which would prejudice in any way the rights of the Chemical Bank. The counsel for the bank contends that the receiver's offer, properly construed, required the bank to agree that if the court should decide that the claim must be reduced by all sums which had been or should have been realized before the presenting of the claim, then the bank would reduce its claim not only by so much thus adjudicated to be a proper reduction, but also by any sums realized after presentation, though not adjudicated to be proper reductions. The language of the receiver in his offer is not as fortunate as it might be, but we do not think it can bear the construction contended for.

When the offer was made, the Chemical Bank had collected \$75,000, and had negligently failed to collect \$25,000. This, according to the receiver's contention, reduced the claim of the bank to \$200,000. The Chemical Bank had other collateral applicable to the debt, but this had not then been collected. According to the receiver's contention, collections on this latter collateral should also reduce the claim.

The obscurity in the receiver's language arises from the clause in the second paragraph which follows the clause "that the receiver is right in his said claim." The following clause reads thus: "And is entitled to have all sums realized or which should have been realized on said collaterals credited on said claim, and a dividend paid only on the balance of the same." It is manifest that "his said claim" refers to the receiver's statement of his rights in the first paragraph, in which he maintained that the Chemical Bank must reduce its claim by all sums then or thereafter realized from collateral, or which should have been realized therefrom. The clause following the words "his said claim" was evidently intended to be a mere repetition of that statement. If the statement and its repetition are capable of having the same meaning, they should be given it. "All sums realized" may mean "all sums now realized," or it may mean "all sums now or hereafter realized." To have the same meaning as the claim of the receiver already stated in the first paragraph, and specifically referred to, the words must be given the latter meaning. The receiver's proposition was, therefore, to allow and pay dividends upon \$200,000 of the claim without prejudice, on the one hand, to the right of the Chemical Bank to sue for the allowance of the remaining \$100,000, and without prejudice, on the other hand, to the right of the receiver to reduce the claim below \$200,000 in case the court should hold such reduction proper. Thus construed, the offer was an equitable one, and the refusal of the Chemical Bank to accept dividends under conditions which did not prejudice its right in any way must prevent the payment of interest to it on dividends due the \$200,000 part of its claim. The money which it could have drawn on this part of the claim remained in the United States treasury, earning no interest. The Chemical Bank cannot charge the other creditors with interest for its own delay.

It remains only to consider the interest on the dividends to be paid on the \$100,000 which should have been allowed by the receiver in accordance with the opinion of this court at the time that he rejected the claim. The question at issue between the receiver and the Chemical Bank was one of such doubt that it would have been quite improper for him not to try it in court. The chance of his sustaining his view was sufficiently great to make any reasonable expense, in seeking to maintain it in court, a fair charge against the other creditors because of the possible benefit they might derive by a successful issue of the litigation. Now, a part of the reasonable expense of refusing to pay what is believed to be an unjust claim, but which is held thereafter to be a just one, is the damage from the delay to the person to whom the payment should have been made,—a damage which is measured by interest on the amount due and unpaid during such delay. It is equitable and just, therefore, that the share of the other creditors in the assets of the bank should be reduced by enough to pay the interest on the delayed dividends on

the \$100,000 from the date of the rejection of the claim until such dividends are paid. This conclusion is fully sustained by the decision of the supreme court in the case of *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 33 L. ed. 747. In that case—which also grew out of the failure of the Fidelity Bank—the creditor bank had presented its claim to the receiver, in September, 1887, and it was rejected. The circuit court held that the claim should have been allowed, and adjudged that interest must also be allowed on the dividend declared October 31, 1887, until the dividend should be paid. The supreme court affirmed the circuit court both in regard to the validity of the claim and also as to the interest, saying, upon page 470, 133 U. S., and page 760, 33 L. ed.: "The allowance of that interest is necessary to put the plaintiff on an equality with other creditors."

We think that the receiver was entitled to take a reasonable time in which to consider and reject or accept the claim of the Chemical National Bank after its presentation; that twenty days was not unreasonable; and, therefore, that no interest should be allowed on any dividend until after April 25, 1890.

Interest will be allowed on the first two dividends, on one third of the claim as allowed, from April 25, 1890, until the dividends shall be paid. Interest will also be allowed on the dividend declared June 30, 1890, on one third of the claim, as allowed, from the date the dividend was declared payable until it shall be paid. Interest will also be allowed on the dividend declared August 5, 1891, on one third of the claim, until the dividend shall be paid. It is admitted that upon July 25, 1892, the receiver paid to the Chemical National Bank \$100,000. We think it just that this \$100,000 should be applied as a credit upon the dividends on the two thirds of the claim, as allowed, which do not bear interest.

The judgment of this court, therefore, will be that the decree of the court below is reversed, and that the cause be remanded, with instructions to enter a decree in accordance with this opinion.

Petition for second rehearing was subsequently filed and argued before **Taft** and **Lurton**, Circuit Judges, and **Severens**, District Judge, and on February 5, 1895, **Taft**, Circuit Judge, delivered the opinion of the court:

This case is before the court on two motions for a rehearing. The original opinion of the court filed at the last term is to be found in 16 U. S. App. 465, 8 C. C. A. 155, and 59 Fed. Rep. 372. The controversy related to the allowance of a claim for more than \$300,000 in favor of the Chemical National Bank of New York, against David Armstrong, the receiver appointed by the comptroller of the currency to take charge of the assets of the Fidelity National Bank of Cincinnati, and to distribute the same in accordance with law to the persons properly entitled. The claim of the Chemical Bank was based on a loan made by it, as it supposed, to the Fidelity Bank, at the instance of E. L. Harper, the

vice-president of the Fidelity Bank. The loan was evidenced by a certificate of deposit for the amount of the loan, signed by the cashier of the Fidelity Bank, payable to E. L. Harper, and indorsed by him in blank. It was secured by a large amount of collateral, in the form of commercial paper. The amended answer of Armstrong, in the court below, averred that the alleged loan was made by E. L. Harper without authority, and that the funds obtained were never used by the Fidelity Bank, but were taken by Harper to his own use, and the liability of the Fidelity Bank for the loan, or any part of it, was therefore denied. The issue thus made was not pressed by counsel for the receiver, and was decided against him, both in the circuit court and in this court, in the original opinion filed in this case. The decision here was made practically without argument by counsel, and is disposed of in our former opinion in a sentence.

The main question discussed when the case was first heard in this court was whether a creditor of the Fidelity Bank, holding collateral at the time of the declared insolvency, was obliged, in proving his claim against the insolvent bank, to reduce it by the amount collected on the collateral after the declared insolvency, and before the allowance of the claim. This court held that the claim of the creditor against the fund in the hands of the receiver must be allowed for the full amount due, with interest down to the time of the declared insolvency of the bank, without respect to the collateral then held or to collections made on it thereafter. No motion for a rehearing was made or granted upon this point, and the ruling of this court thereon remains unchanged.

Another question considered in the former opinion was in respect to the right of the claimant bank to have interest paid to it on dividends, the payment of which had been long delayed after the time when similar dividends were paid to all the other creditors. Upon this question the appellant conceived that, by the former opinion of this court, injustice had been done to it by allowing too small an amount for interest, and a motion was therefore made on its behalf for a rehearing thereon. An examination of the record led us to grant the motion. Pending that motion, no mandate could, under the rules of this court, issue to the circuit court. While the case thus remained within the breast of this court, and completely subject to its control, the Supreme Court of the United States decided and announced its opinion in the case of *Western Nat. Bank of New York v. Armstrong*, reported in 152 U. S. 846, 88 L. ed. 470, in which it was held that the borrowing of money by a bank, though not illegal, is so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money, and that where no such special authority appears, and no ratification of the unauthorized act is shown, the bank is not liable. Therefore the receiver made a motion for a rehearing on the question whether there was any liability at 28 L. R. A.

all of the Fidelity Bank to the Chemical Bank on the claim asserted and heretofore allowed by this court. The action of the circuit court in allowing the claim at all was assigned for error on the cross appeal by the receiver, and, as already stated, though not pressed, was nevertheless before this court for decision. Because the court still had the case under its control, and no mandate had gone down, and because the decision of the Supreme Court of the United States seemed to throw a new light on the question heretofore decided against the receiver, it was deemed proper to grant the motion to rehear the question. The fact that the point was not pressed by counsel for the receiver at the original hearing doubtless vested a discretion in this court to refuse to rehear the issue now urged. We would not by our action in this case wish to establish a precedent that this court will rehear any case upon a question lurking in the record, and not pressed at the first hearing, because, in a subsequent decision of the supreme court, a principle is established by which such question must be decided in a different way, and a different conclusion in the case reached. In this case, however, the moving party is a trustee appointed, not by the beneficiaries, but by the comptroller of the currency, and we feel disposed to exercise the discretion which we have in favor of a trust fund thus administered, which we might not exercise in favor of parties representing their rights in person.

The supreme court, in its conclusion in *Western Nat. Bank of New York v. Armstrong*, differs from the decisions of several state courts upon the same or kindred questions. In *First Nat. Bank of Allentown v. Sullivan*, 11 W. N. C. 362, the supreme court of Pennsylvania used this language: "We have no doubt of the power of national banks to borrow money by means of negotiable paper, made or indorsed for their accommodation, and that they are bound by the contract of their presidents or cashiers to indemnify the person who may have accommodated them with his credit. It is a usual banking operation, and, unless expressly prohibited, would be necessarily implied in every bank charter."

In *Barnes v. Ontario Bank*, 19 N. Y. 152, a state bank of New York was held bound by a certificate of deposit issued by its cashier to evidence a loan made to the bank, although the cashier made the loan and used the proceeds for his individual purpose. The same principle was applied in the case of *Coats v. Donnell*, 94 N. Y. 168. *Barnes v. Ontario Bank*, is cited with approval by the Supreme Court of the United States in the case of *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 604, 19 L. ed. 1008. The same principle is recognized and approved in *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165; *Sturges v. Bank of Circleville*, 11 Ohio St. 158, 167, 78 Am. Dec. 296; *Rockwell v. Elkhorn Bank*, 18 Wis. 654; *Ballston Spa Bank v. Marine Bank of Milwaukee*, 16 Wis. 120, 184; *Morse, Banks & Banking*, § 160. The effect of the foregoing cases is that it is within the usual course of banking business for a bank to borrow money, and

that the generally recognized authority of the cashier or of the managing officer of the bank extends to making such loans, and that, therefore, any one dealing with such officer has the right to rely on the existence of such authority unless the contrary appears. That the right to borrow money is incident to the banking business is decided by the judicial committee of the privy council in *Bank of Australasia v. Breillat*, 6 Moore, P. C. C. 153, 193-195, and by the court of appeals of New York in *Curtis v. Leavitt*, 15 N. Y. 9. The effect of the decision in *Western Nat. Bank of New York v. Armstrong* is to make the above rule as to the authority of a cashier to borrow money for the bank inapplicable to national banks; and the question to be decided in this case is whether there was any special authority vested in Harper, as the vice-president of the Fidelity National Bank, to borrow money for the bank, or whether, in this particular case, his act in so doing was ratified by the bank. Counsel for the appellant states upon his brief that, had he anticipated any real controversy upon the question of the liability of the Fidelity Bank, there was much evidence at hand to establish special authority of Harper and subsequent ratification by the bank. He therefore asks that, as the case must go back to the circuit court, in any event, the appellant be allowed to adduce additional evidence on these two points. In view of the fact that the decision of the Western National Bank against Armstrong gave an importance to these issues which they did not have under previous adjudications in the state courts, and in view of the discretion we have already exercised in favor of the receiver to allow a rehearing of the question, we think it only fair to the Chemical National Bank, the appellant herein, not to decide the question of special authority and of ratification on the record before us, but to reverse the decree for the reasons given in the former opinion, and to send the case back to the circuit court, with leave to the parties to introduce evidence on the issue whether the alleged loan created any liability against the Fidelity Bank at all. This court is very loth to open up a case for new evidence upon issues already decided, and has no intention of making a troublesome precedent by doing so in this case. The circumstances here are so peculiar as to prevent such a result.

And now as to the question of interest, which will become material only in case the liability of the Fidelity Bank is established. Dividends on claims against the Fidelity Bank, which had been duly allowed, were declared by the comptroller of the currency as follows: October 31, 1887, 25 per cent; June 15, 1889, 10 per cent; June 30, 1890, 10 per cent; August 5, 1891, 5 per cent. The Chemical Bank did not present its claim for allowance until April 5, 1890. On April 25, 1890, the receiver offered to allow the claim of the Chemical Bank to the extent of \$200,000, without prejudice, on the one hand, to the right of the Chemical Bank to sue for the allowance of the remaining \$105,000, and without prejudice, on the other hand, to the right of the receiver to reduce the claim al-

lowed below \$200,000 in case the court should hold such reduction proper. The language in which this offer was made is given in the former opinion. Its effect we found to be as above stated. This we considered to be an equitable offer by the receiver, and one which ought, in equity, as between creditors entitled to share the same fund, to prevent the payment of interest upon any dividends which would have been paid then or thereafter, had the Chemical Bank seen fit to accept the offer. In the argument upon the rehearing, counsel for the Chemical Bank questions the correctness of the construction which the court placed upon the language of the receiver's offer, as well as of the view which the court took of the proper effect to be given to the offer, thus construed, upon the payment of interest. After a re-examination of these two questions, we are still of the opinion that our construction of the language of the receiver's offer was correct; and that thus construed, if it had remained in force, it ought to prevent the payment of interest on the dividends paid or to be paid on the \$200,000. The argument of counsel proceeds on the theory that the question is to be settled on principles relating to the legal tender of money due at common law. We think, however, that those rules have little or no application in a case like this, where the question is of equality of distribution of a trust fund between creditors. By the argument on the rehearing, however, our attention has been especially directed to the state of the pleadings below, as indicating a withdrawal by the receiver of this offer to allow the claim for \$200,000. In the court below, in his amended petition, the receiver denied the liability on the part of the Fidelity Bank to the Chemical Bank for this loan, and this position of the receiver is emphasized by his present motion for a rehearing upon the issue thus made. We quite agree with counsel for the appellant that the raising of such an issue must be considered to be a withdrawal of the previous offer by the receiver, and, therefore, that the offer cannot now be used as a ground for refusing the payment of interest upon dividends upon the whole claim for the period after April 25, 1890, when the claim was presented and rejected, down to the time when such dividends shall be paid. The court overlooked this consideration in its former opinion, and to this extent the previous decision of the court is modified. The previous order of the court is therefore changed so as to make the order as follows: That the decree of the circuit court is reversed, with leave to the parties to adduce further evidence upon the issue whether the Fidelity Bank owes anything to the Chemical Bank by virtue of the alleged loan; that, if this issue is decided in favor of the receiver, the bill shall be dismissed, and a decree entered in favor of the receiver for the restitution of the \$100,000 paid by the receiver July 25, 1892, to the Chemical Bank on the faith of the decree of the court below; that, if the liability of the Fidelity Bank for the loan is established, a decree shall be entered directing the receiver to allow the claim for \$305,450 (being the amount of the loan

and interest until the date of the declared insolvency, June 21, 1887), and to pay the dividends accruing on such claim, with interest, on those declared before April 25, 1890, from that date, and on those thereafter declared, from the date of their declaration, until the dividends and interest are paid, and

to take credit, on the payment of such dividends and interest, for the \$100,000 by him paid July 25, 1892, on the principle ordinarily applied in partial payments. The costs of this appeal will be equally divided. The costs in the circuit court will abide the event.

CONNECTICUT SUPREME COURT OF ERRORS.

Re William CLARK.

(.....Conn.....)

1. **The power to issue a mittimus** without a regular trial and judgment is given to a justice of the peace by Gen. Stat., § 91, when complaint is made to him by grand jurors of a refusal to give testimony before them.
2. **A summary enforcement of an answer by imprisoning a witness** is not an exercise of judicial power to punish contempt of court as a criminal offense, but of administrative power to enforce a law which if enforced at all must be enforced at once.
3. **Due process in the imprisonment of a witness for refusal to answer a proper question** on an investigation by grand jurors does not require a regular trial and judgment, but is complied with by the issue of a writ on complaint of the grand jurors to a justice of the peace as provided in Gen. Stat., § 91.

(September 1, 1894.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Litchfield County discharging defendant upon habeas corpus from the custody of James A. Cochran, deputy sheriff, to which he had been committed for refusal to answer questions propounded by the grand jury. *Reversed.*

The facts are stated in the opinion.

Messrs. L. J. Nickerson and W. B. Smith, for appellant:

The commitment being in due form, and in conformity with the statute, and the justice having jurisdiction, the party being before him, errors and irregularities of procedure are not proper subjects of revision upon a writ of habeas corpus.

Bion's App. 11 L. R. A. 694, 59 Conn. 389, and cases cited.

The applicant was clearly liable to be committed to jail until he answered the question set forth.

State v. Teahan, 50 Conn. 94.

A judgment for contempt cannot be impeached for error or irregularities. An attack on such a judgment goes to the power to act. On habeas corpus, in cases of contempt, the only question is one of jurisdiction.

NOTE.—Statutes attempting to confer the power to imprison witnesses for contempt were held unconstitutional in *Re Sims* (Kan.) 25 L. R. A. 110, and *Langenberg v. Decker* (Ind.) 16 L. R. A. 108, but in both cases on the ground that the officers to whom it was proposed to give such power were not judicial officers. In the present case the asserted ground of unconstitutionality is quite different. As to judicial power of summary punishment for contempt, see *State v. Kaiser* (Or.) 8 L. R. A. 584, and note; *Re Clayton* (Conn.) 13 L. R. A. 63, and note.

28 L. R. A.

9 Am. & Eng. Encyclop. Law, p. 215; *Ex parte Kearney*, 20 U. S. 7 Wheat. 39, 5 L. ed. 391.

Mr. Daniel Davenport for appellee.

Hamersley, J., delivered the opinion of the court:

There are two questions presented by this case:

First. Does section 91 of the General Statutes authorize a justice of the peace to issue a mittimus without a regular trial and judgment? The section is as follows: "The grand jurors in each town, or any three of them, may meet to advise concerning offenses committed therein, and may call before them, at such meetings, any witnesses, to be examined touching the same; and if any person shall refuse to appear before them at such meeting, being summoned by competent authority, they may apply to a justice of the peace for a *capias*, who may issue one to bring such person before them; and if any person appearing, or being brought before them, shall refuse to be sworn, or, being sworn, shall refuse to answer any proper question, they may complain to any justice of the peace in the county where such meeting is had, who shall cause such person to be brought before him, and commit him to jail, there to remain, at his own expense, until he shall give evidence as required. Said grand jurors, when so met, shall have all the powers of a justice of the peace, when holding court, to commit for contempt." The claim is, that the refusal to answer a proper question, asked in pursuance of this section, constitutes an offense; that the complaint to a justice of the peace is the commencement of a prosecution by complaint; that upon such prosecution the witness is entitled to a trial as in any prosecution for a criminal offense; and that a mittimus for his commitment to jail can issue only after final judgment has been rendered. This meaning imputed to the statute would practically destroy its efficiency. A witness who refuses to answer need only demur to the complaint made to the justice, appeal from the judgment on the demurrer to a higher court, and before the case is determined the occasion for which the question was asked may have passed. Such was the course attempted in this case. The words of the statute will not bear such a construction; and although the statute, in various forms, has been in force since 1750, and has been in constant use as a means for the detection of crimes, yet no record can be found that the claim now made by the plaintiff has ever before been inti-

mated. The plaintiff suggests that the fact that in the Revision of 1821, and until the Revision of 1849, the statute read as follows: "Such grand jurors may make complaint to any justice of the peace, who shall cause such person to be brought before him, and, on conviction, shall commit him to the common jail" (Rev. Stat. 1821, p. 260, § 6),—proves that until 1849 a trial by the justice was necessary, and that the omission of the words "on conviction" in the Revision of 1849 did not alter the law. The words "on conviction," which were retained in the statute until 1849, will not bear the interpretation which the plaintiff gives them. These words were used in the original act of 1750, and their meaning clearly appears by that act. The act provides that the grand jurors in each town shall meet once in three years, or oftener if necessary, "to advise concerning such breaches of law as by their office they are to inquire after, and present, and shall have power to call before them . . . any persons as witnesses, in order to be examined touching such delinquency as they are inquiring after; and if any person refuse to appear . . . upon being summoned thereto by warrant from an assistant, or justice of the peace (who are hereby directed to grant such warrant, on request of such grand jurors) or shall refuse to be examined upon oath, if thereto required, such witnesses may, by such assistant, or justice, on conviction of such refusal, be committed to the common jail." "On conviction of such refusal," as thus used, did not mean on conviction of an offense after trial, but simply meant on being convinced of such refusal in any satisfactory manner, and especially by the persistence of the witness in his refusal; and the meaning then attached to the words has never been changed.

In 1644 a grand jury was required to appear before every court yearly "to make presentment of breaches of any laws or orders, or any other misdemeanors they know of in their jurisdiction." 1 Col. Rec. 91. In 1668 at least one grand juror was required to appear from each plantation in the county. 2 Col. Rec. 98. In 1680 it was ordered that the grand jurors appointed by the county courts should serve at least one year. 3 Col. Rec. 52. In 1681 the oath prescribed for grand jurors, who had now become a permanent inquest, was altered so as to include the obligation "with all due care and faithfulness to make diligent search" for violations of law, as well as presentment of those within their knowledge. Id. 95. In 1712 each town was required to appoint two or more grand jurors to serve as before, whose names should be returned to the clerk of the court, and a sufficient number of them be summoned as needed. It will thus be seen that the grand jurors of the towns were officers, annually appointed, and not only constituted the grand inquest of the county attending the superior courts for the purpose of presenting crimes, but were also charged with the duty at all times of making diligent search, with all due care and faithfulness, for the discovery of violations of law, and of presenting offenses discovered to the

judicial authority in each town, as well as at the sessions of the court. The Act of 1750 practically authorized a local inquest to be held in each town, as well as the grand inquest at the sessions of the court, and directed an assistant, who was a judge of the highest court, or one of the justices of the peace, who might be eligible to sit as judge of the county court, to issue the warrants necessary to enable the local inquest to perform its duties; and it is evident that when the act directed such judge to commit a witness who refused to be examined under oath upon conviction of such refusal, it did not contemplate any formal trial, or any hearing different from that which might precede the ordering of a mittimus if the judge were holding court and had occasion to commit a witness who refused to be examined under oath before a grand jury. The Statute of 1750 has been modified in the process of time, both by changes in phraseology and in the duties of grand jurors and justices; but there has been no change in the purpose of the act, or in the authority for the summary commitment of a witness who refuses to testify. The omission of the words "on conviction," when the legislature enacted the Revision of 1849, was probably made because the words had lost much of their original significance, or were deemed unnecessary in the present form of the act, or liable to misconstruction, but, however that may be, it is clear that the alterations in the act made in 1849 were intentional, and that the act as altered does authorize a justice of the peace to issue a mittimus without a regular trial and judgment; and this operation of the act has been unquestioned for nearly fifty years.

Second. Is the issue of a mittimus, in pursuance of section 91, in violation of any provision of the constitution? The plaintiff claims that his imprisonment under the mittimus was unconstitutional, because the statute authorized the mittimus to issue only upon conviction of a criminal offense, after trial; that the mittimus was in fact issued without such trial, and therefore he was imprisoned without due process of law. This argument of the plaintiff would be conclusive if his construction of the statute were correct. His brief also claims that the statute is unconstitutional if his construction is not correct, and as the discharge of the plaintiff by the court below was right if the statute authorizing the imprisonment is in violation of the constitution, we must consider that question. Section 91 does not create any criminal offense, nor does it relate to any judicial proceeding. The imprisonment imposed is not a penalty for any crime. It simply imposes a duty on the citizen, and seeks to enforce that duty when immediate obedience is essential by the temporary restraint of the person. The restraint of the person may be authorized by the legislature without the intervention of any court in many cases where such restraint is necessary to the execution of the law and the enforcement of police regulations. The defendant in a civil action, who refuses to turn out property for attachment, may be committed to jail without trial. Selectmen may, with-

out trial, take children from the custody of parents who neglect them, and bind them out to masters. Gen. Stat. § 2109. For certain infringements of the pauper laws they may, without trial, order an inhabitant of another state to be forcibly taken out of this state, and may expel from their town the inhabitant of another town. Sections 3292, 3293. A tax collector may, if necessary, commit to jail a citizen refusing to pay his taxes, there to remain until payment is made, or he be discharged in due course of law. Section 8889. A collector who fails to collect and pay over the taxes may himself, without trial, be committed to jail, as on execution after judgment. Section 8879. The moderator of any town meeting, or of any meeting of any society or other community, may order into custody any person who refuses to submit to his lawful authority, and have him forcibly removed until he shall conform to order. Section 52. The instances are numerous and familiar where officers are authorized to restrain, without trial, and even without process, persons who persist in the open violation of law. This power of summary compulsion to compliance with law may be committed to administrative as well as to judicial officers, and when committed to judicial officers they act solely in an administrative capacity, unless the power is exercised in the course of judicial proceedings. Section 91 relates wholly to administrative proceedings. It is a police regulation for the purpose of protecting society against crime by providing efficient means for the discovery of crime and the detection of the criminal. Our state has followed a policy different from that of England in the investigation of crimes. From a very early period in our history we have charged public officers with the duty of investigating as to the commission of offenses, and have invested them with the power of compelling witnesses to give the evidence necessary to discover the crime and the criminal. A remedy for the defect in the law of England in this respect has been under consideration since the introduction in parliament of the criminal code bill in 1880. In other countries the power of investigation is much more extensive. In India, England has established a carefully guarded system. Code Crim. Proc. §§ 154 *et seq.* But the power to authorize such investigation is inherent in every government, and the extent and manner of its use rest in discretion of the legislature, subject to constitutional limitations.

In this case the law imposed upon the plaintiff the duty of answering the proper questions put to him by the grand jurors. The legislature clearly has the right to enact such a law. His continued refusal to answer was an open and persistent defiance of the law when public interest demanded immediate obedience. The power of the legislature to authorize his restraint or imprisonment so long as he continues in such open defiance of law cannot be questioned. It is true that the right to examine a witness and to compel him to testify belongs to courts of justice, and is an essential part of a judicial proceeding. When he refuses to testify the

judge may require him to answer or stand committed. There is no trial of such witness. He is not committed as a punishment, but to enforce a particular duty; and no evidence need, in such case, be taken. Whart. Crim. Pl. § 907. And when this power of compulsion is exercised by a court of justice it is naturally held that the exercise should conform, as far as practicable, to the analogies of judicial proceeding. But it is also true that the power itself, while essential to judicial proceedings, is not distinctively a judicial power. It may be exercised by administrative as well as by judicial officers, and is, in its essence, so far as it can be called distinctive of any department, distinctively an administrative power. The principle on which the power rests is that, when immediate enforcement of law is essential to its execution, the state cannot permit a citizen to obstruct, by his disobedience, such immediate execution of law, and has the power to invest the officer charged with the administration of law, whether he be a judicial or administrative officer, with authority to compel, in such case of emergency, immediate obedience in the manner prescribed by law. The real nature of the power to compel a citizen to answer a proper question when a refusal to answer obstructs the necessary, immediate execution of law has been obscured by the habit of calling every such refusal a contempt. It is a contempt in the sense that every open defiance of law is a contempt of the authority of the state; it is a contempt of court when done in the course of a judicial trial; but the summary enforcement of an answer is not an exercise by the court of its judicial power to punish contempt of court as a criminal offense, but of its administrative power to enforce a law, which, if enforced at all, must be enforced at once. In *Com. v. Willard*, 22 Pick. 478, *Chief Justice Shaw* says: "To give effect to this power, it must be so applied as to compel a specific performance of this duty. If it be said that a witness may be indicted and punished as for other breaches of duty, the answer is obvious that, besides the long delay and postponement of trials which this would occasion, the witnesses called to prove the case against the contumacious witness might, in their turn, refuse to attend or to testify. Indeed the necessity for the existence and exercise of this summary power to compel actual and prompt attendance of witnesses, and to require them to testify, is too plain to be seriously questioned." This distinction is clearly marked in our legislation. The power to commit for a refusal to answer, given to every court, is not called a contempt, but is a power given to enforce the duty to appear and testify (Gen. Stat. § 842); while the power given to every court to punish for criminal contempt is given as a distinct power. Id. § 843. There are many instances where this power has been committed to administrative officers. County commissioners are authorized to compel, by commitment, information necessary to the enforcement of their administrative duties. The board of pardons has like authority in the performance of its executive duties.

Police commissioners of cities have like authority, and the commitment may be ordered by the commissioners, and the mittimus signed by their clerk. *Id.* § 165. The coroner may exercise the same power in the investigation of crime. The same power is inherent in the legislature without the enactment of a special law. The same power has been committed by the legislature to special commissions charged with obtaining information necessary to public interests. A noted instance is the commission of which the late *Chief Justice* Seymour was chairman; and the commitment of such power by the legislature to administrative officers has been held to be constitutional. *Noyes v. Bybee*, 45 Conn. 862. In that case this distinction is drawn: The power to compel a witness to answer is inherent in a court of justice, but, when the power to summon and examine witnesses is given to a mere administrative officer, the power to compel an answer cannot be inferred, but must be clearly given by statute. There is no power more essential to government than the power to discover and detect crime. In the exercise of that power the legislature has authorized grand jurors to summon witnesses before them and to compel answers to proper questions. This is an exercise of that police power essential to the existence of government, and does not violate any constitutional guaranty relating to the course of proceedings in judicial trials. The witness imprisoned in strict pursuance of that statute is imprisoned by due course of law, as truly as a prisoner duly convicted of a crime. Imprisonment in strict accordance with that statute involves, besides the official character of the persons acting under it, the refusal of the witness to answer a proper question put by the grand jurors, the application to a justice, the appearance of the witness before the justice, his continued refusal to answer, a finding by the justice of the facts necessary to commitment, a mittimus accurately reciting such facts, and signed by the justice. The finding by the justice of the necessary facts is not a judicial act, and does not involve a trial. The finding is of that quasi judicial character which characterizes the formation of opinion by every administrative officer when he is called upon to perform a ministerial act which the law authorizes only upon the existence of certain conditions. *Yudkin v. Gates*, 60 Conn. 426.

If any person is imprisoned under this statute, but not in strict pursuance of its provisions, he may be discharged upon habeas corpus. Upon such habeas corpus the court may be called upon to decide the following questions: the official character of the grand jurors and justice; the legality of the mittimus on its face; the propriety of the question asked; and if a case can be imagined where the mittimus has been issued after the witness has answered the question, that fact might be at issue. It is difficult to see, and unnecessary now to determine, what other questions could arise. A proper question is any question the witness may legally be compelled to answer. The pertinency of the question must be largely, if not wholly, left

to the judgment of the grand jurors. They are authorized to investigate in secret session. The whole object of their investigation might be defeated by disclosing to a witness the purpose of a question. We do not, however, say that their authority may not be so abused in pursuing an unjustifiable investigation that the witness will be entitled to protection. The fact that we have no knowledge of such abuse during an administration of the law for 150 years does not demonstrate that such abuse may not occur in the future. In *Anderson's Case* (decided in chambers by the late *Chief Justice* Storrs in 1858), it was held that a witness imprisoned for refusal to give evidence which might tend to criminate him must be discharged on habeas corpus; but the judge carefully avoids saying that in other cases the decision of the grand jurors and justice may not be conclusive. The correctness of that decision cannot be questioned, and the principle on which it rests would require the discharge on habeas corpus of a witness imprisoned under this law, in case, if such case could arise, such imprisonment violated any other guaranty of the constitution. While the constitutionality of this act has never been directly decided, it has never been questioned, and was plainly recognized in the case of *Re Clayton*, 59 Conn. 510, 18 L. R. A. 66. In that case a commitment under a law authorizing the examination as a witness of a person who had been convicted of drunkenness, as to how he had obtained the liquor which caused his intoxication, and authorizing his commitment in case of refusal to answer, was held to be legal, and in due course of law. The court says: "For more than a century and a half we have had upon the statute book a law authorizing the grand jurors in the several towns to meet and advise, and inquire into the offenses that had been committed, with power to summon and examine witnesses, and, if need be, to punish for contempt. This proceeding is but an extension of the same power to other officers, for the same general purpose, namely, the protection of society, by preventing crime through the detection and punishment of offenders. . . . This objection misconceives the nature and character of the proceeding before the police court. The appellant was not then before the court as a defendant in a criminal prosecution. That had been his position, but upon his conviction that was changed, and he became, so far as this case is concerned, merely a witness. He was in no sense on trial,—no one was,—and therefore was not in jeopardy. The proceeding was not judicial, but ministerial. . . . It is the duty of all good citizens, when legally required so to do, to testify to any facts within their knowledge affecting public interests; and no one has a natural right to be protected in his refusal to discharge this duty. Public policy does not forbid, but, on the contrary, often requires, legislation to facilitate the administration of justice."

Judged by the analogies of past legislation section 91 is a lawful exercise of legislative power, and in the case above cited we held that compelling a witness by commitment to

give proper information essential to the investigation of crime was not an unwarranted exercise of judicial power by the executive department, where such compulsion was enforced by a magistrate acting in a ministerial capacity. The strongest case cited by the plaintiff, apparently in conflict with the doctrine of *Re Clayton*, is *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502. In that case the court held that a law authorizing a city council to commit a witness for refusal to testify was in violation of the constitution of Massachusetts. The decision is based in part on the special phraseology of the Massachusetts constitution, particularly of the clause granting power to the legislature to establish municipal governments, in connection with the fact that at the time the constitution was adopted it was no part of the law of the land that municipal boards of officers should have power to punish for contempt. The expressions relied on in this case relative to the general relations of the several departments of government must be read in connection with the particular facts and the particular constitution under discussion. The rule invoked by the plaintiff is not necessarily involved in the decision of *Whitcomb's Case*. It is the broad rule that a constitution establishing separate departments for the exercise of the powers granted, and vesting the judicial power in one department, necessarily forbids the legislature to authorize administrative officers, in the exercise of legitimate executive power, to use any method found essential to the exercise of that power which is also a method in common and necessary use in judicial proceedings; and that any act done in pursuance of such legislation is necessarily in violation of the constitutional guaranty that "no person shall be deprived of life, liberty, or property but by due course of law." This guaranty of the constitution relates primarily to the protection of the individual against unlawful acts of executive or judicial officers, and is not by itself a limitation on the power of legislation. "Due course of law" was originally synonymous with "law of the land." This guaranty as it first appears in our declaration of rights (Laws 1672, p. 1), is against any acts not warranted by "some express law of this colony." But the establishment of governments under written constitutions, without altering the meaning of the words, gave an effect to their operation which was not felt in England, nor in Connecticut until 1818. The written constitution placed limitations on the exercise of legislative powers. A law inconsistent with such limitation is not law. Hence an act warranted by a law inconsistent with such limitation is done without "due course of law." And so, in determining the validity of an act claimed to be obnoxious to this ancient guaranty, we may have not only the original question, Is the act clearly warranted by any law? but also the additional question, Is the law authorizing the act itself inconsistent with the limitations contained in the fundamental law? But this difference is only apparent. Under a written constitution the substantial question is the same as it was be-

fore such constitution was known.—Is the act authorized by the law of the land? It is authorized if warranted by any specific law, unless such law is a mere color of law by reason of its inconsistency with the fundamental law. Hence, in each case when an imprisonment in pursuance of statute law is claimed to be without due process of law, the question must depend on the circumstances of that case; not upon the meaning of "due process of law," for that meaning is well settled, but upon the compliance of the particular statute with the fundamental law limiting the exercise of legislative power. This view of the origin and meaning of the phrase "due process of law" is suggested in the opinion delivered by Justice Miller in *Davidson v. New Orleans*, 96 U. S. 97, 4 L. ed. 616. See also *Larson v. Steele*, 152 U. S. 133, 38 L. ed. 885; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751.

No general definition of the acts which, done under color of law, are without due process of law, can be given, because the definition in each case depends not so much upon the quality of the act as upon the relation of the particular law authorizing it to the fundamental law which limits the power of the legislature. And so, in dealing with the provisions of section 1 of article 14 of the Amendments to the Federal Constitution, the United States courts have, in the main, avoided general definitions, and treated each case as suggested in *Davidson v. New Orleans*, in view of the question whether the acts in that case are warranted by the law of the land. It cannot safely be affirmed that the phraseology of this amendment alters the meaning of "due process of law" as understood at the time this guaranty to the individual against the unlawful exercise of power by the agents of government was first incorporated into state constitutions and into the United States Constitution by article 5 of the Amendments. If this view of the constitutional guaranty be correct, the imprisonment of the plaintiff was by "due process of law." If it be claimed that the examination by the grand jurors, and the commitment of the plaintiff to compel an answer to a proper question, was in the nature of a judicial proceeding, and that the law authorizing such a proceeding by administrative officers is in violation of the provisions of the constitution dividing the functions of government and vesting the judicial power in the courts, the sufficient answer is that these great functions of government are not divided in any such way that all acts of the nature of the functions of one department can never be exercised by another department. Such a division is impracticable, and, if carried out, would result in the paralysis of government. Executive, legislative, and judicial powers of necessity overlap each other, and cover many acts which are in their nature common to more than one department. These great functions of government are committed to the different magistracies in all their fullness, and involve many incidental powers necessary to their execution, even though such incidental powers in their intrinsic

character belong more naturally to a different department. No act can be more clearly within the functions of the judicial department than the enforcement of the payment of a debt by the confiscation of the property and the imprisonment of the person of the debtor; but when the legislature finds it necessary to the full execution of the powers confided to the executive department to authorize such collection of debts due the government without recourse to the courts, such a law is not in violation of the division of powers made by the constitution. In *Murray v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272, 15 L. ed. 372, cited and approved in the opinion of Justice Miller (*Davidson v. New Orleans*, *supra*), it was held that an act of congress authorizing the audit of the accounts of a collector of customs, and authorizing the solicitor of the treasury to issue a distress warrant for the collection of the amount of balance found due the government, was not invalid as authorizing the exercise by the executive department of a judicial power; and that the levy of such warrant was not a violation of the guaranty of article 5 of the Amendments, that no person "shall be deprived of life, liberty, or property without due process of law." And in disposing of the claim that the law of congress was invalid because the duty it authorized the treasury department to perform was in fact a judicial act, Justice Curtis says: "So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law."

It is unnecessary to multiply illustrations of this essential principle of constitutional law that a statute authorizing administrative officers to perform executive functions by methods which partake of the judicial nature is not necessarily in violation of the constitutional provisions dividing the functions of government, and vesting the judicial power in courts. The real question in each case is, not merely whether the act is of a judicial nature, but whether the act is legitimately incident and necessary to the execution of powers confided to the executive and legislative departments, and not obnoxious to any prohibition of the constitution. This question has been answered by the application of various tests. The one most frequently applied is the inquiry whether the particular act has been treated as a legitimate exercise of executive power prior to the adoption of the constitution. As a determination of principle by the process of analogy such inquiry is useful, convenient, and, in most cases, conclusive; but can hardly be accepted as necessarily conclusive. The constitutional definition of the three departments of government cannot wholly depend upon the actual legislation in England, when parliament was little more than a court to register the expressions of royal will; or in Connecticut, when absolute political power was concentrated in a general court, and the effect of the common law was given to the penal codes of the Israelites. Another test, not infrequently applied, is the inquiry whether the act in question is a legitimate exercise of the police power necessarily inherent in government.

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The term "police power" is often used as a term of convenience, and not of clearly ascertained legal principle. It was found to be the most convenient phrase for designating the extent of state legislation, when such legitimate legislation covered the same ground included in the exclusive power of legislation given to congress notably in the wide field covered by the power to regulate interstate and foreign commerce. As used in this connection, the term has acquired a more definite meaning through the many decisions of the United States Supreme Court, but such meaning relates rather to what it has been decided to cover than to what it may in fact cover. As Justice Grier says in the *Licenses Cases*, 46 U. S. 5 How. 504, 12 L. ed. 256: "Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restriction or punishment of crime, for the preservation of the public peace, health, and morals, must come within this category." But the term is much more indefinite when used to designate that exercise of executive power which involves, and justifies, as a necessary incident, the performance of acts by administrative officers that may partake of a judicial nature; and the necessity for its use in this connection, except as a term of convenience, is much less obvious. The truth is that all such tests are useful aids in applying to each case the principles of constitutional law that must control. Our state constitution vests in the three departments of government the whole political power, and the power to be exercised in the several departments is coextensive with the exigencies of government, except as its exercise is restrained by the declaration of general principles and the specific limitations embodied in the constitution itself, including the United States Constitution, which is also the fundamental law of each state. The mere apportionment of political power to separate departments does not diminish the political power vested in the government; and so, when the exigencies of government demand the exercise of executive power involving as a necessary incident the use of methods which are also necessary to the exercise of judicial power, the authorization by the legislature of such exercise of power in such manner is a legitimate exercise of the legislative power. The legislature must determine the existence of the exigency and of the necessity, and the courts must be the final judge in each case whether such particular exercise of legislative power has been restrained by the general principles or specific limitations contained in the constitution. The determination of such limitations of legislative power is often one of the most difficult and delicate questions that can be presented to the court, but the decision becomes more easy when it is remembered that the real question as to the exercise in such case of a judicial power exclusively vested in the courts is one of substance, and not of form. The language used by Justice Harlan, in the recent case of *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, while discussing the limitations imposed by the United States Constitu-

tion on state legislation in the exercise of police power, applies as well to the question under discussion: "While every possible presumption is to be indulged in favor of the validity of the statute, the courts must obey the constitution rather than the law-making department of government, and must, upon their responsibility, determine whether, in any particular case, these limits have been passed. . . . The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

From whatever point of view we consider the imprisonment of the plaintiff, it was in "due course of law." The law authorizing it follows the analogies of our legislation long prior to the adoption of the constitution, has been in force for 150 years, and clearly comes within the most narrow definition of the police power inherent in the state government. It is also within the principles of constitutional law controlling such legislation. The power to punish crime and to preserve the public peace and morals belongs to the state government in all its fullness, and is essential to its existence. Legislation authorizing investigation as to the existence of crime is a legitimate exercise of this power. The conduct of such investigation prior to the prosecution of a person for the commission of a particular crime is beyond doubt an executive function, and in the execution of such investigation the state has the plainest right to proper information within the knowledge of every citizen, and to compel the disclosure of such information by any method consistent with constitutional limitations. In an emergency demanding immediate action it has the right to compel, as *Chief Justice Shaw* says, "the specific performance of this duty," obligatory on every person, and for that purpose to hold him in custody of the law. Such compulsion may be as essential to the efficient exercise of executive power as of judicial power, and its use by administrative officers is no more an infringement of the exclusive powers vested in the judicial department because such compulsion is in ordinary use in judicial proceedings than is the summary enforcement of a debt to the government because the payment of debts can ordinarily be enforced only by judicial process issued upon judgment of a court, or the destruction of a building to prevent the spread of a fire, or the taking of land to prevent the spread of disease, because property can ordinarily be condemned only by judicial proceedings. It would indeed be unfortunate if the strength of the government for the detection and prevention of crime were crippled by any constitutional provision forbidding the legislature to enact laws similar to the one under discussion; but no such prohibition can be found, either in the declarations contained in our bill of rights or in the specific limitations of our constitution. It may be added that this law, in authorizing a commitment to compel an answer to a proper question,

follows the analogies and provides all the essential safeguards of a summary commitment by a court for a similar purpose, with the additional security that the remedy for illegal use of the power is more ample, because upon a writ of habeas corpus the court may inquire more freely into the legality of a commitment when made by an administrative officer, whose only authority must be found in a special statute, than when made by a court in which the authority to commit is inherent.

We conclude, therefore, that section 91 is an exercise of legislative power for a purpose included in the powers vested in the state government, and is not in violation of any provision of our constitution or of the United States Constitution applicable to the limitation of state legislation. As section 91 authorized the justice of the peace to issue the mittimus in this case without a formal trial and judgment, and was a lawful exercise of legislative power, we find nothing in the record to authorize the discharge of the plaintiff by the court below. By his return the sheriff justified under a mittimus, valid on its face, reciting every fact required by law in order to authorize the issue of the mittimus. The plaintiff's reply does not contradict a single fact recited. It does not make a single allegation of fact inconsistent with the validity of his commitment. It substantially admits the official character of the grand jurors and justice of the peace; that the plaintiff appeared before the grand jurors lawfully convened under the statute, and was duly sworn; that the questions recited were asked him; that he willfully and contemptuously refused to answer the questions; that the complaint was made by the grand jurors to the justice; that he was duly called before the justice, and then persisted in his refusal to answer. The reply is substantially a demurrer to the return for three reasons: (1) Because it does not appear by the return that the grand jurors required the plaintiff to answer any questions relating to any offense committed in the town of Sharon. It does sufficiently and clearly appear that the examination of the witness was concerning offenses committed in said town. (2) Because it does not appear by the return that the questions put to the plaintiff were pertinent or proper questions. It does clearly appear that the questions were proper questions. *State v. Teahan*, 50 Conn. 94. (3) Because it does not appear by the return that he was formally tried by the justice as for a criminal offense, that he was allowed an opportunity to be heard by himself and witnesses in answer to said complaint, or that he was confronted by the witnesses against him; and therefore it does appear that he was imprisoned without due process of law. The insufficiency of this reason has been shown. As the proceeding before the justice was a ministerial, and not a judicial, proceeding, the provisions of the constitution relating to judicial trials do not apply. The reply, in addition to the statement that these matters do not appear by the return, makes the same claim of the necessity of a formal trial by way of alleging that the plaintiff demurred

to the complaint, claimed the right to plead guilty to the complaint, and to plead in answer to the allegations of the complaint, and to be confronted with the witnesses against him; that these claims were all denied, and that there was no such trial and judgment on the complaint. But the reply does not allege that the plaintiff was deprived of the opportunity of purging himself by answering the questions, or that he did not have full opportunity to make any statement, or present any reasons he saw fit, why the mittimus should not issue, or that the justice did not have ample reason for making his finding as recited in the mittimus. On the contrary, the reply is a substantial admission of all these facts. The reply is simply a claim that the return is no justification, because the mittimus could not issue except after a trial of the plaintiff and judgment against him, as in a criminal proceeding.

This claim has no foundation in law. So far as the reply states this claim by way of demurrer, the reasons are insufficient, and so far as it states the claim by way of direct assertion the allegations are irrelevant. The court below should have adjudged the reply insufficient, and, unless the plaintiff offered to prove facts showing illegality in the proceedings, should have forthwith remanded him to jail. The case, as it appears before us especially by the plaintiff's own claims, indicates that he openly and willfully obstructed the execution of the law. So long as he persists in such obstruction, his imprisonment is lawful, and well deserved.

There is error in the judgment appealed from, and the case is remanded to the Court of Common Pleas, to be proceeded with to judgment in accordance with this opinion.

The other Judges concur.

WISCONSIN SUPREME COURT.

CHICAGO, MILWAUKEE & ST. PAUL
R. CO., *Appt.*,

v.

City of MILWAUKEE, *Reapt.*

(.....Wis.....)

1. The exception in a statutory provision exempting railroad property

NOTE.—*Liability of railroad right of way to assessment for local improvements.*

Although the cases are not very numerous upon this question the courts are not agreed as to the rule which is applicable.

There have been some cases in which the right of way was held not liable to the assessment in the particular case because there was no benefit, and others in which the court has assumed the position that there could be no benefit in such cases. In all of these the more direct question as to whether or not a right of way could be assessed and sold to enforce payment of the assessment seems to have been ignored.

The English cases.

The question does not seem to have been directly considered in England.

In *North London R. Co. v. Vestry of St. Mary*, 21 Week. Rep. 226, 27 L. T. N. S. 672, the assessment was on depot grounds.

In *Great Eastern R. Co. v. Hackney Board of Works*, 8 App. Cas. 687, 52 L. J. M. C. 106, 49 L. T. N. S. 509, 31 Week. Rep. 793, reversing L. R. 9 Q. B. Div. 412, 51 L. J. M. C. 57, 46 L. T. N. S. 679, 30 Week. Rep. 765, it was held that the property did not bound on the highway, and in *London, B. & S. C. R. Co. v. St. Giles*, L. R. 4 Exch. Div. 239, 46 L. J. M. C. 186, 41 L. T. N. S. 162, a similar decision was made.

In *London & N. W. R. Co. v. Vestry of St. Pancras*, 17 L. T. N. S. 654, the railroad ran beside the highway at a higher grade supported by a retaining wall and the court held that the land of the company bounded on the street and was subject to assessment, but the action appeared to be one to recover the amount of the assessment from the corporation without any attempt to enforce a lien against the land.

In *Higgins v. Harding*, L. R. 8 Q. B. 7, 43 L. J. M. 28 L. R. A.

from taxation "except that the same shall be subject to special assessment for local improvements" has no operation or force except to exclude such assessments from the exemption, and leave them subject to the law as it stood before the statute.

2. Tracks and necessary right of way of a railway company are not subject to assessment and sale for benefits by local improve-

C. 31, 27 L. T. N. S. 483, 21 Week. Rep. 191, where a railroad was carried over a highway on a bridge and on each side of the street was a narrow space left for the purpose of making repairs, beyond which the road was carried forward on an embankment and arches, the court held that the spaces and slopes of the embankment were land subject to assessment for improving the street. But in that case also the question of enforcing the assessment is left undecided.

Property not contiguous.

In case of a railroad right of way as well as in those relating to other classes of property the assessment will not hold if the property is not contiguous as required by the statute.

A right of way in and across a street is not "contiguous property abutting on" the street within the meaning of the statute permitting such property to be assessed for an improvement of the street. *South Park Comrs. v. Chicago, B. & Q. R. Co.* 107 Ill. 105, affirming *Chicago, B. & Q. R. Co. v. South Park Comrs.*, 11 Ill. App. 562.

Property not benefited.

If the property is not benefited the assessment against it will not hold.

The assessment cannot be sustained unless benefit to the railroad property is shown. *State v. Elizabeth*, 37 N. J. L. 380.

There must be benefit to justify the assessment. *Re Public Parks Comrs.* 47 Hun. 302.

There is no benefit which will justify the assessment as for a local improvement of the cost of widening the passageway of a street under a railroad bridge, upon the track of the railroad extending on either side of the bridge. *Bloomington v. Chicago & A. R. Co.* 134 Ill. 451.

In *State v. Newark*, 27 N. J. L. 185, it was held

ments, in the absence of an express statutory provision.

3. No benefit to railroad tracks and the necessary right of way, which will sustain an assessment for benefits, will accrue from street improvements.
4. The fact that abutting land of a railroad company not in use for railway purposes will probably be required for such use in the near future will not exclude it from assessments for street improvements.

(March 5, 1896.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County in favor of defendant in an action brought to set aside an assessment which had been made against plaintiff's property for street improvement. *Reversed.*

Statement by Pinney, J.:

This was an appeal to the circuit court from an assessment of benefits made September 1, 1891, upon a strip of land owned by the appellant in fee, and used in part for its tracks, and as a right of way for railroad purposes, abutting upon the northerly side of Commerce street, and extending from the northeast corner of lot 14, in subdivision of lots 2 and 8, section 21, in Milwaukee, to the northwest corner of block 5, in the sixth ward of said city, for grading and paving the roadway of said street with cedar-block pavement, the grading, curbing with stone, and planking of the sidewalks, and the paving of the gutters on said street opposite said

land, being a total frontage of 2,275 feet. The amount of the assessment for benefits was \$5,687.51 on a strip of land between said Commerce street and a line drawn parallel with and 50 feet northerly of the center of the main track of appellant's railway on lots in said strip numbered 83, 84, 85, 86, 87, and 88. The tracks beginning at the lower end of appellant's premises, opposite lot 14, were 21 feet above the grade of Commerce street, and ascended, on a regular grade, to the other end of the premises, and were on an average elevation of 25.9 feet above the level of Commerce street. The width of the part of the strip between the center of appellant's main track and Commerce street varied, and, for the purposes of the trial of the appeal, the court divided the strip into two parts, namely: The easterly portion, having a frontage of 810 feet on Commerce street, and along which the land between the tracks and Commerce street was considerably more than 50 feet wide, for right of way, and the excess was not used for railroad purposes; and the westerly portion, where the land assessed lying between the main railway track is practically no more than 50 feet wide, and is 1,665 feet long. It appeared on the trial that the strip of land within the limits described had been used for railway purposes since 1854; that on the westerly portion of the strip the slope of the embankment necessary for its support came down practically to the curb line on Commerce street, and this was not disputed; and there were some five buildings on the

that a railroad track could not be said to be specially benefited by the widening of a street through which it ran, so as to be liable to assessment for the improvement.

It requires no argument to show that the paying of a footway by the side of a railroad track can confer no possible benefit upon the property known as the right of way, hence the whole theory which justifies such charges falls in this instance. *Mount Pleasant v. Baltimore & O. R. Co.* 11 L. R. A. 520, 138 Pa. 365.

In *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 509, the court said: "While it was proper to consider, in this case, all benefits conferred upon the defendant's right of way, for all railroad purposes, by the construction of the improvement, it is manifest that it would be unjust to charge upon the land benefits which might in the opinions of witnesses be conferred on the land should it be devoted to other purposes, when the railroad company is prohibited by law from using the land for any but railroad purposes."

Where the only land permitted by statute to be assessed for local benefits is such as is specially benefited, land owned by a railroad company and used for depot purposes, or standing vacant, cannot be assessed for laying a sidewalk since it cannot be increased in value for any purpose for which the railroad company can properly use it. *New York & N. H. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534.

The railroad company has a qualified easement or right in the land for a specific use and the value of their right or easement in the land cannot be directly and substantially increased by the existence of a highway adjoining its right of way and therefore is not subject to assessment for benefits. *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 355, 4 Am. Rep. 62.

29 L. R. A.

Property generally.

It is generally held that the mere fact that property belongs to a railroad company will not prevent its assessment.

Land owned by a railroad company in fee and without restriction upon its use, and which is occupied only as a place for running off and leaving freight cars, but which is well situated for mechanical and manufacturing purposes, is liable for assessment for a public sewer by which it is benefited. *New York, N. H. & H. R. Co. v. New Britain*, 49 Conn. 40.

Depot grounds are subject to assessment. *Burlington & M. R. Co. v. Spearman*, 13 Iowa, 112.

In *Nevada v. Eddy*, 123 Mo. 543, where the question was as to the liability of property used as depot grounds to assessment, the court says that it is not exempt by reason of the constitutional provisions making railroads public highways, and that there may be a distinction between property used as right of way and that used for depot and yard purposes.

The property of a railroad company constituting terminal facilities and dock property may be assessed for improvements. *Re Alexander Ave.* 44 N. Y. S. R. 545.

Railroad companies may be liable for assessment upon their stations, freight depots, and repair shops, which are benefited by the opening of a street leading to them. *Re Opening of Berks Street*, 12 W. N. C. 10.

Right of way.

A distinction has sometimes been made between those cases in which a sale of the property was necessary to enforce the assessment,—holding that in such cases the assessment could not be made,—and those in which the assessment could be collected by suit against the owner,—holding that in such cases the assessment was valid. This distinction

easterly portion owned by employes of appellant, in which they lived, but it was probable that in the near future the entire strip would be required for railway purposes. Evidence was given by several witnesses on the part of the appellant tending to show that the slope of the embankment could not be used for unloading freight of any kind, and that the improvement of the street was no benefit to the appellant's tract or strip of land, but some of them estimated the benefits to the wider portion or easterly part of the strip at from \$5 to \$10 per front foot. On the part of the respondent one witness only was called, and he gave testimony tending to show that the benefit to the appellant's property was \$5 per front foot of the entire length of the strip, 2,275 feet; that the ground could be leveled up along the westerly portion of said strip by building piers, and be used for warehouses and for platforms for loading materials down on wagons on the street; that lumber, stone, hay, etc., could be so loaded; and that the strip was accessible only from Commerce street. The distance down would be about 30 feet. The appellant asked the court to instruct the jury: "(1) You cannot assess benefits against lands used by the appellant at the time of the assessment solely and necessarily for right of way purposes. (2) Appellant's land, lots 84, 85, 86, 87, and 88, was at the time of the assessment not used for any purposes other than right of way purposes, and there is a conclusive presumption that a strip fifty feet in width on each

side of the center line of said main track across said lots was and is necessary for right of way purposes, and such strip was not properly assessable for benefits at the time of the assessment. (3) So much of appellant's lands in said lots lying south of said tracks as was necessary to sustain the embankment was at the time of the assessment used solely and necessarily for right of way purposes. (4) If you find that land not in use by appellant was at the time of the assessment designed for use for right of way and railroad yard purposes, and was held for such purposes, you cannot assess benefits against it." These several instructions were refused. The court charged the jury that the land, so far as it lay beyond the tracks of the railroad and beyond the necessary supports for those tracks, was clearly liable to assessment, if it was in fact benefited by the street made in front of it; that it was a question for the jury to determine upon the evidence whether the land in the western portion of the strip, elevated about 30 feet above the street, was susceptible of being benefited by the improvement of the street, and whether it was susceptible of being benefited at all by the improvement of the street running alongside of it, and, if so, to what extent it could be so benefited; that the rule for assessing benefits was not affected at all by the cost of the work, nor by the actual amount of benefits that have been assessed; that the question was whether there was an actual benefit. The jury found a special verdict to the effect that the easterly portion of the strip

tion, however, does not seem to be well supported by the decisions. In fact some of the courts have held that there was nothing to prevent a sale of the right of way in sections to enforce such assessments.

In Illinois the assessment must be collected from the track and right of way of the railroad within the district where the assessment is levied. *Illinois Cent. R. Co. v. East Lake Fork Special Drainage Dist. Comrs.*, 129 Ill. 417.

In *Chicago City R. Co. v. Chicago*, 90 Ill. 573, 32 Am. Rep. 54, which was a case of a street railway company, the court held the assessment valid on the authority of *Chicago v. Baer*, 41 Ill. 306, and *Farnelee v. Chicago*, 60 Ill. 287, but *Dickey, J.*, says: "were this an open question, I should be inclined to hold that the rights of railway companies are not property of such character as to subject it to such assessments. This class of assessments creates no personal liability upon the owner of the property assessed. Their property is not subject to transfer by alienation. If subject to sale for the amount assessed the purchaser could acquire no right to use it."

Under a statute providing for the formation of drainage districts for "agricultural and sanitary purposes" a railroad right of way may be assessed for benefits which accrue to it from the construction of the drain. *Illinois Cent. R. Co. v. East Lake Fork Special Drainage Dist. Comrs.* *supra*.

In *Chicago, R. I. & P. R. Co. v. Chicago (Ill.)* June 15, 1891, it is said: "We do not deem it necessary to decide whether or not the right of way of a railroad company can be assessed for a street improvement or not since the question does not arise in this case," and the implication from the decision is that the court regarded the question as an open one in that state.

In *Chicago & N. W. R. Co. v. People*, 120 Ill. 104, 36 L. R. A.

it is said: "There is no constitutional or statutory exemption against assessing railroad property, if specially benefited 'for street purposes' and, therefore, unless there is something in the nature of the property itself which absolutely precludes, as a matter of law, inquiry and judgment by the circuit court whether such property can be specially benefited by the opening or improving" of streets "the court plainly had jurisdiction to ascertain and determine the fact and apply the law. . . . We are aware of nothing in the nature of such property which, in a legal sense, absolutely precludes all inquiry whether it may, in any case and under any circumstances, be specially benefited" by a street. "Whatever may be said in regard to the mere track of the railway, it is impossible to see why depot grounds, and other real estate used by the company, may not be benefited by" such improvements, and since the question of jurisdiction turns upon the right of inquiry, and not upon the correctness of decision, it is enough that railroad property may sometimes, under certain circumstances, be specially benefited by improvements, to make the decision of the circuit court binding upon the supreme court.

A railway contiguous to a proposed street improvement may be specially taxed for the making of such improvement. *Chicago & A. R. Co. v. Joliet*, 133 Ill. 649.

The track of a railroad company when it borders on a street is properly assessable for its due proportion of the cost of the improvement of such street and the assessments when properly made will constitute a lien on the property. *Peru & L. R. Co. v. Hanna*, 68 Ind. 562.

But in a later case the court held that in the absence of statutory authority the bed of the railroad cannot be sold to collect the assessment. *Louisville, N. A. & C. R. Co. v. State*, 123 Ind. 443.

across the appellant's land was benefited by the improvement of Commerce street in the sum of \$8,100, and that the westerly portion was benefited thereby in the sum of \$2,980. A motion was made to set aside the second finding of the jury, because contrary to law and to the evidence, and to enter judgment setting aside the assessment as to that portion of the strip, and to enter judgment assessing benefits in the sum of \$2,025 against the lands in the eastern portion of the strip, that being the sum apparently charged against it by the assessment, or that a new trial of the action be granted. The court denied the motion, and rendered judgment affirming the assessment made by the board of public works, from which the appellant appealed to this court.

Mr. C. H. Van Alstine, for appellant:

Subdivision 14 of section 1038, Rev. Stat., must be construed as authorizing special assessments to be made against such property of a railway company as is in the nature of things susceptible of being specially benefited by local improvements or be held void as being in conflict with section 1 of article 8 of the Constitution, requiring taxation to be uniform, which means, says *Weeks v. Milwaukee*, 10 Wis. 258, "equality in the burden of taxation."

Section 1038, Rev. Stat., and the charter of Milwaukee have not made the right of way of a railway company, used solely for right of way purposes, liable to special assessments, because, from the character of the property, the court can say, as matter of law, that it cannot be specially benefited by local improvements.

The assessment was recognized as valid and it was held that it could be collected as a personal liability by action, in *Muscantine v. Chicago*, R. I. & P. R. Co. 79 Iowa, 645.

In the case of assessments for local improvements, where the statute directs that the property assessed be sold to satisfy the claim and directs the manner in which it shall be sold, it will be found not to forbid fragmentary sales of the property to enforce payment of assessments for improvements. *Ludlow v. Cincinnati Southern Railway Trustees*, 73 Ky. 387.

The roadbed of the railroad company is property legally subject to assessment for municipal benefits. *State v. Passaic*, 54 N. J. L. 340.

Land used by a railroad company for its track and crossing a street at right angles is liable to assessment for improvement of the street and as between the company and the person doing the work, such land may be sold to pay the assessment. *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 150.

The New Jersey act relating to railroad taxation expressly provides that all railroad companies shall be liable for city improvements beneficial to such property for the purposes for which it is used by the company. *State v. Jersey City*, 42 N. J. L. 102.

In *Troy & L. R. Co. v. Kane*, 9 Hun. 506, it is said that the property of the road upon which the assessment was levied might be sold for non-payment of the assessment. The court says: "The purpose of these proceedings is to coerce payment of the assessment from the party who should pay it. It does not lie with such party to say that the assessment is invalid because one of the modes provided by law for its enforcement will be un-

New York & N. H. R. Co. v. New Haven, 42 Conn. 279, 19 Am. Rep. 534; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 258, 4 Am. Rep. 63; *Junction R. Co. v. Philadelphia*, 88 Pa. 424; *Philadelphia v. Philadelphia, W. & B. R. Co.* 83 Pa. 41; *New York & H. R. Co. v. Morrisania Trustees*, 7 Hun. 652.

The assessment was made without reference to actual or probable benefits.

Johnson v. Milwaukee, 40 Wis. 815.

Mr. Burton Hanson also for appellant.

Mr. C. H. Johnson for respondent.

Pinney, J., delivered the opinion of the court:

1. It is contended that the assessment in question is authorized by subdivision 14, section 1038, Rev. Stat. Neither this section, nor the chapter in which it is found, treats of or has any relation to assessments for special improvements, but relates to general taxation only. This section declares what property shall be exempt from such taxation, and the subdivision relied on is that "the track, right of way, depot grounds and buildings, machine shops, rolling stock, and all other property necessarily used in operating any railroad in this state belonging to any railroad company, including pontoon or pile and pontoon railroads, shall henceforth remain exempt from taxation for any purpose, except that the same shall be subject to special assessment for local improvements in cities and villages." It had been held prior to this statute that such assessments were special taxes imposed upon the basis of special benefits, and they had been distinguished from general taxes by the name of "assessments." *Weeks v. Milwaukee*,

productive in its results. Indeed whether it will be unproductive depends on his own willingness or unwillingness to forego the use and enjoyment of the property which would pass from him under the sale."

In *New Haven v. Fair Haven & W. R. Co.*, 30 Conn. 422, 9 Am. Rep. 399, where the materials from which a street railroad was made were held to be property subject to assessment, the court says without deciding whether a lien could or could not attach to this property: "We are clearly of the opinion that the right and power to assess are in no way dependent upon a lien. If the legislature intended that as the only mode in which the assessment could be collected then there may be some force in the argument that such property is not subject to assessment, but if it was merely intended as security in addition to the proper remedy at law then the argument is without force."

Liability for assessment has been assumed in cases where the question of exemption by general exemption clauses in charters has been considered. *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 122, affirming 1 L. R. A. 613, 126 Ill. 92; *Illinois Cent. R. Co. v. Mattoon*, 141 Ill. 32; *Winona & St. P. R. Co. v. Watertown*, 1 S. Dak. 48.

Other courts have held, in accordance with *CHICAGO, MILWAUKEE & ST. PAUL R. CO. v. MILWAUKEE*, that the assessment would not hold. See *Detroit, G. H. & M. R. Co. v. Grand Rapids*, post, p. —.

In *Philadelphia v. Philadelphia, W. & B. R. Co.*, 33 Pa. 41, it is said the claim to assess the track of a railroad company for a street improvement has no foundation either in the letter of the law, or in its spirit, nor in the form of the remedy. Not in the letter because the defendants do not own

10 Wis. 256, 260; *Hale v. Kenosha*, 29 Wis. 605. And the object of the exception, which is in the nature of a proviso, was not to declare a rule upon an independent subject, but to confine the exemption to the subject of general taxation, and to exclude any inference of intention that the section was to be operative as to special taxes or assessments (Endlich, Interpretation of Statutes, §§ 184, 186); and the exception could have no operation or force separate and apart from the provision it was designed to limit, and left the liability of such property to assessment as it stood before the statute. This is evident from the grouping of the kinds of property named in the section. The "track, right of way, and depot grounds" are classed with "rolling stock," with "all other property necessarily used in operating any railroad," and "pontoon or pile and pontoon railroads,"—kinds of property which it would be impracticable to subject to assessment for local improvements. *Oshkosh City R. Co. v. Winnebago County* (at the present term) (Wis.) 61 N. W. Rep. 1107.

2. Whether the track and right of way of a railroad company is subject to assessment for local improvements on the ground of special benefits, under the language of statutes couched in general terms providing for such assessments, is a question upon which the courts have not been agreed. The system and policy of each state enter largely into the question, and give to it a local character. By the charter of Milwaukee, the improvement of Commerce street was made "chargeable to and payable by the lots fronting or abutting upon such street . . . to the amount" which such improvement shall be adjudged by the board of public works to benefit such lots; and an assessment of the amount is provided for, which when confirmed by the council, its collection may be

enforced in case of non-payment by a sale and conveyance of the lots so assessed. City Charter, Laws 1874, chap. 184, subsec. 7, §§ 2, 7. So much of the lots in question as were occupied by the tracks of the railroad and supporting banks, and used for right of way purposes, had been devoted and dedicated to uses in which the public had an important interest of a probable perpetual duration; and to enforce an assessment against such right of way and track, extending about half a mile in distance, by a sale and conveyance, would necessarily dismember and break up the entirety and utility of the road as a line of travel and commercial intercourse, and interfere with and impair the paramount interest which the public have in it for these purposes. The property of the corporation in its road and appurtenances essential to its operation and use, annexed to the franchise of the company to maintain and operate its road, is an entirety, and is thus charged in the hands of the company with an important trust in favor of the public, though the property in all other respects is essentially private, and operated for private gain. Public policy would seem to forbid a severance and segregation of its several special or particular parts, essential to the exercise of the franchises and the use and operation of the road by forced sale upon legal process, or for an assessment. If the general language found in the charters of cities and villages throughout the state on the subject, in substance the same as the provisions of the charter in question, is to be construed as applicable to and warranting an assessment against the track and right of way or other property essential to the exercise of the franchise of the company and the operation of its road, then every railway in the state is liable to be thus severed, and its continuity destroyed, by the action of local au-

the land sought to be charged and have only the right of way over it. Not in the spirit because the paving laws are means of compulsory contribution among the common sharers of the common benefit, and as a railroad cannot from its very nature derive any benefit from the paving, while all the rest of the neighborhood may, we cannot presume that the compulsion was intended to be applied to them. Not in the form of the remedy because the execution for such sort of claims is *levari facias*, a writ not commonly allowed against corporations and which would hardly produce much when directed against a public right of way. It would be strange legislation that would authorize the soil of one public road to be taxed in order to raise funds to make or improve a neighboring one.

And this decision was followed in *Junction R. Co. v. Philadelphia*, 88 Pa. 424.

The right of way is not subject to taxation. *Allegheny City v. Western Pennsylvania R. Co.* 128 Pa. 375.

A general statutory provision permitting the cost of street improvements to be assessed against abutting property, will not be held to apply to a railroad company, where the only way that it can be enforced will be by sale of a portion of the road. *Sweeney v. Kansas City R. Co.* 54 Mo. App. 285.

An authorization to assess real estate benefited will not extend to the right to lay tracks and run the road in a public street. The court says: "The 28 L. R. A.

great public disadvantage and inconvenience which would result from holding the petitioner's track to be real estate so that a detached and intermediate portion of it could be sold to satisfy an assessment for a local improvement demonstrate the extreme improbability that any such rule of law could have been contemplated by the legislature." *State v. Ramsey County Dist. Ct.* 81 Minn. 364.

In *New York & H. R. Co. v. Morrisania Trustees*, 7 Hun, 652, where an assessment was laid for opening a street across a railroad track, the court says the legislature have not authorized the sale of lands constituting the track of a railroad in the several counties in which the same is situated or in the towns in which it is assessed for real estate, and they therefore held that there was no authority to make the assessment.

A railroad company may be rendered liable to assessment by the legislature. *Hampshire County Commrs., Petitioners*, 143 Mass. 424.

A statute permitting the city to require the owner of lots adjacent to streets to pay for improvement does not permit of assessment on a mere easement of a railroad to run its tracks over a lot. *Muscantine v. Chicago, R. I. & P. R. Co.* 89 Iowa, 291.

A mere contract right to run trains over a road of a company which can be terminated upon notice is not property which can be assessed for local improvements. *Louisville & N. R. Co. v. East St. Louis*, 134 Ill. 654. H. P. F.

thorities in any city or village through which it passes,—a result which we are persuaded was not contemplated in the enactment of the charter of Milwaukee, or other charters for local municipal government. While the company may be compelled by mandamus to operate its road between its termini, and forfeiture of its franchises may be adjudged for its failure (*People v. Albany & V. R. Co.*, 24 N. Y. 261, 82 Am. Dec. 295; *People v. Rome, W. & O. R. Co.*, 103 N. Y. 108; *Union Pac. R. Co. v. Hall*, 91 U. S. 354, 23 L. ed. 432; *State v. West Wisconsin R. Co.*, 84 Wis. 215, 217), the company would be rendered powerless to execute its public trust and discharge its public duties. The question is to be judged by the consequences which would attend a complete exercise of the power of assessment, when carried to a sale and conveyance of the property attempted to be charged. The authorities holding that neither the corporate rights and franchise of a quasi public corporation can be sold on execution, nor can its lands or works essential to the enjoyment of the franchise be separated from it and sold under execution, so as to destroy or impair the value of the franchise, were cited and considered in *Yellow River Imp. Co. v. Wood County*, 51 Wis. 559, 562, 17 L. R. A. 92; and the principle was asserted in *Gue v. Tide Water Canal Co.*, 65 U. S. 24 How. 263, 16 L. ed. 636, upon the ground stated in that case that the property seized was of little or no value apart from the franchise, but was essential to the operation of the canal, and in connection with it was of great value, and would be rendered valueless by such sale, and that the franchise by which the use of the property was made valuable would not pass by the sale. The track and right of way in this case are not adapted to any other profitable use. A sale of such property on execution, which included the very bed of the road as well as the ground needed for depot and other buildings, was held invalid as to such portions; that no title passed to the purchaser; and that the company must be protected in the possession of all that was really essential to the enjoyment of its franchise. *Plymouth R. Co. v. Colwell*, 89 Pa. 387, 80 Am. Dec. 526.

In the case of *Yellow River Imp. Co. v. Wood County*, *supra*, it was held that the principles mentioned "apply with equal force to tax proceedings," upon the ground "that the rights, franchises, and plant essential to the continued business and purposes of a quasi public corporation are not to be severed, broken up, or destroyed without express legislative authority, but, on the contrary, are to be preserved in their entirety, and for that purpose are deemed segregated from any other property owned by the corporation." And it was accordingly held that the value of a dam, an essential portion of the corporate rights, franchises, and plant of the company, was improperly included in the assessment of the tract of land owned by the company, and upon which it was located, and that the tax extended on the assessment was, for that reason, held invalid and canceled. To the same effect is *Fond du Lac Water Co. v. Fond du Lac*, 62 Wis. 322, 16 23 L. R. A.

L. R. A. 581, where it was held that an assessment for taxation of only the lots upon which the pumping works and the station of the company were situated was invalid; that the assessment should have included the entire property of the company, its mains, pipes, and hydrants, throughout the city, and franchises and privileges as an entirety, so as to avoid any severance upon sale for non-payment of taxes. These cases establish the principle that the general provisions of the statute concerning the levying and collection of taxes are to be construed and held subordinate to the rule against severance and segregation of the property essential to the continued exercise of such corporate franchises, and that such a result cannot be effected, under the power of taxation, without express legislative authority, and that general language in such statutes will not be held to authorize such a result. Manifestly, the same rule of construction should be applied to the general language of the charter of Milwaukee, and, in the absence of an express statute authorizing an assessment of the tracks and necessary right of way of a railway company, the assessment and sale thereof for benefits by local improvements cannot be sustained. *People v. Gilon*, 126 N. Y. 147; *New York & H. R. Co. v. Morrisania Trustees*, 7 Hun, 652.

It is universally conceded that all such assessments have their foundation, rest upon, and cannot lawfully exceed, the special benefits of the improvement to the property against which the cost of its construction, to that extent, is charged. 2 Dill. Mun. Corp. 781; *Weeks v. Milwaukee*, 10 Wis. 259, 261; *Hale v. Kenosha*, 29 Wis. 605, 606; *Donnelly v. Decker*, 53 Wis. 465, 46 Am. Rep. 637; *Hammett v. Philadelphia*, 65 Pa. 152 *et seq.*, 3 Am. Rep. 615. Such an assessment cannot be maintained for general benefits to the community or locality resulting from the work. For the payment of such expenditures, resort must be had to general taxation, the rule of which is required to be uniform. "Whenever an assessment upon an individual is not grounded upon and measured by the extent of his particular benefit, it is *pro tanto* a taking of his private property for public use, without any provision for compensation." Per Sharswood, J., in *Hammett v. Philadelphia*, *supra*. We think it clear, as a matter of law, that property, such as the railroad tracks and necessary right of way, cannot be said to be benefited by the improvement in question; and as said in *Philadelphia v. Philadelphia, W. & B. R. Co.*, 38 Pa. 49: "It would be strange legislation that would authorize the soil of one public road to be taxed in order to raise funds to make or improve a neighboring one." In *Junction R. Co. v. Philadelphia*, 88 Pa. 424, it was held that the city could not maintain a municipal claim for paving against or opposite the roadbed of a railroad company, and that it was immaterial whether the company had simply a right of way or owned the bed in fee, and it was said that "the right of way is exclusive at all times and for all purposes, and, moreover, it is perpetual;" and that "a railroad from its very nature cannot derive any

benefit from the paving, while all the rest of the neighborhood may, and it is not to be presumed that the compulsion was intended to be applied to such companies." To the same purport is *Allegheny City v. Western Pennsylvania R. Co.*, 188 Pa. 375, in which it was said that, "in a case where we can declare as a matter of law that no such benefit can arise, the legislature is powerless to impose such a burden. It would not be a tax in any proper sense of the term. It would be a forced loan, and would practically amount to confiscation." In *Bridgeport v. New York & N. H. R. Co.*, 86 Conn. 355, 4 Am. Rep. 68, it was held that contingent, remote, inappreciable, or uncertain benefits would not authorize an assessment, where an assessment might be made against the franchise of the company, and the track and right of way were not liable to such assessment, and that the benefit in such case must be direct, immediate, and certain. *New York & N. H. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 584. "The fact that the pavement makes access to the station easier shows a benefit to the public at large, but not a special benefit to the company."

It was contended that the assessment of the board of public works is conclusive; that the entire strip in question, including the track and necessary right of way, was benefited by grading and paving of Commerce street; and that the only question open to the appellant was as to the amount of benefits. Section 11, subsec. 7, chap. 184, Laws 1874, and the cases of *Teegarden v. Racine*, 56 Wis. 545, and *Dickson v. Racine*, 61 Wis. 545, were relied on. The question of benefits to the track and right of way being a legal one, manifestly the assessment cannot be conclusive, but the position is no doubt correct as to the rest of the strip. This precise question was presented in *Allegheny City v. Western Pennsylvania R. Co.*, 188 Pa. 382, where it was held that "while the owner of an ordinary lot of ground, whether an individual or corporation, cannot be heard to defend against

a municipal assessment for paving, for the reason that the law presumes such property is benefited, yet, in the case of the roadbed of a railroad, the presumption of law is the other way. It is the same at all times and under all circumstances, hence the law declares the absence of benefits." But, if the presumption is a disputable one, the evidence on the part of the city did not tend to show any direct, immediate, and certain benefit to the track and right of way, and the only benefit indicated by the testimony was clearly remote and contingent, depending upon the expenditure of considerable sums, and there was nothing to show that it would be judicious or desirable for the company to enter upon the work. The benefit shown, if any, was to the public in facilitating consignees, in getting heavy freights from the tracks, and not to the company. Contrary conclusions have been reached in *Illinois Cent. R. Co. v. Decatur*, 126 Ill. 92, 1 L. R. A. 618; *Muscattine v. Chicago, R. I. & P. R. Co.* 79 Iowa, 645; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Ludlow v. Cincinnati Southern Railway Trustees*, 78 Ky. 358; *North Beach & M. R. Co's App.* 82 Cal. 500.

But some of these cases proceed upon quite general reasoning and are not in harmony with our previous decisions. The result is that the assessment as to the railroad track and necessary right of way was without authority of law, and it should be set aside as to all the premises except that portion of the easterly part of the strip between the street and tracks and necessary right of way. The fact that it is probable in the near future this portion of the strip will be required for railway purposes will not serve to protect it against the assessment. *New York, N. H. & H. R. Co. v. New Britain*, 49 Conn. 40. As to this part of the strip there should be a new trial.

The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

LOUISIANA SUPREME COURT.

LACHMAN & JACOBI, *Appts.*,

v.

Henry BLOCK *et al.*

(47 La. Ann. 505.)

*1. **Suretyship.** Like other contracts, requires assent manifested by the parties, so that each may know the other is bound; hence, a paper addressed L. & J., San Francisco, Cal., worded, "I agree to become surety to you for \$10,000, for B. & B.," sent to L. & J. by the party who obtained it, does not constitute a contract, without an acceptance in any form manifested by L. & J. to him who signs the

paper, entitled to know, and to know seasonably, whether he is to be held, and between him and L. & J. there being no communication, of any kind whatever, expressive of their assent. Rev. Civ. Code, arts. 1797, 1798, 1800, 1802, *et seq.*; *McDonough v. Winchester*, 1 La. 189; *Caveller v. Germain*, 6 La. 218; *Story, Cont. § 853*; 1 *Brandt, Suretyship*, § 188 *et seq.*

2. Nor can it be doubted that guaranties and letters of credit require, under the commercial laws, as under our code, acceptance communicated to the parties signing such letters or guaranties, unless acceptance is plainly implied, as, for instance, when the guarantee pays, and the guarantor receives, a consideration for the guaranty. Such acceptance is, as expressed by the Supreme Court of the United States, a reasonable requirement to enable the guarantor to know the nature and extent of his liability, and to exercise vigilance in guarding against loss which might other-

*Headnotes by MILLER, J.

NOTE.—In connection with the above case on the subject of notice of acceptance of guaranty, see note to *National Exchange Bank v. Gay* (Conn.) 4 L. R. A. 242.

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wise be unknown to him. Story, Cont. § 883; 1 Brandt, Suretyship, §§ 188 *et seq.*; Bank of Illinois v. Sloc, 16 La. 543, 35 Am. Dec. 223; Menard v. Scudder, 7 La. Ann. 885, 56 Am. Dec. 610; Douglass v. Reynolds, 32 U. S. 7 Pet. 125, 8 L. ed. 631; Adams v. Jones, 37 U. S. 12 Pet. 213, 9 L. ed. 1080; Davis v. Wells, 104 U. S. 167, 26 L. ed. 690.

3. The words, "I agree to become surety for \$10,000," with no designation of the debt, whether past, present, or future, will not authorize the construction that the proposed suretyship extends to future as well as past debts. Such construction is to supply, forbidden by the code, that which is neither expressed nor implied. In such case resort to the testimony is proper to ascertain the intention. Civ. Code, arts. 3035, 3036; New Orleans Canal & Bkg. Co. v. Hagan, 1 La. Ann. 62; Freeland v. Briscoe, 3 La. Ann. 227.

4. When a suretyship is to bind for a limited period, plainly stated, the suretyship will not attach to debts contracted on terms of credit extending beyond the period fixed for the surety's liability.

5. Statutes of another state, not noticed by our courts unless proved, will not be deemed to apply to a paper made here, supposed to create the obligation of a surety, which, if it exists, is to be performed here, unless the paper itself is clearly within the scope of the statute, and unless the supposed obligation is clearly excluded from the operation of our law; it being settled that courts, in all cases of doubt as to the application of statutes of other states, follow our law. *Borgs v. Reed*, 5 Mart. (La.) 673, 12 Am. Dec. 482; *Smoot v. Russell*, 1 Mart. N. S. 522; *Ripka v. Pope*, 5 La. Ann. 63, 52 Am. Dec. 579; *Clampitt v. Newport*, 3 La. Ann. 124; *Saul v. His Creditors*, 5 Mart. N. S. 587, 16 Am. Dec. 212.

6. But it is clear the supposed obligation of a surety claimed to arise on a paper executed, and, if producing any obligation, it is to be performed here by him, is a Louisiana contract, governed by our law, although the paper is designed to be used by a merchant residing here to obtain credit from a California merchant, the law of which state is claimed to differ from that of Louisiana on the subject of suretyship. Story, Conf. L. §§ 233, 234, 235, 236; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104.

7. The recognition of an asserted debt or promise to pay it is admissible, but not conclusive against the party, and may be shown to have been made in error. 1 Greenl. Ev. §§ 204, 209, 212; *Heath v. Commercial Bank of New Orleans*, 7 Rob. (La.) 338.

8. Allegations in a petition and an affidavit for an attachment are admissible, only in evidence, but not conclusive, in favor of one not a party to the suit; hence, such allegations are open to explanation and correction by proof of error. 1 Greenl. Ev. §§ 204, 206, 209, 212; 1 Rice, Ev. pp. 446, 447; *Mallard v. Carpenter*, 6 La. Ann. 307.

9. Least of all can such allegations or affidavit give rise to any estoppel, unless the basis of some advantage obtained to the prejudice of another, or unless another has changed his position or acted on such allegations or affidavit. 1 Greenl. Ev. §§ 204, 206, 209, 212.

(Watkins, J., dissents.)

(March 11, 1895.)

APPEAL by plaintiffs from a judgment of the Civil District Court for the Parish of Or-
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leans in favor of defendant Calmi Lazard in an action brought to enforce payment of a debt owing by Henry Block & Bro. to the plaintiffs for which Lazard was alleged to have become surety. *Affirmed.*

The facts are stated in the opinions.

Messrs. Percy Roberts and Bernard Titcher for appellants.

Messrs. Lazarus, Moore & Luce, Farrar, Leake & Lemle, and Farrar, Jonas & Kruttschnitt for appellee Lazard.

Watkins, J., delivered the opinion of the court:

As against Henry Block & Bro., this suit is brought upon a matter of indebtedness, aggregating about \$10,000 in amount, accompanied by an attachment; but, as against Lazard, it is founded on an instrument of the following tenor, viz.: "New Orleans, June 4th, 1891. Messrs. Lachman & Jacobi, San Francisco, Cal.—Gentlemen. I hereby agree to become surety for Henry Block & Bro. for the sum of \$10,000, jointly and severally with Henry Block & Bro. This agreement to bind me in the sum of \$10,000 until the 15th day of October, 1891. Very respectfully, [Signed] C. Lazard." This instrument presents the only matter in controversy in this case, the defendants Block & Bro. having been confessedly insolvent at the time suit was filed, and at this time urging no defense; and their property and assets having been attached by various creditors previous to institution of this suit, and notably by C. Lazard & Co., of which firm the defendant C. Lazard is a member. Various defenses were urged in the court below on the part of Lazard, the purport of which is as follows, viz.: (1) That there was no acceptance of the guaranty on the part of the plaintiff; (2) that the guaranty was procured by fraud on the part of Block & Bro. and concealment on part of plaintiffs; (3) that the debt sued on is not the one that was guaranteed; (4) that the items of indebtedness sued on matured after the 15th of October, 1891, and do not come within the limit fixed in the contract of guaranty; (5) that, in any event, he can only be held liable for items of indebtedness Henry Block & Co. contracted after June 4, 1891,—date of agreement. On these issues the case was tried, and judgment rendered in favor of the defendant, and the plaintiffs have appealed.

It is manifest that the first two defenses are the most serious, and on them the district judge rested his opinion exclusively employing this language, viz.: "The correspondence, the circumstances, the testimony, leave no doubt, in my mind, that the letter of guaranty on which Lazard is sued was obtained by fraud, collusion, and misrepresentation, devised jointly by Lachman & Jacobi and the Block Brothers." These defenses must be first analyzed.

1. *In limine*, an exception of no cause of action was propounded, and, by the judge, referred to the merits. As this is a suit upon an unconditional obligation of the defendant, who has not disavowed his signature, a cause of action has been plainly stated. The exception must be overruled.

2. The matter of controversy between counsel, and that for the court to decide, is whether it was obligatory upon the plaintiffs to give the guarantor or surety notice of their acceptance of the guaranty or suretyship as a condition precedent to its validity. The law of guaranty is not treated of, *ex nomine*, in the Civil Code, but it furnishes and formulates rules for the interpretation of the contract of suretyship in its stead, the contract of guaranty being governed and controlled by the precepts of the law-merchant. In order to arrive at an accurate conclusion with regard to the question of notice, it will be necessary to summarize and compare the essential ingredients of the contracts of suretyship and guaranty. The Code defines suretyship to be an accessory promise, by which a person binds himself, for another already bound, and agrees with the creditor to satisfy the obligation if the debtor does not. Rev. Civ. Code, art. 3035. It must be restrained within the limit intended by the contract. Id. art. 3039. The surety is entitled to have the creditor discuss the property of the principal debtor, except he has become "bound *in solido*", jointly with the debtor, in which case the effects of his engagement are to be regulated by the same principles which have been established for debtors *in solido*." Id. arts. 3045, 3059. A guaranty is a collateral engagement to answer for the debt, default, or miscarriage of another person. De Colyar Guaranties, p. 1. That author states the essential requisites of the contract to be (1) the mutual assent of the parties; (2) that the parties be capable of contracting; (3) that it be supported by a valuable consideration. With regard to the mutual assent of the parties, he says: "Every contract includes a concurrence of intention in two parties, one of whom promises something to the other, who, on his part, accepts such promise. Until, therefore, an acceptance be given (which must be an absolute and unconditional acceptance of the previous offer), the promisor is not liable. In accordance with this doctrine, it has been decided that a mere offer to guaranty is not binding until acceptance by the person to whom the offer is made. Till then it is revocable by the party making it." Id. pp. 2, 3. Tested by these principles, the agreement under consideration must be regarded rather in the light of a contract of suretyship than of guaranty, though the two engagements possess many similar features. It unequivocally states that the defendant Lazard agrees "to become surety for Henry Block & Bro.;" to become surety for Henry Block & Bro. "for the specified sum of \$10,000." It declares that his undertaking is "jointly and severally with Henry Block & Bro." It is concluded with the statement that "this agreement [is] to bind [him] in the sum of \$10,000 until the 15th day of October, 1891." We find from the foregoing recitals—First, that it is a contract of suretyship in terms as it is in substance; second, that the amount for which the suretyship is undertaken is fixed and certain; third, that the contract is joint and several, and is operative as a solidary engagement, which is to be construed according to the principles that

have been established by the Code for the interpretation of solidary obligations; fourth, that it is of limited duration. As a contract of suretyship, notice of its acceptance on the part of the creditor seems not to be contemplated by the code, no such requirement being specified in those articles treating of that subject. On the question "of the consent necessary to give validity to a contract" the precepts of our code are quite similar to those we have quoted from De Colyar's treatise on the Law of Guaranties. It provides that "the contract, consisting of a proposition and the consent to it, the agreement is incomplete until the acceptance of the person to whom it is proposed. If he who proposes should, before that consent is given, change his intention upon the subject, the concurrence of the two wills is wanting, and there is no contract." Rev. Civ. Code, art. 1800. But it likewise declares that the proposer "is bound by his proposition, and the signification of his dissent will be of no avail, if the proposition be made in terms, which evidence a design to give the other party the right of concluding the contract by his assent," etc. Id. art. 1802. (Our italics.) It further declares that "the acceptance need not be made by the same act, or in point of time, immediately after the proposition; if made at any time before the person who offers, or promises, has changed his mind, or may reasonably be presumed to have done so, it is sufficient." Id. art. 1804. It further declares that "the proposition as well as the assent to a contract may be express or implied." Such assent "is implied, when it is manifested by actions, even by silence, or by inaction, in cases in which they can, from circumstances, be supposed to mean, or by legal presumption are directed to be considered as, evidence of an assent." Id. art. 1811. It likewise declares that "silence and inaction are, also, under some circumstances, the means of showing an assent that constitutes an obligation." Id. art. 1817. And the rules on the subject are concluded with the declaration that "when the law does not create a legal presumption of consent from certain facts, then, as in the case of other simple presumptions, it must be left to the discretion of the judge, whether assent is to be implied from them or not." Id. art. 1818. These are the rules of law applicable to all contracts, including the contract of suretyship. Applying them to the agreement or proposition of the defendant, and it seems to be clear that the plaintiffs were not bound to accept same before it became complete, because it was made in terms which evidence a design on the part of Lazard to give them the right to conclude it by their simple assent; and the facts disclosed by the record satisfy us that the plaintiffs acted on the defendants' agreement "to become surety for Henry Block & Bro." by extending them a line of credit they would not otherwise have extended to them. And that this line of credit began immediately after the receipt of the defendants' agreement is evidenced by the items of the account sued on, and which are undenied. And, if acceptance be deemed essential, the circumstances clearly indicate

plaintiffs' assent,—such an assent as puts it beyond the power of the defendant Lazard to voluntarily withdraw from his engagement. Certain it is that no formal notification of the creditor's acceptance is required by our law as a condition precedent to the completion of a contract of suretyship. De Colyar draws a distinction between a proposition of guaranty which is absolute and unconditional in its terms—like the contract before us—and one containing a mere “offer of guaranty,” which “is not binding until acceptance by the person to whom the offer is made,” and which remains revocable until such acceptance occurs. But of this mere offer of guaranty the author states that “it is not, as a rule, necessary that the acceptance should be express; it may be implied.” And in illustration of that rule he furnishes the following example, viz.: “Thus, when an offer of guaranty is in these terms: ‘I agree to be security to you for T. C., for whatever you may trust him with while in your employ, and in case of default to make the same good,’—as soon as the person to whom it is given employs T. C. (but not before) the guaranty attaches, and becomes binding on the party who gave it, without any formal acceptance.” De Colyar, Guaranties p. 8. But the doctrine is much more strongly stated by an English judge in the following words, viz.: “If a person offers a guaranty, and, more still, if he signs a guaranty by which he makes himself liable, and that be sent to the other party, such other party, if he means not to accept the guaranty, is bound expressly to dissent within a reasonable time; and if he keeps the guaranty an unreasonable time he is deemed to accept just the same as if he had assented to it by words, and if he has ever accepted it either by word or by act he cannot afterwards retract.” Id. p. 8. (Our italics.) *Pope v. Andrews*, 9 Car. & P. 564. According to this treatise on the law of guaranty, as it is understood in England, and as it is interpreted in the English jurisprudence, even an offer of guaranty becomes binding on the guarantor, without other acceptance by the guarantee than acting under it; and it is esteemed the duty of the person to whom such offer is delivered to expressly dissent therefrom if it be his intention not to accept, and within a reasonable time, otherwise his acceptance of the offer will be implied. Referring to the defendant's brief, we find his argument addressed to the offer of guaranty exclusively. Thus: “We contend that the letter of Lazard to Lachman & Jacobi was nothing more nor less than an offer to guarantee; and in this we are supported by the jurisprudence of this state, and, so far as we have been able to find, by the jurisprudence of the United States Supreme Court and the supreme court of every other state in the Union.” Though far from conceding that the agreement under consideration is a mere offer of guaranty,—the terms of the instrument being absolute and unconditional,—it is apparent from casual observation that the authorities quoted by the defendants' counsel deal with that question exclusively. Many of them are based on letters of credit, compliance with which is

purely optional on the part of the party addressed. *Russell v. Clark*, 11 U. S. 7 Cranch, 91, 8 L. ed. 279; *Edmondston v. Drake*, 30 U. S. 5 Pet. 624, 8 L. ed. 251; *Douglass v. Reynolds*, 32 U. S. 7 Pet. 125, 8 L. ed. 631; *Lee v. Dick*, 35 U. S. 10 Pet. 482, 9 L. ed. 503; *Adams v. Jones*, 37 U. S. 12 Pet. 207, 9 L. ed. 1058. All of these cases proceed upon the principle that is announced in *Kellogg v. Stockton*, 29 Pa. 460. “In all cases,” says the court, “when a plaintiff seeks to make one liable for the debt of another, the case must be plainly made out. Every ambiguity in the evidence is in favor of the defendant. It is essential, in such case, that the plaintiff should accept and give credit on the faith of the proposition; and it is equally necessary that the guarantor should be notified that his proffer has been accepted, otherwise there is no contract. A mere offer, not accepted, is not a contract, and a mere mental acceptance of a proposition, not communicated to the party to be charged, is not an acceptance at all, in the eyes of the law.” *Coe v. Buehler*, 110 Pa. 366. The decisions of the Arkansas court are to the same effect. *Lane v. Levillian*, 4 Ark. 84, 37 Am. Dec. 769; *McCollum v. Cushing*, 23 Ark. 540. The decisions of the Alabama court are of like tenor. *Lawson v. Townes*, 2 Ala. 373; *Walker v. Forbes*, 25 Ala. 139, 60 Am. Dec. 496. The rule was similarly stated in *Mussey v. Rayner*, 22 Pick. 223; also in *Rankin v. Childs*, 9 Mo. 674, and *Hill v. Calvin*, 4 How. (Miss.) 231. This rule was by the Illinois court extended to an offer to guarantee the payment of merchandise, thus: “An offer to guarantee the payment of goods to be sold to a third person does not become a complete contract, so as to bind the guarantor, until the guarantee has given notice to the guarantor of his acceptance of the guaranty, and has extended credit to the proposed purchaser.” *Ruffner v. Lons*, 33 Ill. App. 601; *Tuussig v. Reid*, 145 Ill. 488. In *Bank of Illinois v. Sloo*, 16 La. 539, 35 Am. Dec. 223, our predecessors seemed to have followed the rule as laid down in *Cremer v. Higginson*, 1 Mason, 323, Fed. Cas. No. 3333, and *Douglass v. Reynolds*, 32 U. S. 7 Pet. 113, 8 L. ed. 626, and which are in keeping with other cases cited *supra*, and affirmed a judgment discharging the proffered guarantors because they had been given no notice of the acceptance of their guaranty of a letter of credit, nor of advances made under it, “nor until the circumstances of the debtors were materially changed by the dishonor of the bill.” In his treatise on the Law of Suretyship and Guaranty Mr. Brandt broadly states the doctrine of the common law on this subject to be in keeping with the principles announced in the American decisions above quoted. “A question often arising upon commercial guaranties is whether, in order to charge the guarantor, it is necessary that he be notified of the acceptance of the guaranty by the person acting upon it. When the guaranty is a letter of credit, or is an offer to become responsible for a credit which may or may not be given to another, at the option of the party to whom the application for credit is made the great weight of authority is that

the guarantor must, within a reasonable time, be notified of the acceptance of the guaranty." 1 Brandt, Suretyship, 2d ed. § 186. But this author quotes approvingly from a decision of the Massachusetts court, in which the same distinction is taken between an offer of guaranty and an absolute guaranty that is made by De Colyar. "The distinction," says the court, "is between an offer to guarantee a debt about to be created, the amount of which the party making the offer does not know, and it is uncertain whether the offer will be accepted, so that he may be ultimately liable, and the case of an absolute guaranty, the terms of which are definite as to its extent and amount. In the latter case no notice is necessary to the guarantor, whereas in the former case the contract is not completed until the offer is accepted." *Allen v. Pike*, 8 Cush. 288; 1 Brandt, Suretyship, § 188. The action in *Davis v. Wells*, 104 U. S. 159, 26 L. ed. 686, was brought on an unconditional contract of guaranty to the extent of \$10,000, and the answer of the guarantor was that there was no notice of the guaranteees' acceptance of the guaranty, and of their intention to act under it; but the court held that the rule requiring notice by the guaranteee of his acceptance of a guaranty, and his intention to act under it, applies only where the instrument is, in legal effect, an offer or proposal of guaranty, and not when it is an absolute guaranty; the court maintaining the principle that the contract of guaranty is the obligation of a surety. The same distinction was recognized and applied in the various cases therein cited by the court. *Menard v. Scudder*, 7 La. Ann. 885, 56 Am. Dec. 610, presents the case of a prospective or continuing guaranty, and the court maintained and enforced the contract, holding that the guarantor had been constructively notified, and was, consequently, bound.

Referring to the instrument sued on, we find it couched in carefully selected terms, clearly indicative of the defendant's intention to bind himself absolutely. Its statement is that he agrees to become surety for Henry Block & Bro. The amount is fixed at \$10,000. It is styled "an agreement to bind" the promisor "in the sum of \$10,000." The duration of this agreement is limited to the 15th of October, 1891. But the words selected for the purpose of clearly conveying the absolute character of the engagement are, "I hereby agree to become surety for Henry Block & Bro., jointly and severally," etc. The execution of this instrument evidences care and skill. It is not the work of a mere layman. It is, in terms, as well as in import, most absolute and unconditional; and, in the sense of all the authorities, English as well as American, formal notice of its acceptance by the plaintiffs as guaranteees was unnecessary, and the *vinculum* of the contract became complete by its delivery to them, and by their acting on it, by extending to the debtors credit on the faith of it. But, if the defendant's covenant be treated as a California, rather than as a Louisiana, contract,—the plaintiffs residing in San Francisco, and the defendant Lazard in New Orleans,—the

situation of the latter is not improved, because the state of California has a civil code, an article of which treats of letters of credit, and declares that "the writer of a letter of credit is liable for credit given upon it, without notice to him, unless its terms express or imply the necessity of giving a notice." Section 2865. On this state of the authorities and the law we feel bound to hold that the plaintiffs were dispensed from giving to the defendant Lazard notice of their acceptance of his contract of guaranty or suretyship.

3. The defendant's answer sets out his right to be discharged in the form of a threefold proposition, thus: (1) That it was plaintiffs' duty to put him in possession of all the facts likely to materially affect his responsibility, but they did not do so, and, on the contrary, concealed the facts in relation thereto which would have prevented his signing the letter of guaranty, had he been made aware of their existence. (2) That the debtors, Henry Block & Bro., obtained said letter of guaranty through fraud and misrepresentation; and the course of dealing between them and the plaintiffs were such as to fairly lead the latter to believe that the former had employed fraud in obtaining the letter of guaranty, and to put them upon inquiry as to the circumstances under which it was obtained.

(3) That, the letter of guaranty having been obtained through fraudulent misrepresentation and concealment of facts, it was thereby abrogated and annulled, and he became discharged *ipso facto*. It is to be observed that the allegations are general in terms, and contain no particular designation of the "material facts" which the plaintiffs suppressed, or reference to what particular fraudulent device or misrepresentation the defendants Block & Bro. resorted, which influenced Lazard to execute the contract of guaranty. But the facts seem to be as follows, viz.: Prior to June 4, 1891,—date of the agreement of guaranty,—the firm of Henry Block & Bro., of New Orleans, had been extensively dealing in the wines sold by Lachman & Jacobi, of San Francisco, through L. Block, the father of Henry Block, as plaintiffs' agent. In the course of these transactions, Henry Block, individually, had made collections from customers of his father to the amount of about \$8,000, and appropriated same to his own account, making no return to the plaintiffs. This deficit occasioned some correspondence between Henry Block and the individual members of the Jacobi firm,—three only of the latter's letters preceding the contract of guaranty, the same bearing dates May 25 and 26, 1891; all others succeeding it. Those letters appertain exclusively to Henry Block's shortage, and demand immediate settlement, two of them containing casual mention of the guaranty only; as, for instance: "The guaranty written of we want in such shape that it will cover all you owe us now [on merchandise] and all you owe us hereafter, up to \$10,000." Nothing whatever is said in the letters of Henry Block, replying, on June 2d and 3d, but in his letter of the 4th he says: "Your telegram of 3d to hand, and contents noted.

and I wire you, 'Lazard guaranty mailed to day,' which I inclose herewith. If I or our firm owe you this on that date, same will be paid by C. Lazard & Co." This was the same day on which the letter of guaranty was written to the plaintiffs, and mailed to them by Henry Block. With respect to the execution of the letter of guaranty it appears that Henry Block called on the firm of C. Lazard & Co., and requested them to sign the guaranty. It was not signed by the firm of C. Lazard & Co., because of objections on the part of the junior members; but it was signed by C. Lazard individually, notwithstanding said protest. C. Lazard is the father-in-law of Henry Block, and the business establishment of C. Lazard & Co. is only a few squares distant from that of Henry Block & Bro., the members of the two firms enjoying intimate social relations, and all of them acquainted with Lachman & Jacobi. The reliance of the defendant Lazard in procuring release from his contract is: First, upon the failure of the plaintiffs to make full and complete disclosures, to all the parties concerned, of Henry Block's shortage and defalcation; and, second, upon the facts which are disclosed in the testimony of the two Lazards, to the effect that Henry Block had procured the signature of C. Lazard on the representation that he needed it to enable him to purchase 500 barrels of wine that was a little specked, on which he expected to realize a profit of a few thousand dollars. The first is charged in the answer to have been a fraudulent concealment on the part of plaintiffs, which operates defendant's equitable discharge; and the second was a misrepresentation on the part of Block & Bro., through which the letter of guaranty was obtained; and that the course of dealing between plaintiffs and the Blocks had been such as to lead them to believe it had been thus obtained. Both of these propositions are strenuously denied by plaintiffs' counsel, and they insist that they did not participate in the negotiations leading up to the execution of the agreement, and no inquiries were made of them as to the reason or necessity for the guaranty, and that they are, consequently, not in any way responsible for defendant's want of information. They further insist that these negotiations were undertaken and consummated by Henry Block alone, and for his individual advantage, and that he alone was guilty of appropriating their money, and not Henry Block & Bro., for whom the defendant Lazard became guarantor; hence the impropriety and want of necessity for any disclosures being made, the guaranty being for the firm, and not Henry Block alone.

In addition the plaintiffs urge as an estoppel against C. Lazard the judicial declarations made in the suit of *C. Lazard & Co. v. Henry Block & Bro.*,—a suit recently filed, and still pending,—in which he sued for and claimed judgment on this guaranty as a liability of the defendants; and, as a further estoppel, the promise of C. Lazard to pay the amount of this guaranty subsequent to the institution of this suit. From the record it appears that on the 5th of Oc-

tober, 1891,—ten days prior to the termination of the contract of guaranty,—the firm of C. Lazard & Co. obtained an attachment against Henry Block & Bro. upon a claim of \$41,598.43, and caused all of their assets to be seized, C. Lazard making the affidavit. The claim on which this suit was brought exceeded the value of the assets of the defendant by nearly \$80,000; this attachment being first in point of time and in rank of lien. Two days subsequent to the attachment the plaintiffs, through their attorneys, made demand on C. Lazard for the payment of the account of Henry Block & Bro., and he admitted his liability, and requested time within which to pay it. It subsequently transpired that the \$10,000 guaranty constituted a part of the \$41,598.43 on which C. Lazard & Co. brought suit against Henry Block & Bro.; and that, after the aforesaid demand had been made, and the promise to pay had been given by C. Lazard, the attorneys for the plaintiffs in attachment appeared in court, and voluntarily remitted the sum of \$10,000, on the hypothesis that same had been included "through error of fact;" their motion not indicating what was the fact which was relied upon as error. But the two Lazards, as witnesses, state that the error was that when C. Lazard's interview occurred he understood that Henry Block & Bro. had received the wine he expected to buy, and, if they had received the wine, he was indebted for it,—or, in other words, that Henry Block & Bro. had received the 500 barrels of specked wine which Henry Block had stipulated to buy, and on the faith of which undertaking C. Lazard had executed the guaranty; and that such was his impression when he sued out the writ of attachment, though such was error in point of fact, Henry Block & Bro. not having received the wine. This testimony—and other testimony of like character—was objected to by plaintiffs' counsel on the ground that it tended to contradict, change, and vary the terms of the written contract of guaranty; but the objection was overruled, and the testimony admitted for the purpose of throwing light on the alleged fraudulent misrepresentation and concealment of facts material to the issue, but only in the event of plaintiffs being connected therewith. There seems to be no objection to this ruling, but the record furnishes no evidence in any way connecting the plaintiffs with the statement of the Lazards, and, consequently, any such misrepresentation or concealment as this testimony intimates cannot be considered under the restriction placed upon it by the judge *a quo*. But, if this evidence be considered for the purpose of explaining the defendant's admission of liability to the plaintiffs, and, in a measure, counteracting the plaintiffs' plea of estoppel, it recoils upon him; for the account sued on shows that the plaintiffs sold Henry Block & Bro. over 700 barrels of wine between the 16th of June and the 28th of September, 1891,—within the limit of the guaranty,—and it is for the purchase price of the goods thus sold and delivered that this suit is brought. This leads to the supposition that it was the expectation of

C. Lazard and Henry Block that the specked or indifferent wine the latter contemplated buying could be sold at the market price of good wine. Surely, if such a fraud on the public was contemplated, plaintiffs are not censurable for not having participated in its consummation. And this leads us to inquire in what different manner Henry Block could have promised himself a profit of two or three thousand dollars on 500 barrels of specked wine, in consideration of the fact, which is patent on the face of the plaintiffs' account, that plaintiffs sold the Block firm, during the tenure of the guaranty, near 800 barrels of good wine for the total price of \$7,500. In any view that can be taken of this testimony, it is evident that it cannot be considered; and, leaving it out of consideration, Lazard's admission, to the plaintiffs' attorneys, of his liability under the contract of guaranty or suretyship, stands unimpaired and binding. Not only so, but it leaves the relinquishment on the part of C. Lazard & Co. in their attachment suit without justification or excuse, for it cannot be seriously argued that the judicial admissions of a party to a suit can be altered at will, to the detriment of the other party, or with respect to those persons having an adverse interest in them. C. Lazard & Co. attached all the assets of Henry Block & Bro. Theirs was the first and ranking attachment on their property. The assets attached proved to be of very much less value than the amount of the claims of the attaching creditors, which included the amount of C. Lazard's guaranty. Having included the amount of this guaranty in the account sued on, and C. Lazard having made the affidavit for the attachment, the judicial admissions therein contained operate like stipulations *pour autrui* in matters of contract, which cannot be recalled by the party making them after they have been accepted and acted upon by the party in whose favor they are made. Rev. Civ. Code, art. 1890. And in this case it is apparent that the effort of Lazard & Co. was, by their attachment, to realize their own claim against the Block firm, and at the same time recoup the amount of C. Lazard's obligation of guaranty to the plaintiffs; and, finding themselves in this position at the time demand was made on them for payment, it seems reasonable and likely that these attaching creditors examined the situation of their suit, and ascertained that they were about to sustain a heavy loss, and hastened to make the necessary remittitur. While there is no positive proof of such examination having been made by the plaintiffs, yet the inference is clear that it was made, as they acted on the advice of counsel in entering their remittitur, and notifying the attorneys of the guarantees that C. Lazard was not bound as guarantor. In our view, the attaching creditors cannot be permitted to thus alter their position in that suit for the purpose and with the view of defeating the very claim on which they attached the goods of Block & Bro., and for which they had prayed for judgment against them therein. To maintain their right to thus shift their position would be to contradict the equitable principle which is an-

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nounced in *Kenner v. Holliday*, 19 La. 154, to the effect that a person having contracted to pay the debt of a third person, and received property out of which it was to be paid, cannot be permitted to defeat the debt, and retain the funds that were placed in his hands to pay it. This case comes within the equity of that principle. And this court recently said in *Williams v. Gilkeson-Sloss Commission Co.*, 45 La. Ann. 1013, that "there are acts in judicial proceedings which bind the parties to them, even so far as third persons may be concerned."

These conclusions dispose of the second and third paragraphs of the answer, and leave the first for our determination, it involving a question of law: Was it the duty of Lachman & Jacobi to have given information to C. Lazard of Henry Block's defalcation and embezzlement, in anticipation of the former becoming the surety or guarantor for the latter's firm. In the first place, it must be kept in mind that such a course was not at all practicable, because Henry Block procured from C. Lazard the contract of guaranty in response to a telegram he received from Lachman & Jacobi on the 4th of June, 1891, and forwarded the same by mail on that date. Consequently there was neither time nor opportunity for any communications between Lazard and the plaintiffs in respect to it. No disclosures were made by Henry Block, and no questions were asked by Lazard, with regard to the plaintiffs' reasons for demanding a guaranty, notwithstanding Henry Block & Bro. were undoubtedly indebted largely to the Lazard firm at that time, and had theretofore enjoyed good credit with the plaintiffs, — circumstances of a character to arouse suspicion in the mind of the average business man. Was the embezzlement of Henry Block a material fact, which Lachman & Jacobi were bound to disclose as a condition precedent to the validity of the guaranty; and did their failure to make the disclosure operate an equitable discharge of Lazard from his engagement? It is our deliberate conviction that such embezzlement did not constitute a fact material to the agreement or transaction of suretyship or guaranty, and it was not necessary for the guarantees to disclose it, and that their failure to disclose it does not operate the release or discharge of the defendant. To this effect is the weight of authority, as exhibited by adjudicated cases and the opinions of text-writers. De Colyar, in treating of the fraud of the creditor which will discharge the surety, says that it was once supposed that a disclosure should be made of all material facts prevailing in assurances upon marine and life risks, and that their non-disclosure vitiated the contract of guaranty; but that author states that the English decisions sustaining that view have been overruled, and a different and more liberal rule established; citing, among quite a number of other cases, that of *North British Ins. Co. v. Lloyd*, 10 Exch. 523; and *Davies v. London & P. Marine Ins. Co.* L. R. 8 Ch. Div. 469. De Colyar, *Guaranties*, pp. 257, 258. That author approves the rule laid down in *Hamilton v. Watson*, 12 Clark & F. 109, and which is

that "the criterion whether the disclosure ought to be made voluntarily is, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction; that is to say, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that the surety might naturally expect, and, if so, the surety is to see whether that is disclosed to him." And to this class of cases the author applies the rule stated in *Wythes v. Labouchere*, 3 De G. & J. 593, which is that "the concealment, too, must be of some material part of the transaction itself between the creditor and his debtor, to which the suretyship relates. The creditor is under no obligation to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction in which he is about to engage, which will render his position more hazardous." Id. p. 261. Brandt in treating of this subject formulates a like rule in more concise and forcible terms, viz.: "If, in the contract of suretyship, there is any fraudulent concealment on the part of the obligee as to a material part of the transaction, to induce the surety to become a party, he is not bound. But, to be material, it must be concealment of some fact or circumstance immediately affecting the liability of the surety, and bearing directly upon the particular transaction to which the suretyship attaches." (Our italics.) 2 Brandt, Suretyship, § 419, citing *Flanagan v. Post*, 45 Vt. 246; *Morgan v. Smith*, 7 Hun. 244, 70 N. Y. 537; *Stone v. Compton*, 5 Bing. N. C. 149, 6 Scott, 846. In *Comstock v. Gage*, 91 Ill. 328, it was held that the non-communicated fact, to have the effect of a fraud upon the surety, must be one necessarily having the effect of increasing the surety's responsibility. In *Warren v. Branch*, 15 W. Va. 21, the court, on a careful review of authority, said: "Our conclusion is that, unless inquired of by the surety, a creditor is under no obligation to disclose facts in no manner connected with the business which is the subject of the suretyship, though such facts would probably have a decided influence on the surety in entering into or declining to enter into his contract of suretyship; as, for instance, in taking the bond of a cashier, the fact that he gambled largely might, and probably would, influence a surety in going on his bond, yet, such fact not being in any manner connected with the contract that he would faithfully perform his duties as cashier, the directors are under no obligation to volunteer a disclosure of this fact to a surety," stating the general rule as announced by Brandt and De Colyar, *supra*. (Our italics.) In *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231, a similar case is stated, and the court puts the proposition thus: "We think it is going too far to say that the creditor is in all cases, and without being inquired of, bound to communicate everything that it is important for the surety to know, and that would increase his risk. Under such a rule no one would ever know when he could rely upon a bond, and it would

tend to a great deal of litigation;" summarizing the rule as announced by said authors. But perhaps the most pertinent and conclusive case that is afforded by the decisions of the courts of our sister states is that of *Roper v. Sangamon Lodge Trustees*, 91 Ill. 518, 83 Am. Rep. 60, in which the lodge sought to recover a sum of money from its treasurer and his sureties, and to which the defense was interposed by the sureties that the principal was treasurer, and at the time they signed the bond he "was a defaulter to the lodge for moneys previously received and misapplied; that it was known to the officers and members of the lodge that he was a defaulter, and the sureties were ignorant of the fact; . . . that it was the duty of the officers and members of the lodge, when the bond was executed, to have informed defendants that their principal was a defaulter, and defendants were misled thereby," etc. The plaintiff demurred to the defense, and the court sustained the demurrer.

The contention of the sureties, as stated by the court, was "that such conduct on the part of the lodge was calculated to and did mislead appellants, and operated as a fraud upon them; and the concealment by the officers and members of the fact that [the treasurer] was a defaulter when they signed his bond was a positive fraud." But the court held that the defense was not a good one, citing *Morley v. Matamora*, 78 Ill. 895, 30 Am. Rep. 266; *Pinkstaff v. People*, 59 Ill. 148. That is exactly this case, and the identical question here presented is there decided, on the ground that it was not the duty of the lodge to spontaneously furnish proof of the principal's embezzlement. The same question was again decided in the same way in *Home Ins. Co. v. Holway*, 55 Iowa, 571, 39 Am. Rep. 179. In *Mages v. Manhattan L. Ins. Co.*, 92 U. S. 93, 23 L. ed. 699, a similar case is stated, and a like demurrer was sustained in the lower court, and the judgment was affirmed by the supreme court, citing with approval the English decisions quoted by De Colyar. The theory of our law and the tenor of our jurisprudence is the same as that of other states of the Union. In *Union Bank of Louisiana v. Beatty*, 10 La. Ann. 878, suit was brought against the cashier and certain of his sureties, and the defense of the latter was the same as it is in the instant case,—undisclosed embezzlement of their principal; but the court held the sureties bound. The decision of the court was, in effect, that such of the assets as did not exist in kind "existed in claims of the same amount" upon (the cashier personally) "for undetected embezzlements." "The principal contract was not, either wholly or in part, affected with nullity, and, being good and valid, the validity of the collateral undertaking follows. The consideration of a contract does not pass to the surety. His obligation arises from the consideration received by his principal." *Vids Mouton v. Beauchamp*, Id. 866. But, if the rule of our law applicable to suretyship be applied, this defense is wholly unavailing, because the code declares that "the surety may oppose to the creditor all the exceptions belonging to the

principal debtor, and which are inherent to the debt; but he cannot oppose exceptions which are personal to the debtor." Rev. Civ. Code, art. 3060. Not only so, but, as the defendant Lazard's obligation is, in terms, joint and several with the debtors, Henry Block & Bro., he is to be dealt with and "his engagement is to be regulated by the same principles which have been established for debtors *in solido*." Id. art. 3045. Altogether there is no escape from the conclusion that this defense of Lazard is a bad one, and was incorrectly maintained in the court *a qua*.

4. (a) It cannot be successfully urged that the debt sued on is not the one that was guaranteed, for the manifest reason that the language of the agreement is that "I [C. Lazard] hereby agree to become surety for Henry Block & Bro. for the sum of \$10,000, jointly and severally with Henry Block & Bro.;" and there is no limit, restriction, or designation of any particular debt or account, either present or future; and the surety is bound by the terms of his contract.

(b) It is not a good defense that some of the items of indebtedness matured after the date fixed in the agreement, as the limit of his obligation. It is only material to inquire whether the items of indebtedness were contracted prior to the expiration thereof.

(c) It is not a good defense that some of the items of plaintiff's account were contracted by Block & Bro. prior to the date of the defendants' contract, for the reason previously stated,—that his engagement was general "to become surety for Henry Block & Bro. for the sum of \$10,000." The only limit of any kind that is fixed in the agreement is that it is not to remain in operation after the 15th of October, 1891.

Having examined with due care the various defenses set up by the surety or guarantor, and all the authorities on the subject, we have reached the conclusion that the judgment which was rendered by our learned and conscientious brother of the lower court is erroneous, and must be reversed. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the plaintiffs, Lachman & Jacobi, do have and recover of and from the defendant C. Lazard, as surety for Henry Block & Bro., the sum of \$10,199.64, with 5 per cent per annum interest from judicial demand, subject to a credit of \$594.18 as of date of filing suit and all costs of both courts.

A petition for rehearing was subsequently filed in response to which Watkins, J., on May 21, 1894, on behalf of the court delivered the following opinion:

Considering that one of the justices was not a member of the court at the time of the submission of this cause; that the amount in controversy is large, and the principles of law are important and somewhat abstruse; and that the argument of counsel now representing Lazard presents some novel features, requiring examination; counsel who prepared the case, made the argument, and filed the briefs, at its submission, not taking part

in this application,—the court is of opinion that the case should be again argued before a final decision is reached. It is therefore ordered and decreed that the case be set down for oral argument at the first fixing of causes at the next term of the court, on the application for rehearing.

After rehearing, the opinion of the court was delivered by Miller, J., on March 11, 1895:

The important issues in this case, after the fullest discussion by counsel, have been re-examined with earnest attention. The suit is founded on a paper dated 14th June, 1891, signed by defendant C. Lazard, addressed to plaintiffs, expressing that he agrees to become surety for Block & Bro., jointly and severally with them, for \$10,000; the agreement to bind till the 15th October, 1891. The argument for plaintiffs maintains that the paper obtained from defendant Lazard by one of the firm of Block & Bro. by him transmitted to plaintiffs, residing in California, with no intercourse whatever between plaintiffs and defendant, either before or after the execution of the paper, binds him for \$10,000 of the indebtedness of Block & Bro. to plaintiffs, existing at the date of the letter, or contracted after, and even on terms of credit extending beyond the limit expressed in the paper. On the other hand, it is contended on behalf of defendant that the paper, importing merely an engagement to become surety, with no designation of the debt, cannot, by construction, be deemed to cover past and future indebtedness, nor debts contracted on terms of credit beyond the period of defendant's suretyship stated in the paper; and along with these views of the meaning of the letter, restricting the liability on it, if any, the proposition of the defense is that this paper, a mere proposition to become surety, not accepted in any mode whatever, never became a contract, and hence produced no obligation. There are other defenses, but, in our view, they require no determination.

In ordinary significance, suretyship refers to an existing debt. As the code puts it, suretyship is the accessory contract of one who binds himself for the debt of another. But it is not to be doubted that under the code the contract may bind for future as well as existing or past indebtedness. The expansiveness of the code may be deemed to embrace suretyship in the largest sense; including, of course, the guaranties and bills of credit so familiar in commercial usage. Civ. Code, arts. 3035, 3039; 1 Bouvier, Law Dict. 645. But it seems natural, if suretyship was intended to cover past and future indebtedness of the debtor, the purpose would be expressed. One proposing to bind himself as surety for indebtedness future and past, and desiring to be understood, would hardly confine himself with the mere expression of agreeing to become surety, with no indication of the debt intended to be secured. On the other hand, the creditor seeking a surety for existing as well as prospective liability of his debtor would not deem the purpose accomplished by the scant agreement

to become surety, with no debt mentioned, future or past. The contention of plaintiffs is, this court is to read into this paper that which is not expressed, and give it the largest significance of suretyship; that is, a suretyship up to \$10,000 for the indebtedness, past and future, of Block & Bro. to plaintiffs. It must be borne in mind, too, that the surety is entitled to a strict construction of his contract. He is protected from any interpretation of his contract not resting on clear expression or plain implication. The code declares that suretyship is not to be presumed, should be expressed, and is to be restricted within the limits intended. Civ. Code, art. 3039; *New Orleans Canal & Bkg. Co. v. Hagan*, 1 La. Ann. 62; *Freeland v. Briscoe*, 3 La. Ann. 257. It seems to us, to make this paper cover past as well as future indebtedness would be to supply by inference that which is neither expressed nor implied. If it stands for past indebtedness, the most liberal construction, if any, would be required to make it cover future debts. If accepted as suretyship for the future engagements of Block & Bro., it would hardly be deemed rational to make the same words cover past indebtedness. The limitation of defendant's responsibility to 15th October, to our minds, aids the construction. Such a stipulation might, it is true, be used with reference to an existing debt. It is more natural so to qualify suretyship for future engagements, and is not uncommon in such papers. Men are not disposed to become surety for future debts without restricting their responsibility as to its duration. That stipulation serves to mark the character of the paper, and coincides with Lazard's testimony. Plaintiffs desired security for future and past debts. It is quite clear defendant never intended to give that which plaintiffs wanted, and did not, in signing the paper before us. Indeed, the proof is in the record that plaintiffs were not satisfied with the paper. In their communication to Block & Bro., acknowledging its receipt, they state that it is not in correct form, and of no "legal force;" that they "will send another." But it was never sent. The plaintiffs' communication forcibly suggests whether they were ever influenced by the paper, of no "legal force," as they expressed it, but on which they are now asserting defendant's liability. If of any obligatory force, it would seem to be beyond their appreciation of it, expressed to their correspondent. On the character of this paper, we have too, the undisputed testimony of defendant that he gave it on Block's application, to enable him to make a purchase of wine from plaintiffs, susceptible of speedy sale and quick profit, so that defendant's suretyship would be short. Hence defendant's limitation not to be bound beyond 15th October, 1891. True, Block's representation would not affect plaintiffs, if the paper was worded to cover a wider or different liability than that intended. The paper authorized no such interpretation as plaintiffs now seek to place on it. Nor are plaintiffs in any condition to invoke a construction beyond the fair import of its terms. It seems to us, to hold this paper had any reference

to past indebtedness is to disregard its language and close our eyes to the testimony of its purpose.

In the face of the limitation in the paper, the defendant is sought to be held for purchases of Block & Bro. beyond the period announced in plain terms as the duration of his responsibility. Reaching the conclusion the paper contemplated,—the future purchase or purchases,—how can we hold defendant for engagements extending beyond 15th October, 1891? Can this limitation be deemed to refer to the dates of the purchases? They were limited to \$10,000. There was no occasion to repeat that. It is obvious the express stipulation as to the time defendant was to be bound excluded the liability for any engagement of Block & Bro. maturing after 15th October, 1891. To hold otherwise, it seems to us, would be to avoid the fair import of the restriction in this respect, and deprive the defendant of the protection he designed securing. On this ground alone the case is with defendant. But we have given attention to other phases of the controversy.

Whether this paper is to be viewed as referring to past or future, or both past and future, indebtedness of Block & Bro., the question remains, Did the mere signing of the paper on Block's request, and its transmission by him to plaintiffs, produce any obligation on defendant's part? In any point of view, is it not indispensable to the creation of any obligation arising on the paper that plaintiffs should have accepted it, and communicated their assent to defendant? If, as we hold, the contemplation of defendant was a suretyship for future debts Block & Bro. might contrast on the faith of his guaranty, was he not entitled to know that plaintiffs acted on it? Can it be admitted that, without the slightest intimation to defendant that his guaranty was accepted, plaintiffs could, at any future time short of prescription, present the paper, and claim that defendant was bound for purchases by Block & Bro., of which defendant had neither knowledge, nor even opportunity of knowledge? If, without assent or communication of any kind by plaintiffs, they can claim in October that defendant's paper, signed in June, became a contract the moment it was signed, and on that theory hold him liable for goods they chose to sell Block, with the same reason plaintiffs might assert such liability years after, or when their debtors became bankrupt, or in other changed conditions, when no sane man would ask or give the guaranty defendant was content to sign in June, 1891, for an apparently prosperous firm. The plaintiffs' case assumes a most extraordinary contract, subsisting and binding defendant, but with no assent on plaintiffs' part, made known to defendant, entitled to know if he was to be held on his guaranty; and another phase of the supposed contract is that while defendant was thus bound, unknown to himself, not the shadow of an obligation rested on plaintiffs to furnish Block any goods whatever. It is difficult to conceive that a contract obligation of defendant came into full force by his

proffered guaranty, in June, 1891, with not the slightest intimation of assent or acceptance by those to whom it was tendered. Contracts, the code declares, arise from proposition by one and acceptance by the other of the parties. As the code again puts it: Consent being an operation of the mind, it can have no effect in producing the contract, unless evinced in some manner that shall cause it to be understood by the other party. In a varied form of expression, the code again declares the agreement is incomplete until acceptance. Nor can there be any acceptance unless given within the time it was the manifest intention to allow. The appropriate time for plaintiffs' assent was June, when the paper was signed. It will hardly be claimed it could be given in October, when the first intimation came from plaintiffs to defendant of any claim of contract on his part. Then Block had failed, and acceptance on the then condition was precluded by both reason and law. Civ. Code, arts. 1797, 1798, 1800, 1803, 1804, *et seq.* The plaintiffs' case rests on the basis of contract without mutual consent, or rather of assent by one of the parties never given. It would seem to find its answer in those articles of the code defining the essentials of contracts.

The paper on which this suit is based was executed here. If it imports any obligation, its performance was to be here. Payment accordingly is demanded here. In our view, our code is the law to be applied. The code, too, is in harmony with the general law on the subject. The result would not be at all different if recourse is had to the rules of the commercial law, applied in solving questions arising on letters of credit or the "contract of guaranty," as it is termed. It is to be observed that the application of these rules is not excluded unless contrary to the codal or statutory provision on the subject. *Wagner v. Kenner*, 2 Rob. (La.) 124; *Thompson v. Mylne*, 4 La. Ann. 210. We think it clear that under the commercial law the guaranty or letter of credit does not bind without acceptance, express or implied. Indeed, this is, in our view, plainly announced in the Louisiana decisions, and to hold otherwise in this case would be a departure from jurisprudence. We state the earlier case in our Reports thus: Merchants here gave a letter of credit never accepted by the party from whom the proposed advances were to be obtained. The advances were made, and suit was brought against the merchants on their letter. The decision was, the merchants were not bound, because, as the court puts it, the party giving the guaranty has a right to know whether or not it is accepted. The same question came again under discussion in a later case, and, although the conclusion was reached that acceptance of the guaranty in that case was to be implied from the subsequent relations of the parties, there is no trace of any contention that acceptance in some form was not essential. *Bank of Illinois v. Bloo*, 16 La. 542, 35 Am. Dec. 223; *Menard v. Scudder*, 7 La. Ann. 885, 56 Am. Dec. 610. Here there is absolutely nothing on which acceptance can be implied. The challenge, as we appreciate the argument for

plaintiffs, is to the code and our decisions, and affirms that no acceptance is requisite. Nor can the least benefit to defendant come from the case they cite from the United States Reports dealing with this subject, on which it was held that acceptance was perfected by a consideration, however small,—in that case, one dollar,—paid by the guarantee to the guarantor. *Davis v. Wells*, 104 U. S. 160, 26 L. ed. 687. That payment by the one, and the receipt of the money by the other, completed the contract. It was a case of proposition and acceptance. In that case the court refers to acceptance as essential, and to the line of decisions affirming it. Ordinarily, suretyship is completed by the assent of both parties manifested at the time of the contract. True, it may be given after under the restrictions as to time and conditions so clearly stated in the code. Here there is none at any time. There is no more emphatic statement of the necessity of acceptance than is stated in one of the leading text-books, thus: "Guaranty, like all other contracts, requires proposal and acceptance thereof. If, therefore, an offer of guaranty be made to any person, it is his duty to give notice of his acceptance, or there will be no contract." Story, Cont. §§ 852, 853, *et seq.* Or in the language of the Supreme Court of the United States: "On a letter of guaranty addressed to a particular person, or to persons generally, for a future credit to be given to a party in whose favor the guaranty is drawn, to charge the guarantor, notice is necessary to be given to him that the person giving the credit accepted or acted upon the guaranty, or had given credit upon the faith of it. This is not an open question in this court, after the decisions which have been made in *Russell v. Clark*, 11 U. S. 7 Cranch, 69, 3 L. ed. 271; *Edmondston v. Drake*, 30 U. S. 5 Pet. 624, 8 L. ed. 251; *Douglass v. Reynolds*, 32 U. S. 7 Pet. 113, 8 L. ed. 626, and *Lee v. Dick*, 35 U. S. 10 Pet. 482, 9 L. ed. 503." The court further said, on page 213, 1 L. ed. 106: "It is in itself a reasonable rule enabling the guarantor to know the nature and extent of his liability, to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him, and to avail himself of the appropriate means, in law and equity, to compel the other parties to discharge him from future responsibility." The court, after referring to the various decisions of that court on the subject, and after quoting and affirming 32 U. S. 7 Pet. 125, 8 L. ed. 631, says: "It is unnecessary, after such clear and decided authority of this court on this point, to fortify it by additional adjudications. We are not aware of any conflict of decision on this point." *Adams v. Jones*, 37 U. S. 12 Pet. 207, 9 L. ed. 1058.

It is claimed, however, that neither our code nor the decisions afford any solution of this controversy. It is to be governed, it is urged on us, by a statute of California. This contention is on the idea that, plaintiffs receiving the paper in California, it became subjected to the law there. The statute is that, on letters of credit, notice of the advances is not requisite. It is assumed that

the paper,—a suretyship, as it seems,—under our code, is within the purview of the statute, and that concludes the question. Notice of advances on letters of credit may well be dispensed with. The failure of such notice is not in any case a defense, unless causing loss to the guarantor. *Louisville Mfg. Co. v. Welch*, 51 U. S. 10 How. 461, 475, 13 L. ed. 497, 502; *Davis v. Wells*, 104 U. S. 170, 26 L. ed. 691. It is contended the California statute goes further; applies to guaranties, letters of credit or suretyship, and dispenses with any consent to the contract on the part of the guarantor. If so, the law supplies consent,—the foundation of contracts. We do not undertake to determine the scope of this statute. The law of a contract is used to denote as well that of the place where the contract is made as of the place of performance. The operation of the law of the place of performance is where the contract made in one place is to be executed in another. *Story, Confli. L.* §§ 233, 234, 280, 284; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104. The defendant executed the paper in this state. The performance of his contract, if any, was to be here. Here the payment of his alleged obligation was to be demanded, and in our courts payment is sought to be exacted. We think his asserted contract is governed by our law. There is, it seems to us, no doubt of the character. It is paper tested by our law, and, it may be added, in questions of the application of laws to contracts, in all cases of doubt, our courts follow our law.

In reaching our conclusion, the contention as to the asserted estoppel of the defendant, forming so large a part in the discussion in the briefs and at the bar, has not escaped attention. It is urged that his promise to pay plaintiffs' demand, and his allegations and oath to the debt sued on in this suit of his firm against Block & Bro., conclude the defendant from disputing plaintiffs' demand. The proof is, demand was made on defendant in the early part of October, 1891, for the money claimed on his paper of the preceding June. It may well, we think, be assumed that defendant was not at all informed on the question of his liability. The inquiry as to the effect of his paper occupying the attention of counsel and of the court for months, it is not to be supposed the defendant was competent to determine on the demand made on him through plaintiffs' lawyer. But the demand assumed his liability, and defendant's promise was expressed in his request for time to pay. But he consulted his counsel, was advised there was no liability, and, on a second demand being made, defendant replied, through his counsel, he was not bound and would not pay. It seems to us utterly beyond the compass of reasonable discussion to hold the defendant bound merely and only because of his recognition or promise to pay an asserted debt, promptly withdrawn on being apprised he was not bound. The law does not bind a man irrevocably by his promise made in error, and admits of any explanation that will avoid the promise. A very familiar illustration, if any was needed, that such promises do not bind, is furnished in the instance of

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the indorser who, ignorant of his discharge, promises to pay. The law permits explanation of his error, holds the promise for naught, and, if he has paid on such promise, gives the action to recover back his money. *Story, Prom. Notes*, § 361; *Citizens Bank v. Dugue*, 5 La. Ann. 12; *Oakey v. Bank of Louisiana*, 17 La. 386; *Heath v. Commercial Bank of New Orleans*, 7 Rob. (La.) 384. We cannot, therefore, hold this defendant liable on the ground only that on the lawyer's demand he made a promise withdrawn soon after, and on which it is not pretended plaintiffs extended any forbearance, or adopted or omitted any action whatever. In the suit of *Lazard & Co. against Block & Bro.* for a large indebtedness, it is claimed the amount of defendant's paper or guaranty was included, and in that suit the plaintiff made oath to obtain the attachment. The amount, \$41,000, sued for in that suit, included an item of \$10,000 as "outstanding." It appears there was no explanation or discussion between Lazard and the counsel who brought the suit as to this item. If there had been, it is to be presumed the suit of C. Lazard & Co. for their debt would not have embraced \$10,000, which, if due at all, would be due to C. Lazard individually. Least of all is it likely that the counsel, if there had been any explanation on the subject, would have permitted defendant to swear to a debt including \$10,000, which under no circumstances could become a debt until defendant paid the \$10,000 to plaintiffs, and which by that payment would become the debt of Block & Bro. to defendant, and not to his firm, the plaintiffs in the attachment suit. Along with the fact that the suit as to this item, "outstanding, \$10,000," was neither preceded nor accompanied by any special direction or information from defendant, we have the statement that the bookkeeper of Lazard & Co. furnished the memorandum making up the \$41,000. There is some discussion as to the memorandum,—whether or not it was the guide of counsel in framing his petition. We will accept the conclusion most favorable to plaintiffs—that it was furnished to the counsel,—and we will assume it was intended to include the amount of \$10,000. Still it is quite evident the suit was brought hastily,—often the case in attachments,—evinced, as in this case, we infer, a race of creditors seeking to secure the favored position; and it is perfectly clear there was no special communication by defendant to his counsel with reference to this \$10,000 item, and not the slightest knowledge on counsel's part that this paper or guaranty of defendant formed any part of the attachment suit. We infer from the record that it was not until the demand came from plaintiffs, based on that paper, it became known to counsel that the attachment suit embraced the guaranty. He then told defendant the explanation of the \$10,000 item should have been given before the attachment suit was instituted; clearly implying that, if given, the item would not have included the guaranty. The suit as to the \$10,000 was thereupon discontinued on the ground of error. It is this suit, the allegations on which it was based, and defend-

ant's affidavit to the amount sued for, that, it is urged on us, excludes defendant from denying his liability in the present suit. Let it be conceded that, when that suit was brought, defendant conceived he was bound on the guaranty. If he was not in fact bound, are we to hold him on the ground that, whether or not liable, he became bound because, in the attachment suit of his firm against Block & Bro. the guaranty was included? Undoubtedly, the allegations of a party in a suit are evidence against him, in favor of another, not a party to the suit. But are they to be deemed conclusive? Even as admissions, their value is diminished by the fact that the petition in the attachment suit was directed and framed with no examination or appreciation on the part of counsel or defendant of the question of liability on the letter of guaranty. Is an impression of liability when none exists, made the basis of an attachment suit against Block, to preclude the defendant from any defense against plaintiffs when his impression turns out to be erroneous, especially when the suit against Block was discontinued? If so, the error of the party in directing a suit, or the mistake or lack of attention of counsel in framing the petition, is attended with consequences more serious than are readily appreciated. We cannot accept the theory that because, in the suit of defendant's firm against Block & Bro., the guaranty, which had no place in that suit, was included, although the suit was discontinued in that respect, yet we are to make the defendant liable, however clear it may appear to us that he was never bound. That would be to bind defendant by his erroneous assumption of liability, or by the error of counsel, and not because of any obligation originally resting on him. But it is urged on us that defendant derived an advantage from the inclusion of the guaranty in his attachment suit, and hence cannot, holding on to the advantage, repudiate the allegations in the suit which secured the supposed benefit. We cannot perceive the basis of fact for this argument. The firm's debt, of course, excluding the guaranty, was \$31,000. The entire property attached did not exceed \$9,000. Finally, on this branch of the case, it is pressed on us that the allegations in the attachment suit are judicial confessions, within the purview of article 2291 of the Civil Code. This, in our view, misconceives the judicial confession,—the subject of that article. It can be invoked as conclusive by the party to the suit in which the allegation is made, and, even as to him, may be revoked for error of fact. As to those not parties to that suit, the allegations are evidence in their favor, but open to explanation and correction by proof. 1 Greenl. Ev. §§ 206, 212; *Millard v. Carpenter*, 6 La. Ann. 397. Of course, when any admission or declaration of a party has been acted on by another can be withdrawn to his prejudice, then the admission becomes an estoppel. 1 Greenl. Ev. § 207. There is not the faintest pretense that the plaintiffs in this case, save in one respect,—the beginning of this suit,—were influenced in the slightest degree by the intercourse be-

tween their lawyer and defendant, from which his promise is deduced, nor by the attachment suit of defendant's firm, or the allegations of the petition in that suit. The plaintiffs were apprised that defendant did not recognize their demand, and on that they acted, *i. e.* brought this suit. But no act or declaration of defendant is exhibited by this record on which, in our view, any estoppel can be based.

In our view, the case is with the defendant on the terms of the paper, the basis of this suit. That paper excludes liability for the engagements of Block & Bro. maturing after the 15th October, 1891. We have also considered the question whether any contract was ever formed, and on that issue our conclusion is adverse to plaintiffs. The grounds of liability urged by plaintiffs have had our careful attention. More might have been said with respect to the issues we deem controlling, as well as other phases of the controversy, but the views presented in this opinion dispose of the case.

It is therefore ordered, adjudged, and decreed that our former judgment in this case be set aside; and it is now ordered, adjudged, and decreed that the judgment of the lower court be affirmed, with costs.

Watkins, J., dissenting:

Various grounds have been assigned—which are pressed in argument, oral and printed—why we should grant a rehearing and change our decree; but as we are all of the opinion that all of them are groundless, with the exception of one, I will confine my argument to that one, exclusively.

This suit is brought against Henry Block & Bro., on their indebtedness to plaintiffs on open account, aggregating something more than \$10,000, and against C. Lazard, on his written agreement to bind himself to them for \$10,000, in favor of Henry Block & Bro. This agreement is of the following tenor, *viz.*: "I hereby agree to become surety for Henry Block & Bro. for the sum of ten thousand dollars, jointly and severally with Henry Block & Bro. This agreement to bind me in the sum of ten thousand dollars until the 15th of October, 1891." The two principal grounds of defense which are set up in the answer and relied upon in argument are (1) want of notice by Lachman & Jacobi to Lazard of their acceptance of his agreement; and (2) fraud on their part in obtaining it. *Imprimis*, these defenses involve a manifest contradiction, that is utterly destructive of the defense, in this: If plaintiffs never accepted the defendant's agreement, they could not have been, at the same time, guilty of fraud in obtaining it; and, if they were guilty of fraud in procuring it, certainly notice of their acceptance would have been an unavailing ceremony. These judicial admissions ought to be the end of the case.

The only doubt there is in the minds of the members of this court as to the correctness of our original opinion is in relation to the plaintiffs' notice to Lazard of their acceptance of his agreement. The difficulty of solution arises chiefly from the difficulty

there is in determining what the instrument of writing is,—one of suretyship, guaranty, or a letter of credit. In my opinion the agreement of Lazard is one of suretyship, for the following reasons, viz.: (1) Because the recitals of the instrument declare that "I hereby agree to become surety for Henry Block & Bro." (2) In the brief of counsel in support of this application, I find the following admission, viz.: "The contract, on its face, is a contract of suretyship, and the court holds it to be such." Again: "The court erred in holding that Lazard was not entitled to notice from the plaintiffs of their acceptance of his alleged contract of suretyship." Again: "The court erred in holding that the letter missive in this cause to plaintiffs was not an offer to become a surety, within the meaning of the law upon that subject." That these admissions were deliberately made is attested by the fact that the last two quotations are the headings of the two propositions on which counsel mainly rely, and one of which the court has under present consideration. (3) They are in strict keeping with the individual answer of Lazard in this suit, wherein he avers that, if he is in any way liable for the account sued on Mayer Israel is a cosurety, and that he is entitled to the benefit of division which he hereby claims; or, in the alternative, "the said Mayer Israel being a cosurety, he is entitled to recover against him judgment for one half of the amount of the judgment rendered against him." His prayer for judgment conforms to the foregoing allegations of his answer. (4) In the demand that the attorneys of Lachman & Jacobi made upon C. Lazard, under date October 7, 1891, they say, *inter alias*, that: "We hereby notify you that the indebtedness of Messrs. Henry Block & Bro. to said Lachman & Jacobi, for which you are surety under your letter of June 4th, 1891, amounts to \$10,070.84. You are aware that attachments, far exceeding Henry Block & Bro.'s assets, have been levied upon them, and we demand immediate payment, or we shall institute suit promptly. Yours, very truly, Moise & Titcher."

There can be no doubt of the correctness of our opinion, in so far as it affirmed that Lazard sustained towards the plaintiffs the relation of surety for Henry Block & Bro. Under the code, "suretyship is an accessory promise by which a person binds himself for another already bound." Rev. Civ. Code, art. 3035. It is a personal and accessory promise in favor of a third person, primarily. A mortgage is a contract of security for debt. Id. art. 3278. So is a pledge a contract of security for debt. Id. art. 3133. A mortgage is "a species of pledge. Id. art. 3279. All of these engagements are, in another article of the code,—under the title "Of Conventional Obligations,"—placed in the same category, thus: "An accessory contract is made for assuring the performance of a prior contract either by the same parties, or by others; such as suretyship, mortgage and pledge." Rev. Civ. Code, art. 1771. As an agreement of suretyship, or accessory promise, notification of acceptance on the part of Lachman & Jacobi was altogether unnecessary to give it binding force on C. Lazard,

(1) because the law does not require such notice; and (2) because the terms of the agreement exclude the idea of notice of acceptance being required. (a) There is nothing said, under the title "Of Suretyship," in the code, of such notice being required,—not even by implication. This is just what we said in our original opinion; and, after making a quotation therefrom, counsel for applicant say in their brief: "True, there is no text of the law to that effect, particularly and specially applicable to the contract of suretyship; but there are many texts to that effect which necessarily apply to all contracts, suretyship included." Counsel, in support of that proposition, cite quite a number of articles of the code (articles 1768, 1779, 1797, 1798, 1800, 1803, 1804, 1809, 1810, 1819, 1997, 2039), all of them being found under the title "Of Conventional Obligations," and neither of them making mention of the notice of the acceptance of a contract of suretyship. This admission is an absolute surrender of the whole question, for it is elementary that the articles of the code which are collated under any given title must be consulted, in determining the essential elements of the contract which is therein specified. We may examine other articles and titles for the purpose of ascertaining the effect of an article under examination, but for such purpose only. But, strange to say, counsel add, in the very next sentence to the one above quoted, that "suretyship is a commutative contract"; referring to Rev. Civ. Code, art. 1768, under the title "Of Conventional Obligations," and, in making that statement, seem to have overlooked the almost immediately following article (1771), which declares that "suretyship" is an "accessory contract," "such as mortgage or pledge." It must be borne in mind that the question is not as to Lachman & Jacobi's consent to a contract, but as to their failure to give the surety notice of their acceptance of their agreement. This agreement is an accessory promise which C. Lazard executed in favor of Lachman & Jacobi *ex gratia*. The primary obligation is from Henry Block & Bro. to Lachman & Jacobi. It is therefore clear that the rules of law governing commutative contracts are without application or analogy to the issue. (b) The terms of Lazard's agreement exclude the idea of Lachman & Jacobi giving notice of acceptance, because they are absolute and unconditional, and clearly import a binding agreement from and after date, for it says: "I hereby agree to become surety for Henry Block & Bro. for the sum of \$10,000, jointly and severally with Henry Block & Bro. This agreement to bind me in the sum of \$10,000 until the 15th of October, 1891." Not only does C. Lazard "agree to become surety for Henry Block & Bro.," but this agreement is made "jointly and severally with Henry Block & Bro." Nor is this all, for the foregoing is supplemented thus: "This agreement to bind me in the sum of \$10,000 until the 15th of October, 1891." To bind him when? Evidently from the date of the agreement. To bind him how? Jointly and severally with Henry Block & Bro.

Bro. for their indebtedness to Lachman & Jacobi. What is the effect of such a promise of suretyship? Let us see what the code says, under the title which treats "Of the Effects of Suretyship between the Creditor and the Surety," with reference to this character of suretyship; and, looking into the code on the subject, we find the following, viz.: "The obligation of the surety towards the creditor is to pay him in case the debtor should not himself satisfy the debt; and the property of such debtor is to be previously discussed, or seized, *unless the surety should have renounced the plea of discussion, or should be bound in solido jointly with the debtor, in which case, the effects of his engagement are to be regulated by the same principles which have been established for debtors in solido.*" Rev. Civ. Code, art. 3045. (Our italics.) Let us then examine the principles which have been established for debtors *in solido*, and thus ascertain what are the effects of C. Lazard's solidary engagement with Henry Block & Bro. in favor of Lachman & Jacobi. A single reference will answer the purpose, for the provisions of Rev. Civ. Code, art. 2094,—to be found in the chapter which treats "Of the Rules Which Govern Obligations with Respect to Debtors *in Solido*,"—are: "The creditor of an obligation contracted *in solido*, may apply to any one of the debtors he pleases, without the debtor's having a right to plead the benefit of division." Giving the same effect to Lazard's solidary engagement of suretyship, he is not entitled to urge the plea of discussion or division; and Lachman & Jacobi could apply to him, first and alone, to pay the debt of Henry Block & Bro., if they chose. This is evidently true, and demonstrates that C. Lazard was not entitled to notice by Lachman & Jacobi of their acceptance of his solidary suretyship. To arrive at this conclusion, this court would have to maintain the doctrine that the surety *in solido* on any conventional obligation would not be bound, without the obligee's formal notice of acceptance were first given. This is not true, of course.

But it is insisted that Lazard's agreement is merely a mercantile letter of credit, and hence notice of acceptance is of its essence. Let us examine this proposition. Had Lazard's engagement been restricted to the phrase, "I hereby agree to become surety for Henry Block & Bro. for the sum of \$10,000," and all that follows omitted, there might have been plausibility in the contention; but the remaining words of the sentence, "jointly and severally with Henry Block & Bro.," give it the character of a solidary engagement with the plaintiffs' debtors, which the code declares shall be "regulated by the same principles which have been established for debtors *in solido*." Rev. Civ. Code, art. 3045. And the concluding sentence—"this agreement to bind me in the sum of \$10,000 until the 15th of October, 1891"—even more clearly evidences the immediate and unconditional effect of Lazard's engagement. Words more potent could not have been chosen for the purpose of showing that Lazard's evident intention was to bind himself immediately and in any contingency.

28 L. R. A.

His agreement is altogether different from the one that figured in the case of *Menard v. Scudder*, 7 La. Ann. 385, 56 Am. Dec. 610. It was of the following tenor, viz.: "Baton Rouge, Dec. 4th, 1849. I do recommend my friend, J. B. Scudder, of the parish of East Baton Rouge, a planter, and any funds he may raise, or acceptances, in case he does not pay, I bind myself to pay. James McCalop." Of that instrument the court expressed the opinion, viz.: "The common sense of this declaration is a *promise to indemnify*; a guaranty to those who *might* lend his money, or accept for him." (Our italics.) They also expressed the opinion that notice of its acceptance was necessary; but it is interesting and instructive to observe the grounds they put that opinion upon. They say: "For when the letter of guaranty is addressed to the public at large; when it is a *proposition*, and to attach upon future transactions; when it is *unlimited in amount and indefinite in duration*, and is, by its nature, *subject to recall*,—it seems manifestly just that the guarantor should be entitled to notice of acceptance, within a reasonable time, from the person who undertakes to act upon its faith." (Our italics.) The agreement of Lazard is wholly different, in every respect.

But, if the agreement of Lazard be taken for a letter of credit, it is a foreign and not a domestic contract. It was drawn and signed in New Orleans, La., to have effect in San Francisco, Cal. It was addressed to Lachman & Jacobi, of San Francisco, by C. Lazard, of New Orleans. It was intended to form the basis of a line of credit the former were to give to Henry Block & Bro., as well as to secure their existing indebtedness. The precept of our code applicable to this kind of an engagement is this: "But the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect." Rev. Civ. Code, art. 10. In our jurisprudence this article has been frequently applied to similar engagements. In *Whiston v. Stradler*, 8 Mart. (La.) 135, 13 Am. Dec. 281, it was held that "a contract between persons separated from each other is consummated in and governed by the laws of the place where the final assent is given. So an order for goods, from one in Louisiana on another in England, is governed by the English law." *Shaw v. Oakley*, 8 Rob. (La.) 361. In *Vidal v. Thompson*, 11 Mart. (La.) 23, it was held that "the laws and usages of the place where the obligation is to be fulfilled must regulate its performance." In *Zacharie v. O'Beirne*, 6 La. 402, it was held that "a mortgage given in one state, to secure advances to be made by a mortgagee in another state, being but inchoate, to take effect on the latter's acceptance, is governed by the laws of his domicile." In *Beirne v. Patton*, 17 La. 589, it was held that "the validity of a contract made in one place, tacitly or expressly to be performed in another, depends upon the laws of the latter." But perhaps the strongest and clearest illustration of this principle of law is to be found in the recent case of *Clafin v. Mayer*, 41 La. Ann. 1048, in which a case is stated in

which "the completion of the contract, the acceptance of the price and conditions, depended entirely upon the nonresident creditors." "When," the court says, "the agent exhibited the samples under their restricted authority, and transmitted their orders to their principal, there was no obligation created which the buyer could enforce. When the proposal to purchase, as forwarded by the agent, was accepted by his principal, then there was a contract created which the buyer in New Orleans could enforce." Again: "In the instant case there is no difference between the proposal to purchase, forwarded by the agent, and one transmitted through the mail by the buyer. It is not doubted that purchases by order, by the buyer himself, become contracts of the place where the order is filled." (Our italics.) *Gates v. Gaither*, 46 La. Ann. 286; *Larendon's Succession*, 89 La. Ann. 952. Unquestionably, Lazard's engagement, considered as a letter of credit, is a California contract; the city of San Francisco being the place of acceptance, as well as the place where the orders of Henry Block & Bro. were to be, thereunder, filled. But, in this view of the case, Lazard was entitled to no notice of acceptance, because the Civil Code of California provides that "the writer of a letter of credit is liable for credit given upon it, without notice to him, unless its terms express or imply the necessity of giving notice." Cal. Civ. Code, § 2865. The application of the law of the place of acceptance destroys this contention of the defendant, altogether.

But let me go a step further, and consider Lazard's agreement as a common-law guaranty, and what is the result? On this proposition it is only necessary for us to consider one case.—*Davis v. Wells*, 104 U. S. 159, 26 L. ed. 686, as it is conceded to be the leading case on that question. Its syllabus is as follows, viz.: "The rule requiring notice by the guarantee of his acceptance of the guaranty, and his intention to act under it, applies only when—the instrument being, in legal effect, *merely an offer or proposal*—such an acceptance is necessary to the mutual assent, without which there can be no contract." (Our italics.) Applying that rule to Lazard's agreement, it is quite evident that he was entitled to no notice of acceptance, because it is not a mere proposal, but a solidary engagement with Henry Block & Bro. This was the feature of the contract Davis entered into with Wells, Fargo & Co., which the supreme court particularly emphasized, as controlling their decision; for, in treating of this absolute and unconditional feature of it, they say: "But if we should consider that, notwithstanding the completeness of the contract, as such, the guaranty of the future advances was *subject to condition imposed by law, that notice should be given to the guarantor* that the guarantee either would or had acted upon the faith of it, we are to inquire what effect is to be given to the use of the words which declare that the guarantors thereby 'guarantee unto them, the said Wells, Fargo & Co., *unconditionally and at all times, any indebtedness of Gordon & Co., to the extent and not exceeding the sum of*

\$10,000, for any overdraft now made or that may be hereafter made at the bank of said Wells, Fargo & Co.' Upon the supposition now made, the notice necessarily arises upon the nature of such a guaranty. It is not, and cannot be, claimed that such a condition is so *essential to the obligation that it cannot be waived*. We do not see what less effect can be ascribed to the words quoted than that *all conditions that would otherwise qualify the obligation are, by agreement, expunged from it, and made valid. The agreement becomes thereby absolute and unqualified,—free from all conditions whatever. This is the natural, obvious, and ordinary meaning of the terms employed, and we cannot doubt that they express the real meaning of the parties.* It was their manifest intention to make it unambiguous that Wells, Fargo & Co., for any indebtedness that might arise to them in consequence of any overdrafts of Gordon & Co., might securely look to the guarantors, *without the performance on their part of any conditions precedent thereto, whatever.*" (Our italics.) The court placed their decision squarely upon the absolute terms of the guaranty, viz.: "We guaranty unto them, the said Wells, Fargo & Co., unconditionally and at all times, any indebtedness of Gordon & Co.," and construed that language to be a waiver of all conditions precedent. In other words, the court interpreted those terms as having the same effect as a solidary promise of suretyship under our law, and operated as a waiver, or rather as a renunciation, of notice of acceptance on the part of the guarantee. That decision furnishes a conclusive answer to the contention of defendant's counsel.

The next proposition that is insisted upon is that in no event can Lazard be bound for the debts Henry Block & Bro. had already contracted at the date of his agreement,—June 4, 1891. Why not? The terms of his agreement are general, viz.: "I hereby become surety for Henry Block & Bro. for \$10,000." Also: "This agreement to bind me in the sum of \$10,000 until the 15th of October, 1891." They are without any limitation or restriction as to any particular indebtedness of Henry Block & Bro., for which Lazard obligated himself as surety, past, present, or future. As a man binds himself, so will he be bound. The law of suretyship puts no limitation upon such agreements,—quite the contrary; for the code declares that "suretyship is an accessory promise, by which a person binds himself for another already bound." Rev. Civ. Code, art. 3035. That article may be interpreted to mean "already bound" for an existing indebtedness, or for an indebtedness to be created in the future. The essential thing is that the surety shall bind himself as the obligor is bound, and not differently. But, if this is considered to be a doubtful proposition, the matter is put at rest by the parties themselves, pending their negotiations on the subject. On the 25th of May, 1891, plaintiff wrote a letter demanding of Henry Block & Bro. a guaranty, in these words, viz.: "You must also secure us in some way for money owing us for merchandise, and a guaranty to the amount of \$10,000 from your father-in-

law would be acceptable." This letter closes with this sentence, viz.: "The guaranty written of, we want in such shape that it covers all you owe us (on merchandise), and all you may owe us hereafter, up to \$10,000." A similar request is made in their letter addressed to Henry Block on the following day. On the 3d of June these two letters were followed by a telegram of similar purport. Immediately upon the receipt of those letters and telegram, the agreement of C. Lazard was procured, and on the 4th of June the following letter was mailed to the plaintiffs, viz.: "New Orleans, La., June 4th, 1891. Messrs. Lachman & Jacobi, San Francisco, Cal.—Dear Sirs: Your telegram of the 3rd to hand, and contents noted, and to-day wire you, Lazard's guaranty mailed to-day, which I inclose herewith. If I or our firm owe you this on that date, same will be promptly paid by C. Lazard & Co. Henry Block." These letters, among others, were introduced in evidence by C. Lazard, and they are as binding on him as any other part of the testimony, and from its effect there is no possible escape for him. Hence we have proved, "out of the mouth of his own witnesses," that the agreement was intended to secure the payment of Henry Block & Bro's merchandise account then due to the plaintiffs, as well as their future and prospective indebtedness up to the 15th of October, 1891. But what is an even more important and conspicuous fact is that Lachman & Jacobi, over their own signatures, negotiated this guaranty, and influenced and procured the agreement, and they indicated their willingness to accept C. Lazard as surety for \$10,000. They telegraphed for it on the 3d of June, and it was promptly forwarded on June 4th, by mail, and explained by wire. All of this correspondence is put in evidence by C. Lazard.

In our original opinion we held that the allegations of the plaintiffs' petition in the suit of *C. Lazard & Co. v. Henry Block & Bro.*—having been sworn to by C. Lazard, the senior member of that firm—constituted judicial admissions of a party to a suit, which cannot be altered at will, to the detriment of the other party, or with respect to those persons having an adverse interest in them." The purpose and scope of this expression were to affirm that, if it were at all doubtful that plaintiffs were entitled to recover against Lazard on his agreement, the judicial admissions in that petition were conclusive against him, notwithstanding Lachman & Jacobi were not parties to that suit; because the amount of the \$10,000 surety here sued on was included in that suit, and the affidavit for the attachment was made by C. Lazard. To that proposition counsel, in their application, make a most determined resistance. Plaintiffs' proposition is that, in this suit against Henry Block & Bro. and C. Lazard on the account and contract of suretyship, the latter cannot deny, for the purpose of relieving himself from liability, the binding force of a contract, the benefit of which he had sought and obtained in the former suit, by procuring for his firm the first attachment

of all the property of Henry Block & Bro., the common debtors of both parties, and defendants in both suits at the same time and the appropriation of the proceeds of the sale of the whole of their property to the payment of the debts of his firm, to the exclusion of all other creditors, plaintiffs included. Counsel for Lazard, in their brief, do not deny that the amount of this \$10,000 suretyship was included in the suit of *C. Lazard & Co. v. Henry Block & Bro.*, but, on the contrary, affirm that to be a fact, and insist that it was not in any way binding on C. Lazard & Co.; for, among other things, they say: "That suit was brought by the commercial firm of C. Lazard & Co. That firm was absolutely distinct from C. Lazard. C. Lazard's obligations were not those of the firm. C. Lazard's rights were not those of the firm. The firm was no party to this alleged contract of suretyship. Even if Lazard had paid every dollar of his obligation, the firm could not have recovered a cent from Block & Bro. The firm had no right, power, or authority to sue on any individual claim of C. Lazard." All that may be admitted at once, for it is not contended that C. Lazard & Co. were in any manner bound to plaintiffs, through the instrumentality of that suit. But it is urged—and our opinion holds—that C. Lazard's affidavit to the petition in that suit, including the suretyship, is a binding judicial admission of it, from which he cannot escape, notwithstanding it was incorporated therein without the knowledge or consent of his firm. Counsel seem to take comfort from the fact that there was no averment in the petition in the suit of *C. Lazard & Co. v. Henry Block & Bro.* to indicate that the contract of C. Lazard formed a part of it, and they say in their brief: "It was a plain error of law and fact to include any such individual claim of Lazard in the suit of the commercial firm of which he was a member. This plain error of law and fact was set forth in a motion and affidavit on December 1, 1891, and the court permitted the discontinuance of the suit in reference thereto. . . . Until this affidavit was filed, there was nothing whatever in the record to show that the claim included the alleged guaranty. . . . No human being, not possessed of the power of divination, could, from this language [the allegations of the plaintiffs' affidavit], infer that the averment covered a contingent liability of one of the partners of the firm, in which the firm had no interest or concern, and which they had no right to set up, and no right to recover on." Again: "There is not a line of evidence in the record to show that plaintiffs had any knowledge as to what the indefinite language of this petition covered, or was intended to cover. There was nothing in the record itself, when the suit at bar was brought, which gave the faintest inkling of the fact that the firm of C. Lazard & Co. was trying to enforce the individual claim of one of its members." The foregoing are distinct and unqualified admissions that the amount of the suretyship was included in that suit; that it was included therein by C. Lazard intentionally; but that it had been by him so

carefully secreted from view, that, in his opinion, "no human being, not possessed of the power of divination," could have inferred, from the "indefinite language of the petition," that "it covered a contingent liability of one of the partners" of his firm. After this suit was filed, on the 6th of October, 1891, the contract of suretyship went to maturity on the 15th; but on the 7th of October, previous to its maturity, the attorneys for the plaintiff wrote to C. Lazard a letter demanding immediate payment, on the penalty of suit *instantly*. In that letter they say: "You are aware that attachments far exceeding Henry Block & Bro's assets have been levied upon them, and we demand immediate payment, or we shall institute suit promptly." What reply did C. Lazard make to that demand? He neither disavowed his liability nor pleaded prematurity, but, carefully withholding from plaintiffs' counsel the fact that his liability was incorporated in the previous suit, asked them for an extension of time, thereby unqualifiedly admitting his liability to the plaintiffs. But the plaintiffs did not then institute suit. They waited patiently for six weeks, and only filed suit on the 16th of November, 1891, attaching the same property that C. Lazard & Co. had attached previously. In their petition in this suit all of the facts of the suit of *C. Lazard & Co. v. Henry Block & Bro.* are circumstantially related, alleging that it was first in order and rank of privilege, and that all of the partnership as well as individual property of the defendants had been seized. Setting out fully C. Lazard's contract of suretyship as securing the defendants' account, plaintiffs aver that in that suit "C. Lazard recognized an indebtedness due to petitioners by said Henry Block & Bro., and as covered by said contract of \$10,000, and that C. Lazard admitted his liability therefor, as guarantor for said amount, by including it in the aforesaid suit, No. 33,910, and swearing to its correctness." It thus appears that plaintiffs were well aware of the fact that this suretyship was incorporated in the former suit, notwithstanding C. Lazard's attempted concealment of it; and that fact was made one of the grounds for their attachment, and on it they place reliance, as establishing C. Lazard's admission of liability. They also rely upon Lazard's admission of liability, and request for an extension of time to pay. On the 20th of November, 1891,—just five days after this suit was filed,—plaintiffs in the suit of *C. Lazard & Co. v. Henry Block & Bro.* obtained an order of court for the sale, *pendente lite*, of all defendant's stock of merchandise; and, in pursuance of that order, same was subsequently sold, and the proceeds thereof applied to plaintiffs' claim, by preference, under their ranking attachment, to the exclusion of all others. On the 30th of November, 1891,—ten days subsequent to said order of sale,—that case went to trial on plaintiffs' motion to confirm a default, and C. Lazard was placed upon the stand, and interrogated as a witness, and in the course of his cross-examination he was asked a great many questions in reference to the agreement he

signed as surety for the defendants, in favor of Lachman & Jacobi; his attention being invited to the petition in the suit, evidently with the view of inducing him to make an admission to the effect that it was included therein.

To all these questions objection on objection was urged by the plaintiffs' counsel, but they were all overruled by the court, and the witness compelled to answer; the objections, evidence, and reasons of the judge covering fully fifty pages of the transcript No. 11,103 of this court. But finally, the day having been consumed, and no decisive answer from C. Lazard obtained to these pertinent inquiries, the court adjourned for the day. On the following morning, plaintiffs' counsel went into court, and filed a very guarded motion, merely stating that, "through an error of fact [they had], claimed from the defendants \$41,598.43," while there was due C. Lazard & Co. only the sum of \$31,598.43, and that they desired to remit the difference of \$10,000 on that account. The order of court followed the terms of the motion. Still entertaining the idea that they had effectually concealed this suretyship from view up to that time, counsel say in their brief: "No human being, not possessed of the power of divination, could, from this language, infer that the amount covered a contingent liability of one of the partners of the firm." And yet they complain very bitterly in their brief that our opinion places an imputation of untruth upon the testimony of Mr. Leake, "when he states that he would not have permitted this claim to have been included, had he been informed at the time, and that as soon as Judge Lazarus returned the error of law and fact was corrected by motion and affidavit." In treating of the \$10,000 guaranty, the opinion of the court says: "We infer from the record that it was not until the demand came from the plaintiffs, based on that paper, that it became known to counsel that the attachment suit embraced the guaranty. He then told [counsel?] the explanation of the \$10,000 [which] should have been given before the attachment suit was instituted; clearly implying that, if given, the item would not have included the guaranty. The suit, as to the \$10,000, was thereupon discontinued on the ground of error. It is this suit, the allegation on which it was based, and defendant's affidavit to the amount sued for, that, it is urged on us, excludes defendant from denying his liability in the present suit." But I have shown from the record that the plaintiffs' demand was made on the 7th of October, 1891, and that this suit was not filed until the 16th of November, 1891. During the five weeks that intervened, no effort was made towards rectifying the alleged error, and counsel for C. Lazard & Co. did not appear in court for that purpose until the 1st of December, 1891. Under this state of facts, I think the judicial averments made in the petition of *C. Lazard & Co. v. Henry Block & Bro.* are undoubtedly binding on C. Lazard in this suit. In our opinion we said: "And this court recently said in *Williams v. Gilkeson-Sloss Commission Co.* 45 La. Ann. 1013, 'there are acts in ju-

judicial proceedings which bind the parties to them, even so far as third persons are concerned." This principle has often been affirmed by this court. In *Morgan v. Kinsard*, 23 La. Ann. 645, the court says: "It is a general rule that parties are bound by their judicial admissions, and it is also true that admissions made in one suit may sometimes be used in another suit, although the suits be not the same." In *Haddon v. Everett Bros.*, 11 La. Ann. 710, the court said, "He is not to be heard, who alleges things contradictory of each other." In *Gridley v. Conner*, 4 La. Ann. 416, the court said: "We understand it to be a rule in the administration of justice that a man shall not be permitted to deny what he has solemnly acknowledged in a judicial proceeding, nor to shift his position at will to a contradictory one in relation to the subject-matter of litigation, in order to prostrate and defeat the action of the law upon it." These principles

have been announced in frequent decisions of this court, and in various forms of expression, and notably, in the following, viz.: *Farrar v. Stacy*, 2 La. Ann. 210; *Webster v. Smith*, 6 La. Ann. 719; *Osborn v. Segars*, 29 La. Ann. 291; *Fowler v. Stevens*, Id. 853; *Factors & Traders Ins. Co. v. De Blanc*, 81 La. Ann. 100; *Byrne v. Hibernia Nat. Bank*, Id. 81; *Folger v. Palmer*, 35 La. Ann. 743.

On the foregoing established facts and this summary of adjudicated cases, I am of opinion that this question is set at rest. And now the question presented for the serious consideration of this court is, Can we, in the face of the law and the evidence, overrule our former opinion, and pronounce a judgment in favor of Lazard, declaring him free from all liability on his written promise of suretyship? This question has been answered in the affirmative by the majority of the court, but I feel constrained to dissent from the conclusion they have reached.

KENTUCKY COURT OF APPEALS.

AVENT-BEATTYVILLE COAL CO., *App't.*,
v.

COMMONWEALTH of Kentucky.

(.....Ky.....)

Giving to an employe checks for merchandise in advance of pay-day on his own

voluntary application does not violate Stat., section 1860, providing that wage earners "shall be paid for their labor in lawful money" provided reasonable periods are fixed for making payment, although it is otherwise if the periods fixed, even with the consent of the employe, are unreasonable so that his necessities may force him to apply for and accept pay in checks.

NOTE.—Validity and effect of statutes requiring wages to be paid in lawful money.

I. *Constitutionality.*

II. *Construction and effect.*

a. *In general.*

b. *To whom statutes apply.*

I. *Constitutionality.*

The power of the legislature to compel employers to pay wages of employes in lawful money and to prohibit contracts for payment in any other medium or commodity has not been altogether denied in more than one or two decisions. But in several important cases statutes of this kind have been held unconstitutional on the ground that they made an unconstitutional discrimination between the employes affected thereby and others to whom the statutes did not apply.

In *State v. Loomis*, 21 L. R. A. 789, 115 Mo. 307, a statute prohibiting mining or manufacturing concerns from issuing for the payment of wages any order or other evidence of indebtedness payable otherwise than in lawful money of the United States, unless the same is negotiable and redeemable without discount in cash or in supplies at the option of the holder, was held void as depriving the employes thereby affected of their liberty without due process of law. Chief Justice Black in his opinion says: "We place our conclusion on the broad ground that these sections of the statute are not due process of law within the meaning of the constitution." 28 L. R. A.

"This doctrine is vigorously assailed by Judge Barclay in a dissenting opinion. Another ground of the decision was that the statute made an unconstitutional discrimination between employes.

In the West Virginia case of *State v. Goodwill*, 6 L. R. A. 621, 33 W. Va. 173, it was held not competent for the legislature to single out owners and operators of mines and manufacturers of every kind and provide that they should bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. And in that case a statute prohibiting persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper which did not purport to be redeemable for its face value in lawful money within thirty days was held unconstitutional.

As a companion to this case the same court decided that a statute prohibiting persons and corporations engaged in mining and manufacturing from selling any merchandise or supplies from stores to their employes at a greater per cent of profit than they sell to others was unconstitutional as class legislation and an unjust interference with private contracts and business. *State v. Fire Creek Coal & Coke Co.* 6 L. R. A. 359, 33 W. Va. 188. The court in this case declared that such a statute is "an insulting attempt to put the laborer in legislative tutelage which is not only degrading to his

(December 1, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Lee County convicting it of the violation of a statute requiring it to pay its employés in nothing but lawful money. *Reversed.*

The facts are stated in the opinion.

Mr. George W. Gourley, with *Messrs. Ed. M. Wallace* and *Robert Riddell*, for appellant:

Has it come to pass that corporations and others so unfortunate as to own coal mines, factories, or work shops shall be discriminated against in making contracts for labor, while all others shall be left free to contract? "No grant of exclusive, separate . . . privileges shall be made to any man or set of men."

New Const. § 244; Crim. Code, § 124; Bill of Rights, §§ 8, 19; *Godcharles v. Wigeman*, 113 Pa. 481.

Mr. William J. Hendrick, Atty-Gen., for the Commonwealth.

manhood but subversive of his rights as a citizen of the United States."

Likewise the Illinois decision in *Fraser v. People*, 16 L. R. A. 492, 141 Ill. 171, held that a statute prohibiting persons or corporations engaged in mining or manufacturing to engage in or be interested in keeping or controlling any truck store, shop, or scheme for furnishing supplies or groceries to employés, but which did not apply to those employing laborers in other branches of business, was in violation of the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law. It will be seen that in each of the above cases in which the statute was held unconstitutional the decision was based in part at least upon the discrimination between persons engaged in different kinds or classes of business.

In the later West Virginia case of *Peel Splint Coal Co. v. State*, 17 L. R. A. 385, 38 W. Va. 802, the court by equal division sustained a statute prohibiting any corporation, company, firm, or person engaged in any trade or business from paying employés in any scrip, token, draft, check, or other evidence of indebtedness payable or redeemable otherwise than in lawful money. As this case applies to persons engaged in *any trade or business* the element of discrimination was lacking and the judges sustaining the law distinguished the decision from the prior West Virginia cases on this ground.

In the Indiana case of *Hancock v. Yaden*, 6 L. R. A. 476, 121 Ind. 366, a statute prohibiting all persons, firms, corporations, etc., engaged in mining or manufacturing to pay employés in anything but lawful money is sustained against objection on the ground of discrimination as well as on the ground that it was an unconstitutional deprivation of the right to contract.

In *Shaffer v. Union Min. Co. of Allegany County*, 55 Md. 74, it was assumed that the legislature could enact a law prohibiting a corporation from paying wages otherwise than in lawful money, or making a contract for payment in any other way.

It will be seen that a very unsettled state of the law exists in respect to statutes of this kind. While the decisions against such statutes in every case involve the element of discrimination or class legislation this is not sufficient to prevent some of those decisions from being authority also for the doctrine that such statutory restrictions on the right of contract are unconstitutional. The divergence of views among the judges indicates the difficulty of the question and the language of 36 L. R. A.

Hazelrigg, J., delivered the opinion of the court:

For failing to pay one of its wage earners in lawful money, the appellant was indicted in the Lee circuit court, tried, found guilty, and fined \$100. Its chief ground of complaint on this appeal is that the proof of the state does not sustain the finding of the jury, and therefore the peremptory instruction asked by it should have been given by the court. The statute alleged to have been violated provides as follows: "That any corporation or person or persons having the ownership or control of any factory, mine or workshop in this commonwealth, who shall violate the provisions of section two hundred and forty-four of the constitution, reading as follows: 'All wage earners in this state employed in factories, mines, workshops or by corporations shall be paid for their labor in lawful money.'—shall be guilty of a misdemeanor, and, on trial and conviction, had in any court of competent jurisdiction, shall

many opinions strongly emphasizes the repugnance to any legislation restricting the right of contract in new directions. Yet a review of the great number of instances in which the right of private contract has long been restricted either by express statutory provision or by judicial application of the doctrine of public policy shows that the constitutional rights of individuals to make contracts is so far from absolute that any accurate definition of it might be a surprise to many of those who deny the legislative power on the subject.

As shown in the above case of *AVENT-BEATTYVILLE COAL CO. v. COM.*, in Kentucky, and possibly in some other states, the constitutional question has been settled by an express constitutional provision.

A statute forbidding an employer to impose a fine upon or withhold wages from an employé engaged in weaving, for any imperfection in the weaving, is held in *Com. v. Perry*, 14 L. R. A. 335, 155 Mass. 117, to be an unconstitutional restriction on the right to make reasonable contracts, but the principal ground of this decision is said in *Re House Bill No. 1230*, post, p. —, to be that the statute was an attempt "to compel payment under a contract for the price of good work when only inferior work was done."

II. Construction and effect.

a. In general.

An order to pay "\$180" drawn by an employer upon a third person is in effect a direction for payment in lawful money of the United States and therefore is not in conflict with the Washington Act of February 2, 1888, making it unlawful to issue for payment of wages any order or evidence of indebtedness payable otherwise than in lawful money of the United States. *Agree v. Smith*, 7 Wash. 471.

The right of an employé to give an order on his employer to merchants or others as an assignment of wages to pay debts is held in *Shaffer v. Union Min. Co. of Allegany County*, 55 Md. 74, to be unaffected by a statute prohibiting a mining, manufacturing, or railroad corporation employing ten hands or more, from paying wages otherwise than in legal tender money.

Applying wages under an assignment made by an employé for a debt which he owed for goods purchased at a store kept by stockholders of the corporation for which he worked, or by any person other than the corporation itself or its officials, does not violate Pennsylvania Corporation Act 1874.

be fined not exceeding \$500 for each violation thereof." Ky. Stat. § 1850. The only competent testimony offered by the state was that of Henry Couch, who was the laborer whose wages were not paid in lawful money, according to the allegations of the indictment. He testified that he worked for the defendant in its coal mines in December, 1893, and in January, 1894, under a contract that on a fixed day he was to be paid all the wages due him for the work done by him during the previous month. That day was the Saturday nearest the 15th of each month. That on that day the defendant always paid him in lawful money all that was due him. That he voluntarily applied to the defendant's clerk, and obtained from him "checks," or round coin-like metal, stamped with the company's name, and having on them the figures 5, 10, and so on up to 100, meaning 5 cents or 10 cents, and also the words "payable in merchandise." That he was never asked to take any of these checks, but applied for them himself, always before his

wages were due under his contract, and used them at the company's store, where he got goods, etc., as cheaply as he could at any other store in the town. That these checks were a convenience to him and to the miners. On pay days the amounts he had gotten in checks were deducted from the amount of his earnings, and he was paid the balance in money. The defendant did not pay money for these checks on pay-day. On this proof it is insisted that no case is made out: (1) Because no time is fixed by the witness when the checks were delivered to him. As the statute was not in force until October 8, 1893, it is urged that a failure to pay the witness in lawful money, or deliver him checks for his wages, prior to that date, was not in violation of law. (2) Because, though indicted as a corporation, there was no proof conducing to show that the defendant was such. If those violating the statute were not incorporated, they were liable as individuals, and not as the "Avent-Beattyville Coal Company." That the omission to prove these

§ 43, prohibiting certain corporations withholding wages by reason of the sale or furnishing of goods by any person except under process of law. *Mo-Manaman v. Hanover Coal Co.* 6 Kulp, 181. The prohibition against the keeping of stores by such corporations does not apply to their stockholders.

Under the English Truck Act against payment of wages in goods the mere payment and receipt of wages in goods constitutes an offense although there was no prior agreement to take payment in that way, and the offense is not purged by a subsequent payment in money whether it was voluntary or by order of justices. *Wilson v. Cookson*, 13 C. B. N. S. 496, 22 L. J. M. C. 177, 9 Jur. N. S. 177, 8 L. T. N. S. 33, 11 Week. Rep. 426.

Where the wife of a workman received for him an order from the master who directed her to take it to a clerk and the latter gave her another order for it and told her to go to a store at which she was given goods only in payment, it was held that as the place where the master gave her the first order was within the jurisdiction the offense was there complete although the store at which the goods were obtained was outside of the jurisdiction. *Athersmith v. Drury*, 1 El. & Bl. 46, 23 L. J. M. C. 5, 5 Jur. N. S. 433.

Giving checks on a bank fifteen miles away was held in *Pillar v. Llynvi Coal & Iron Co.* L. R. 4 C. P. 752, 38 L. J. C. P. 294, 20 L. T. N. S. 923, 17 Week. Rep. 1123, to be a mere subterfuge to enable the employer to pay the employé in goods at a shop which was kept by the former and at which the checks were in fact used.

Compelling a weaver to take a piece of cloth which he had woven defectively as part payment of his wages was held to constitute an offense within the English Truck Act prohibiting payment in goods. *Smith v. Walton*, L. R. 3 Q. P. Div. 109, 47 L. J. M. C. 35, 37 L. T. N. S. 437.

Although deductions from wages for various purposes do not properly come within the subject of payment of wages a few cases on this subject are quite closely connected with it.

In *Chawner v. Cummings*, 8 Q. B. 311, 15 L. J. Q. B. 161, 10 Jur. 454, deductions from wages of a framework knitter doing piece work, of charges for frames and standing room and for a boy winding, and also of a small percentage when the weekly wages exceeded a certain sum, which were made in accordance with the usage of the trade, were held lawful as a mere mode of calculating wages and not constituting deductions in the nature of payment.

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By equal division in the exchequer chamber this case was followed and approved in *Archer v. James*, 31 L. J. Q. B. 153, 8 Jur. N. S. 166, 6 L. T. N. S. 187, 10 Week. Rep. 459, 1 L. T. N. S. 23, 2 Best & S. 61, upholding deductions from wages of a framework knitter for the use of frames, machine, room, fire, goods and winding, and also for occasional small fines on account of absence. But the law on this point was changed by the English Act of 1874, 37 and 38 Vict., chap. 48, § 3, which prohibits deductions for "frames, rent and standing, and other charges," but this was held inapplicable to fines for absences imposed under factory regulations, as fines were not regarded as charges. *Wallis v. Thorp*, L. R. 19 Q. B. 383, 44 L. J. Q. B. 137, 33 L. T. N. S. 11, 23 Week. Rep. 730.

Slack passing through coal screens is held not to be included among "materials other than minerals contracted to be gotten" in coal mining, so as to permit deductions therefor from wages payable according to the quantity mined. *Bourne v. Netherseal Colliery Co.* L. R. 20 Q. B. Div. 606, 57 L. J. Q. B. 306, 59 L. T. N. S. 751, 36 Week. Rep. 406, 52 J. P. 453.

The Truck Act, section 23, permits a written agreement to deduct from wages for medicine or medical attendance and materials of occupation furnished to miners, and for rent, and it is held that this agreement need not specify the amount of deductions that may be made under each head. *Cutts v. Ward*, 36 L. J. Q. B. 161, L. R. 3 Q. B. 397, 15 L. T. N. S. 614, 15 Week. Rep. 445.

But an agreement for deduction on account of materials must make an absolute contract of sale and not be a mere hiring or deposit of money for security against breakage. *Ibid.*

A deduction of 6d. a week for medicine and medical attendance of a miner to be paid to a club according to the practice of the trade by each miner, is sustained. *Ibid.*

But deductions from wages to create funds for medicine and schools cannot be sustained without a written agreement therefor. *Pillar v. Llynvi Coal & Iron Co.* L. R. 4 C. P. 752, 38 L. J. C. P. 294, 20 L. T. N. S. 923, 17 Week. Rep. 1123.

Deduction of wages for relief associations or hospitals are shown in various cases to have been made in this country, but statutory provisions as affecting them were not involved. As an instance of deductions of wages to create a fund for an employé's hospital, see *Union Pac. R. Co. v. Artist*, 23 L. R. A. 551, 60 Fed. Rep. 365.

A payment of a portion of an employé's wages under an arrangement agreed to by him, to the

facts is fatal to the prosecution seems clear enough, but, even with the omitted proof in, the peremptory instruction should have been given. The legislation in question is wholly new to our state. If its letter is to control then the delivery of these checks as payments on the wages earned prior to the regular pay-day of the company is in violation of law. A miner works a week, and has earned a certain sum. His wages are not due, but he is in need of provisions for his family. He applies to the company for relief, and it delivers to him, in part payment of his wages, not lawful money, but orders or checks on its store for the provisions he needs. This is confessedly a great convenience to the workman, and we cannot believe that it is in violation of a reasonable construction of the law. The object of the legislation was to protect the weak against the strong, and the wage earner is regarded as liable to imposition and oppression at the hands of his employer. The statute gives him the right to demand his wages in money whenever it is due him, and any device resorted to by the employer, or any contract exacted of the em-

ployé, requiring the acceptance of other than lawful money for labor, is prohibited. If the time between pay-days were unreasonably extended, or if, before employing laborers, agreements were exacted of them that they were to take even a part of their earnings in merchandise, the offense against the law would be complete. It may be claimed that this is an abridgement of the right of those laboring under no disability to contract for themselves, and the legislation is arbitrary and opposed to the spirit, at least, of our bill of rights. But so may the usurer complain of the laws denying him the right to enforce agreements to pay more than a specified rate of interest for the use of money. The object in view is the same in all such legislation, — to prevent oppression and over-reaching. The law says, however, that the wage earner shall be paid for his labor in lawful money, but when? It does not say every day or every week; hence we conclude that contracts fixing pay-days at reasonable periods may be made, on which, and not before, the laborer may demand his pay in money. If such periods be fixed even by consent of the la-

treasurer of a sick and accident club of which all employes are members, for the establishing of a relief fund, is held to constitute a payment in money to the employé within the English Truck Act. *Hewlett v. Allen* [1894] A. C. 883.

So it is held that a deduction of wages for medicine or medical attendance under a contract in writing signed by an artificer as provided by section 23 of the English Truck Act is not in violation of section 6, prohibiting the imposition of conditions by the employer on the employé's expenditure of wages. *Lamb v. Great Northern R. Co.* [1891] 3 Q. B. 281.

But money shown by the books of an employer on going into liquidation to belong to a fund made up from deductions from wages to be used for paying doctors, but which had not been so used, is held not to have been paid to the employés, especially when there was no written contract for such deductions and the employer had not become liable to doctors. *Ex parte Cooper*, L. R. 28 Ch. Div. 608, 61 L. T. N. S. 374.

b. To whom statutes apply.

On the general question as to what persons are included within the class of "laborers" under statutes providing for laborers' liens, preferences, and exemptions, see note to *Tod v. Kentucky Union R. Co.* (C. C. App. 6th C.) 18 L. R. A. 305.

The question who are workmen or artificers within the meaning of the English Truck Act has been decided in several cases which are referred to below. A frame-work knitter is such an artificer. *Moorhouse v. Lee*, 4 Fost. & F. 355. See applications of this ruling under preceding head in respect to deductions from wages of such workmen.

One employed to do work on a large scale, himself employing laborers to do it and who is not required to give his personal services, is not an artificer, workman, or laborer within such statutes. *Sharman v. Sanders*, 13 C. B. 166, 3 Car. & K. 202, 22 L. J. C. P. 86, 17 Jur. N. S. 765.

The act applies only to those who contract as laborers to use their personal services and receive their pay in wages, and not to a person who makes a contract to do certain work in making a cut on a railway. *Riley v. Warden*, 2 Exch. 59, 18 L. J. Exch. 120.

A contractor at a specified price per thousand to make as many brick as required in the brick field

of his employer, finding all of the labor but none of the materials, is not an artificer under the truck act, although he may work with his own employes. *Ingram v. Barnes*, 7 El. & Bl. 115, affirmed Id. 132, 26 L. J. Q. B. 52, affirmed Id. 319, 3 Jur. N. S. 156, affirmed Id. 861.

A workman for a coal and iron company whose personal skill and labor are of the essence of his contract is an artificer, although part of the work was done by the piece and could be done by him at home or by the help of others, and although he sometimes worked for other people. *Pillar v. Llynvi Coal & Iron Co.* L. R. 4 C. P. 753, 38 L. J. C. P. 204, 20 L. T. 623, 17 Week. Rep. 1123.

The question whether or not workmen were by contract required to give their personal services was regarded as the test of their character as artificers under the truck act in the cases of *Bowers v. Lovekin*, 6 El. & Bl. 684, 25 L. J. Q. B. 371, 3 Jur. N. S. 1197, and in *Weaver v. Floyd*, 31 L. J. Q. B. 151, 18 Jur. 289. In these cases it was held that butty colliers who get produce of mines at a price fixed according to the quantity, were held to be artificers although they might employ others to aid them in the work. While on the other hand the act would not apply to contractors agreeing to do a certain quantity of work for which the labor of others must be employed.

The test adopted in these cases is repudiated in the later case of *Sleeman v. Barrett*, 3 Hurlst. & C. 384, 38 L. J. Exch. 153, 10 Jur. N. S. 476, 9 L. T. N. S. 834, 12 Week. Rep. 411, in which it is said that if a contract was for the result of the labor and not for the labor itself the truck act did not apply, and it was held that a butty collier undertaking to perform a piece of work by the day, ton, or yard, employing others to assist him to whom he pays wages, is not an artificer under that act.

The guard of a goods train although at times assisting in coupling and uncoupling and unloading, is not a "workman" within the English Employers and Workmen Act of 1875, section 10, and therefore the provisions of the truck acts relating to deductions from wages do not apply to him. *Hunt v. Great Northern R. Co.* [1891] 1 Q. B. 601.

As to statutory restrictions on hours of labor, see note to *People v. Phyfe* (N. Y.) 19 L. R. A. 141. Also the later case of *Low v. Rees Printing Co.* (Neb.) 24 L. R. A. 702, and *Ritchie v. People*, 28 L. R. A. —, 155 Ill. 93.

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borer, so that the effect is to force him, by reason of his necessities, to apply for and accept his pay in checks for merchandise, the contract is in violation of law, and the enforced delivery and payments are unlawful. But if fixed at reasonable periods, and the necessities of the workman demand it, he may, of his own choice, obtain relief of his employer through the use of checks for merchandise, without subjecting the latter to the penalties denounced in the statute. Any other

construction would in the end disastrously affect the wage earner, for whose benefit the law was enacted. There has been no suggestion of oppression in the argument, and none in the testimony, growing out of the regulation of the pay-days in this case, and we have assumed it to be reasonable.

We think the proof fails to show any violation of the constitution or the statute, and *the judgment is reversed*, with directions to dismiss the indictment.

MISSISSIPPI SUPREME COURT.

PERRY MASON SHOE CO. *et al.*, App'ts.,
v.
W. G. SYKES, Receiver, etc., of W. E.
Howard.

(.....Mm.....)

1. For successfully defending claims to the assigned property by an attempted rescission of sales an assignee for creditors may be allowed for attorney's fees although the assignment is set aside on a cross-petition by other creditors.

2. Attorney's fees cannot be allowed out of the assigned property as against creditors successfully asserting liens thereon, for an unsuccessful defense of the assignment by an assignee for creditors although the assignment is declared void, not for actual fraud, but by reason of failure to comply with some positive requirement of statute law, and although the assignee is also a receiver of the court, since it is not his duty as receiver to defend the assignment.

(February 12, 1896.)

APPEAL by cross-petitioners from a decree of the Chancery Court for Monroe County denying the relief demanded by them in their cross-petitions filed in a proceeding for the administration of the assets in the hands of defendant as assignee for creditors of W. E. Howard which cross-petitioners claimed under prior liens. *Reversed in part.*

W. E. Howard, an insolvent merchant, made an assignment for creditors to W. G. Sykes, on November 17, 1892. Sykes filed a petition and bond and was appointed receiver by the court. Several creditors filed cross-petitions attacking the assignment. Some of the property which came into the hands of the receiver had been sold to the insolvent by the Perry Mason Shoe Company. It asked for a rescission of the contract of sale on the ground that the sale was procured by false and fraudulent representations by Howard. An amended petition was filed asking for a personal judgment against Howard. The representations relied on as constituting the fraud were made at a time when Howard was endeavoring to get an extension of time on a debt he then owed and

further when petitioner's representative W. P. Craddock called upon him for the purpose of selling goods.

W. G. Elkin and Goodbar & Co. had acquired a prior lien on the goods which the Perry Mason Shoe Company sought to reclaim and the petition and bond of the company submitted to the jurisdiction of the court to render such decree as it might think proper.

When Sykes took possession of the property he employed W. E. Howard the assignor as clerk at a monthly salary to assist him in winding up the affairs of the concern. Blacker, Gursile & Co. attack the allowance which the receiver claimed for his compensation and that of his clerks.

Further facts appear in the opinion.

Messrs. Clifton & Eckford, for Blacker, Gursile & Co., appellant:

The allowance made the receiver for attorney's fees, under the circumstances of their case, was never contemplated by our statute, and wholly unauthorized by law:

1. Because as receiver he is an officer of the chancery court and was not the representative of either Mrs. M. V. W. Howard, or W. E. Howard, or the unpreferred creditor between whom in fact the litigation was carried on. The receiver is only authorized to employ counsel and charge the trust estate with attorney's fees in cases where the litigation is for the protection and benefit of the estate.

20 Am. & Eng. Encyclop. Law, p. 18, pl. 8, *note 3*, p. 189, *note 2*; *Bank of Mississippi v. Duncan*, 52 Miss. 748; *Davis v. Gray*, 88 U. S. 16 Wall. 218, 21 L. ed. 452; *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 488; 2 Story, Eq. 12th ed. § 829, p. 86; *Beverley v. Brooke*, 4 Gratt. 208; 2 High, Receivers, § 805.

2. Because the attorneys here who represented the receiver in this litigation over the assignment were also attorneys for Mrs. M. V. W. Howard, one of the parties litigant to the suit, whose interest conflicted with the interest of their cross-petitioner, who with other creditors had attacked the assignment. The inhibition goes to the extent of prohibiting the receiver from employing the counsel of either litigant where the receiver is acting adversely to either.

20 Am. & Eng. Encyclop. Law, pp. 189, 190, *note 2*; *Edwards, Receivers*, p. 93; *Re Bank of Niagara*, 6 Paige, 215, 8 L. ed. 960; *Adams v. Woods*, 8 Cal. 817; *High, Receivers*, §§ 216, 806, 823; *Beach, Receivers*, §§ 262, 263, 751, 752.

NOTE—The present case not only presents a very clear distinction between the cases in which attorney's fees are allowed to an insolvent's assignee and those in which such fees are not allowed, but makes a very valuable review of the authorities on the question.

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The receiver cannot be allowed a salary and commission both.

20 Am. & Eng. Encyclop. Law, p. 178bb, 176c.

Messrs. Houston & Reynolds for Perry Mason Shoe Co., appellant.

Messrs. George C. Paine and Sykes & Bristow for appellee.

Whitfield, J., delivered the opinion of the court:

The Perry Mason Shoe Company, in its original cross-petition, states that it "submits to the jurisdiction of the chancery court in respect to all litigation and liability growing out of the bond given in this cause," and, in its bond, obligates itself to "pay, to whomsoever the . . . court shall order, the damages," etc. There is therefore no error in the alternative direction to pay Elkin & Goodbar \$581.20.

The original cross-petition of the Perry Mason Shoe Company, "seeking," in the language of the chancellor in the final decree, "to rescind the sale of certain goods, and replevy the same," is the one dismissed, not the amended cross-petition asking the fixing of a lien and personal decree against W. E. Howard for \$1,055.45 worth of goods alleged to have been sold as a "different lot of goods" from the lot replevied. On the return of the case into the court below, such personal decree should be entered. The case is still pending there. There was no error, in this view, in not entering the decree on the amended cross-petition, still pending.

On the merits the chancellor must have found, as facts, that the representations made by Howard to Perry were made, not to induce the sale of goods, but to secure an extension of time on past-due indebtedness, for the payment of which Perry was then making very urgent demand,—threatening suit; that the goods sold by the agent, Craddock, were sold before, and not on the faith of, any such representations, if then made "in general conversation" by Howard; and that the goods originally sold and those sold through Craddock were not sold in reliance upon the reports of the commercial agencies. We cannot say that these findings of fact are unwarranted. This disposes of the appeal by the Perry Mason Shoe Company.

The appeal of Blacker, Gurstle & Co. (it is not a cross-appeal) questions the correctness of the chancellor's action in allowing the sums set out in the decree to the receiver and assignee as compensation for his services as receiver and assignee; to the receiver and assignee as attorney's fees, and as compensation for W. E. Howard, for services as clerk.

The assignment was declared void for want of compliance with the positive provisions of section 1178, Code 1880, the chancellor finding that both Mr. and Mrs. Howard acted "in perfect good faith." The bill of exceptions has been stricken from the record, and we can only look to the record, aside from the bill of exceptions, in determining as to the propriety of the court's action on these points.

As to the allowance made to the receiver for Howard, we are not prepared to say it is 28 L. R. A.

unreasonable, in the absence of the bill of exceptions. Respecting the amount decreed to W. G. Sykes, as receiver, the chancellor manifestly made the allowance as a gross sum for the entire service as receiver,—not as part for salary as clerk, and part as commissions; and this, as to the mode of fixing his compensation was correct, the receivership being one "in which the receiver was at once receiver and manager of a business." *Lichtenstein v. Dial*, 68 Miss. 58. As to the reasonableness of the compensation, as to amount, in the absence of a bill of exceptions, and "in view of the facts of the case, and the duties and responsibilities of the receiver," we cannot say the chancellor erred in the exercise of the large discretion committed to him in such matters. *Bernheim Bros. v. Brogan*, 66 Miss. 184.

More difficulty is encountered in the consideration of the allowance or the attorney's fees to the receiver and assignee. We concur entirely with the learned chancellor in holding that it was perfectly proper, under the circumstances of this case, for the attorneys of the receiver and assignee to accept, subsequently, employment by Mrs. Howard, the preferred creditor. The service rendered was in all respects the same—identical throughout—with that which would have been necessary to be rendered by the attorneys, had Mrs. Howard not been in the case. "The validity of her debt went to the whole assignment," as correctly observed by the chancellor. *High, Receivers*, 8d ed. § 217; *Beach, Receivers*, § 268. Leaving entirely out of view, however, the bill of exceptions, it clearly appears—especially from the statements in the "petition for assignee and attorney's fees," and the "receiver's final report"—that the amount allowed manifestly embraced, in part, fees for services in defending unsuccessfully the suits brought by the cross-petitioners Blacker, Gurstle & Co., and others, to declare the assignment void. The former recites that, "soon after the filing of his [assignee's petition], numerous cross-petitions were filed by various parties claiming to be creditors," etc., "setting up various claims to and liens upon the property in petitioner's hands as an officer of this court, whereby divers issues were taken, requiring adjudication by this court," and that said attorneys represented "this receiver on the trial of the said issues," etc.

The question is thus squarely presented, in the construction of chapter 8 of the Code of 1892, where an assignment for the benefit of creditors is declared void, not for actual fraud, but by reason of failure to comply with some positive requirement of statutory law, can the assignee—regarded in the character of assignee or of receiver—be allowed fees for attorney's services rendered in an unsuccessful defense of the assignment against cross-petitioning creditors, who set aside the assignment, and secure prior liens, under section 121 of the Code of 1892; such fees to be charged upon and payable out of such assigned property, on which such liens have thus been fixed?

It will serve to clear the real point under review of embarrassment to say the services

of the attorneys of the assignee and receiver, rendered in successfully defending the claims made by Bolton and the Perry Mason Shoe Company, in their cross-petitions, whereby they sought to rescind the sales and recover the specific goods, were services for which compensation was properly allowable, as having been rendered in litigation resulting in the preservation for all entitled to the property of the assignor, either under the assignment or the cross-petitions. These services resulted in preventing the withdrawal from the property assigned of a part of it, open alike to those protected by the assignment, if it had stood, or to those who, as successful cross-petitioners, fastened liens upon it. The case of *T. T. Haydock Carriage Co. v. Pier*, 78 Wis. 582, is decisive on this point. Fees were allowed the assignee's attorneys in that case for successfully defending a replevin suit seeking to withdraw from the property assigned a part of it. The court says: "Such defense was made for the purpose of saving the property then in controversy to the creditors of the assignor. The expenses incurred by her in making such defense should be reimbursed" to the assignee "out of the proceeds of the assigned property. She must be allowed all her necessary disbursements in that action in both courts, including attorney's fees." The principle underlying this allowance is clear. In *Woodruff v. New York, L. E. & W. R. Co.*, 129 N. Y. 81, the trustee—one who had "acted the part of a trustee," in Justice Bradley's language—was allowed compensation for his own "time, labor, trouble, and traveling expenses," and his attorney's fees all incurred in a successful litigation of thirteen years' duration, resulting in the "creation" and preservation of the fund. To the same effect are *Daniel v. Fain*, 5 Lea, 258,—the case of a quasi bill of interpleader, filed in the preservation of the estate; *Clark v. Sawyer*, 151 Mass. 64,—a case where the assignee made advances in good faith to pay off an insolvent's workmen before accepting an assignment, and subsequently acting under the assignment, which was set aside, not for any fraud with which the assignee was connected, and where the court says: "The jury were instructed that the assignment was void as against the plaintiff, and that any legal services rendered to carry out or maintain it could not be paid for out of the estate, but that the defendant had a right to pay a reasonable sum for services, in good faith, to aid him in protecting the rights of all parties, and to enable him so to conduct the business intrusted to him that the interests of all parties affected by it should be guarded. We have no doubt the instruction was right in what it disallowed." *Hastings v. Spencer*, 1 Curt. C. C. 504.

With more hesitation, we are of opinion that it does not appear to have been wrong in what it authorized the jury to allow the defendant. . . . The instructions to the jury, as we understand them, allowed the defendant only expenses incurred in the preservation of the property. What the legal services were, we do not know; but we cannot say that such services might not be nec-

essary to protect the rights of all the parties interested in the estate;" citing many authorities. In *Hunker v. Bing*, 9 Fed. Rep. 277 (cited in the fifth edition of Burrill on Assignments, in note 7, at page 666, but omitted, strangely, in the sixth edition), the court says, in a case where the assignment was declared void for failure merely to comply (as here) with the positive requirement of statute law, to file proper "inventory and schedule" after disallowing commissions to the assignee: "It does not follow, however, that all remuneration should be denied to the respondent. No claim under the void assignment . . . can be regarded. But for the other acts performed by the respondent, in the way of disbursements and services, which, considered independent of the assignment itself, were lawfully rendered, and were beneficial to the general body of creditors, or which would have been regularly incurred by the complainant as assignee in the care of the property, or in its conversion into money, should be allowed. The express assignment affords the defendant no protection. He must bear all the charges and disbursements pertaining to it. . . . But as it was not illegal for the debtors, by parol, to put their property into the possession of the respondent as their factor or agent to sell it, and distribute its proceeds among their creditors, though subject to be withdrawn by the debtors at any moment, on the payment of charges, and subject to the attacks of execution creditors, or to proceedings in bankruptcy, so the respondent may be regarded as having done what he did under an implied request to that effect, and to have acquired thereby an equitable lien upon the property in his possession for his necessary services and disbursements therein, which should be respected in bankruptcy, so far as they have been necessary and beneficial to the general creditors, or such as the assignee in bankruptcy would otherwise have received." And again: "The items charged for the attorney's fees must abide by the same rule. So far as they depended upon or related to the void assignment, they must be disallowed. So far as they were expenses necessarily incurred for the preservation of the property or collection of the debts, they should be allowed, to an amount which is reasonable and just." The same principle is announced in *Hastings v. Spencer*, 1 Curt. C. C. 507, where it was said that an assignee having claims against the assignor for money paid out in preserving the fund may retain it, though the assignment is avoided, for the reason that "he is under no necessity to set up the deed. He has the right of retention, to that extent, if it were wholly invalid, or had never been made." And the same doctrine on this point is clearly set forth in the dissenting opinion of Eakin, J., in *Hunt v. Weiner*, 39 Ark. 79, which, as to this point, is sound; the court having improperly refused, as we think, to allow charges clearly incurred in the preservation of the property. The parties ultimately entitled cannot take the property benefited and preserved, and decline to pay such charges, whether for services rendered by the assignee or by attorneys for him, as clearly were

rendered in benefiting and preserving the property.

But can the assignee and receiver be allowed fees for attorneys for services rendered in unsuccessfully resisting the cross-petitioners who assailed the assignment as void, and had it declared void? The services thus rendered were not in preserving the property assigned for all creditors, but in directly resisting the claims of cross-petitioners,—in manifest hostility to their claims. To pay them out of the fund assigned, after the assignment is vacated, and the right of the cross-petitioners to prior payment over other creditors out of such fund has been established against the opposition of the assignee in such litigation adverse to the cross-petitioners, would be to make the successful litigant pay the counsel of his adversaries out of the very property the right to which was the question settled by the litigation. Manifestly, this cannot be done. In *Burrill, Assignm.* 6th ed. p. 519, it is said: "A trustee is entitled to be reimbursed his expenses, though the trust be subsequently declared void, if he have acted in good faith." And many authorities are cited to support the proposition, in *note 7*. A careful examination of all the authorities shows that the statement lacks precision. *Hawley v. James*, 16 Wend. 61; *Re Wilson*, 4 Pa. 430, 45 Am. Dec. 701; *Stewart v. McMinn*, 8 Watts & S. 100, 89 Am. Dec. 115, and *Rouse v. Bowers*, 108 N. C. 189,—simply announce the well-settled rule that the assignee will be protected in all payments made to "bona fide creditors of the assignee in pursuance of the assignment, before any other creditors have obtained a lien (general or specific, legal or equitable) upon the assigned property," as it is put by this same author in section 411, where these same authorities are cited, and in the payment of expenses incurred in preserving the fund. In *White v. Hill*, 148 Mass. 398, the property assigned was a printing press, and there were uncompleted contracts, partly executed. The assignee, out of his own pocket, contributed the means to complete these contracts, for "the purchase of materials" (148 Mass. 399) and the payment for labor, rent, and other expenses, and the court said: "If the assignees are entitled to receive all the proceeds of the expenditures made by Kimball, it is clear that they got, not only the property belonging to White [the assignor], but also a considerable amount of the property of Kimball [the assignee]. This is not just, and we think that Kimball is entitled to retain any reasonable and necessary expenses incurred by him, in good faith, under his contract with White." Clearly, this case is one touching disbursements made in benefiting and preserving the property, and falls under the point first discussed in this opinion, as to the attorney's fees in defending against the claims of Bolton and others to rescind. This was, it is to be noted, an assignment in good faith. In *Hunt v. Weiner*, 39 Ark. 77, it is expressly ruled that when an assignment is set aside as fraudulent by reason of some particular provision in it, it is set aside entirely; and trustees, though

creditors, are not permitted to retain any part of the property for the purpose of paying themselves, but are required to account for all that came into their hands under the assignment, as to which we express no opinion, remarking only that the converse of this precise point is held in *Hastings v. Spencer*, 1 Curt. C. C. 507. But the *Hunt Case* also holds that no "charges, commissions, or expenses" should be allowed for any "services or disbursements," except those incurred in preserving the property, page 78; not even premiums paid for insurance, nor "clerk hire," after the filing of the bill assailing the assignment. It will be seen how far this case is from supporting the citation. In *Pier's Case*, *supra*, the court says, of attorney's fees sought to be recovered for services in unsuccessfully defending the assignment: "Can [the assignee] be reimbursed, out of the moneys in her hands, for her costs and disbursements in this action in this court? We think not. Were she thus reimbursed, it would nearly absorb the fund, leaving the larger portion of the plaintiff's judgment against Bartell, the assignor, unpaid. Hence, the effect would be to compel the plaintiff to pay such costs and expenses, although he has obtained a judgment therefor, in this court, against the defendant. Such costs and expenses were not incurred for the benefit of all the creditors, of whom the plaintiff is one, but in direct hostility to the interests of the plaintiff." And this in a case, let it be noted, where the assignment had been held void because the bond required was void as having been executed by a married woman,—not for actual fraud. The assignee had acted "in perfect good faith, under the direction of the court believing the assignment valid." Page 581. *Clark v. Sawyer*, 151 Mass. 66, draws the same distinction. In *Hunter v. Bing* (a well-considered case) 9 Fed. Rep. 280, all "commissions" were denied, and only those expenses for assignee's and attorney's services allowed, rendered in the clear preservation of the fund, although there was no fraud; and the assignment was only declared void because, as here, of failure to comply with a positive requirement of statute law—a failure to file inventory and schedule. The court says (pages 280, 281): "Upon these facts it is clear that the defendant can have no legal or equitable claim to 'commissions,' as assignee. The assignment became, after the lapse of thirty days, through the remissness of the assignee, not merely voidable, but void, without suit or other direct proceeding to avoid it. Therefore, in contemplation of law, there was neither assignment nor assignee; neither trust, trust property, nor trustee. The assigned property reverted by operation of law to the assignors. It became liable to the attachments and executions of creditors. . . . No claim in the character of assignee can therefore be allowed to the defendant; nor for the period of thirty days, during which the assignment was in force (*Re Croughwell*, 17 Nat. Bankr. Reg. 887) can any claim be entertained for commissions, since the assignment subsequently lapsed and became void, through what must be legally

held to have been the fault of the assignee himself, in not filing such a schedule as he could." And the same rule was applied as to attorney's fees, page 288. *A fortiori* cannot such fees be allowed the attorneys, or such commissions the assignee, when the assignment is declared void for actual fraud, especially if participated in by the assignee, as in *Solinsky v. Lincoln Sav. Bank*, 85 Tenn. 376, or as to which the circumstances are such as to charge the assignee with notice of such fraud, as in *Hastings v. Spencer*, 1 Curt. C. C. 507, 508, a fine case. Mr. Burrill states the true rule in section 881, 6th ed. p. 527. By far the best-considered case on this whole subject, which we have been able to find, is the case of *Mayer v. Hazard*, 49 Hun, 222, the reasoning in which we entirely approve, throughout. There counsel fees and assignee's disbursements were asked to be allowed out of the assigned property, in two classes of cases,—one in which the assignee had successfully resisted attacks upon the assignment, in which they were allowed; and one in which the assignee had unsuccessfully resisted such attacks, in which they were disallowed. The court says, as to the latter (page 225, 49 Hun): "By the judgments recovered in those suits, the conclusion was reached by the court, and sustained on appeal, that the assignment was unlawful and fraudulent, and the defenses made by the assignee were of no service or benefit whatever to the assigned estate. And where services may be performed by an assignee . . . the authorities have never proceeded so far as to sanction a claim made by him for reimbursement, on account of such service, out of the assigned property. On the contrary, the expenditures allowed to him have been limited to those which are incurred . . . on behalf of the assigned estate, and for its benefit. When they result otherwise, and prove to be disastrous instead of beneficial, then the rule which is sanctioned by the authorities by implication decidedly excludes their allowance. This rule has been supported by the fact that, when the successful creditor commences his action to set aside the assignment as fraudulent, he acquires a lien upon the debts, property, and equitable interests of the debtor, and the effect of acquiring that lien, in judgment of law, is to entitle him to the benefit of the assigned property, for the payment of his indebtedness as of the time when the action itself to set aside the assignment was commenced." And the court proceeds to review authorities supposed to warrant such allowance, and shows they are only applicable in cases where the compensation is for such "acts of the assignee, or persons employed by him," as are "for the benefit of the assigned estate."

Section 582 of the Code of 1892 refers alone to such compensation and expenses as are proper to be awarded as having been earned in preserving the estate in the discharge of a receiver's ordinary duties, as does section 119. And this rule must be the same whether the assignment is void for actual fraud, or for failure to comply with some positive requirement of the statute law. The good faith of neither assignor nor of assignee, nor

of both, can avail to supply the lack of legal validity in the assignment, in the latter case. As said in *Hunt v. Weiner*, 39 Ark. 76, "the assignees are chargeable with notice of the contents of the instrument under which they claim, and must be deemed cognizant of and participators in the unlawful [not necessarily fraudulent in fact] object;" citing authorities. This rule, too, of allowing the assignee and receiver only such counsel fees as were for services rendered in benefiting and preserving the property assigned, is strictly in harmony with section 119 of the Code of 1892, aided by section 582. The compensation and necessary expenses referred to in section 582 are those earned in benefiting and preserving the trust estate for the parties ultimately entitled. And it is also in perfect harmony with *Memphis Grocery Co. v. Leach*, 71 Miss. 965, where the counsel fees were allowed the assignee and receiver for the services of attorneys who had successfully defended the assignment. No counsel fees for such defense would have been allowed there, had the assignment been annulled, beyond such as were rendered in preserving the estate. "Qualification of the assignee," preparing his "petition" and "inventory," were services of this character, any way. The true test, therefore, as to whether expenses incurred by an assignee, and compensation claimed by him for services rendered, whether by himself or his attorneys, are to be allowed out of the estate assigned, is not whether the assignment was set aside for actual fraud of the assignor of the assignee, or both, or for failure to comply with some requirement of law, statute or common, but is to be found solely in the nature and character of such expenses and such services, as affecting beneficially or injuriously such estate. If such expenses and such services benefit such estate, better it, enhance it in value, preserve it for those ultimately adjudged entitled, whether under the instrument, according to its terms, or against the instrument, as successful cross-petitioners assailing the instrument, then, in every such case, such ultimately entitled parties must take the estate charged with the payment of such expenses and such services. They cannot take the estate thus bettered, improved, enhanced in value, or even preserved, merely, without paying for such expenses and the services which have so preserved, bettered, or improved it. This is the manifest justice of such situation. And the obligation thus to pay arises, not out of the instrument, at all, but, quite independently of the instrument, is raised or implied by the law out of such situation, in furtherance of manifest right and justice. In this view, also, it is quite clear, as held by Eakin, J., in *Hunt v. Weiner*, *supra*, that such expenses and such services are not to be measured, as to time, by the fact that they were incurred or rendered before or after the assignment may be declared void, but simply and only by the extent to which (no matter as to the date of setting aside the assignment) they have, as stated, preserved or bettered the estate. This is the principle of *Thompson v. Phoenix Ins. Co. of Brooklyn*, N. Y. 136 U. S., at pages 294, 295, 34 L. ed. 412. Of such a test

no party can complain. Founded in reason, working out right, it must be sound law; and, as seen, it is the clear and well-settled result of all well-considered authorities, including *Memphis Grocery Co. v. Leach*, 71 Miss., as shown *supra*.

If it be said that, however true all this may be as to the ordinary assignee, it cannot be of the assignee who becomes a receiver of the court, under chapter 8 of the Annotated Code of 1892, a careful consideration of that chapter will show that the principles announced are strictly applicable to the assignee receiver therein referred to. He does not cease to be assignee by becoming also, and additionally, the receiver of the court. His functions as receiver supervene, but do not displace his duties as assignee. Whether the assignment be sustained or annulled is immaterial to him, as receiver. In either case, and whether there be any contest over the assignment at all, or not, as receiver he proceeds with the duties of a receiver, under the orders of the court; pays taxes, insurance charges; keeps and preserves the estate for those ultimately entitled. If the assignment be sustained, he distributes the funds realized, to the beneficiaries named in the assignment, according to the terms of the assignment. If it be annulled, he distributes such funds to the successful cross petitioners, according to the statute (said chapter 8). Over the administration of the estate, in either case, as receiver, he presides, discharging, in its preservation, whether for those claiming under or those claiming against the assignment, the duties of a receiver, under the superintendence of the court. As such receiver, he should take no part in contests, if inaugurated, but stand indifferent between,—concerned merely in caring for the estate. And for these duties of administration—the things done directly by himself, or through attorneys for him, in preserving the estate—he is to be allowed compensation on the same principles obtaining ordinarily as to receiverships. He should not employ counsel, as receiver, to defend the assignment. If he does he takes the risk of reimbursement for fees and costs,—to be allowed, if successful, and the estate is benefited; otherwise, not. No matter in what form the assault is made on the instrument,—whether by preferred or unpreferred creditors; whether with purpose wholly to annul, or merely to strike from it the preferences, under section 124,—he is at all times, in his capacity as receiver, and stakeholder, a custodian, merely, of the fund, for those entitled. It is true, he is to be made a party defendant to the cross-petitions. But creditors “may be,” also. If the assault upon the instrument is made with the purpose of wholly setting it aside, he and the assignee may remain the sole defendants,—rather, however, in his still subsisting character of assignee, than of receiver. The superadding to his character of assignee, in which he has usually defended heretofore, of the duties and character of a receiver, for purposes of pure administration of the trust, is for the said latter purpose alone; and it was not meant that, when defending, he was not to be

regarded in his still subsisting character of assignee. Treating him, then, when made defendant, as defending as assignee, he would be the only necessary party defendant to a cross-petition seeking to annul the assignment. See *Hunt v. Weiner*, 39 Ark. 76, and the authorities cited, and *Trustees of Internal Imp. Fund of Florida v. Greenough*, 105 U. S. 527, 26 L. ed. 1158. But, though the only necessary party defendant, creditors “may be,”—other creditors “may be,”—not only when the object of the cross-petition is, claiming under the assignment, to enforce it (*Hunt v. Weiner*, *supra*), but “may be” whenever the assignee, not willing to incur the risk of costs and fees incurred in an unsuccessful defense, shall (as, in prudence, he always ought to) notify the other creditors to defend, or to indemnify him against the loss of such expenses and fees. He “may” so indemnify himself, and the parties interested to sustain the instrument will, manifestly, heed his notice, and defend themselves, or give him such indemnity. And his right to this indemnity is the complete answer to any apparent hardship supposed to arise from the construction of this chapter 8 which we are announcing. It has, besides, been expressly so decided in the finely reasoned opinion hereinbefore quoted (*Mayer v. Hazard*, 49 Hun, 222), when the court says at page 227, speaking of fees asked to be allowed the assignee for attorneys for services in unsuccessfully defending the assignment: “No good reason appears to support these charges, for the services and disbursements on account of which they were made were hostile to the judgment creditors, who have succeeded in their actions; and for such hostile proceedings they cannot, on any sound principle, be held to be accountable. The services performed, and the disbursements made, were for the benefit of the creditors entitled to be paid out of the estate, under the assignment, and that benefit would form a legal foundation for incurring a liability on their part to repay the expenditures. The assignee is not without protection because he cannot be allowed to charge these expenditures against the assigned estate, for it was within his power, when these actions were brought, to call the creditors together, under the assignment, who were interested in maintaining it, and secure an obligation from them to indemnify him against any expenditures he might make in defending the actions, and in that manner endeavoring to promote their interests. That is what he should have done, and by adopting that proceeding he would either have protected himself against all possible loss, or have been absolved from the obligation of resisting the actions in efforts made to sustain the assignment. These creditors, and not the judgment creditors, are the persons to whom he should have placed himself in the situation to look for his expenditures, in case of an adverse result in the suits; and his failure to do that presents no legal ground for charging these expenditures on the assigned property, and in that manner practically defeating the actions brought by the judgment creditors. Any other or different rule would operate as an inducement

to the assignee to carry on protracted litigations at the expense of the estate, and in that way diminish the amount which should be available to the successful judgment creditors, or perhaps exhaust it altogether."

The decree on the appeal of the Perry Mason Shoe Company is affirmed.

The decree on the appeal of Blacker, Gursell & Co. is affirmed as to the compensation awarded W. E. Howard and W. G. Sykes, receiver and assignee, and is reversed as to the fees allowed him for attorney's fees in defending unsuccessfully against the cross-petitions upon

which the assignment was vacated, and remanded, with directions to the court below to allow the assignee and receiver a reasonable sum for attorney's fees in the receivership proper, for services rendered in the care and preservation of the estate, and for services rendered in defending against the cross-petitions of Bolton and the Perry Mason Shoe Company, seeking to rescind the sales and withdraw specific property from the estate. Costs on this appeal to be equally divided. Decree accordingly.

PENNSYLVANIA SUPREME COURT.

Julius LEWEY, *Appl.*,
v.

H. C. FRICK COKE CO.

(.....Pa.....)

The running of the statute of limitations against a cause of action for removal of coal from a stratum beneath the surface of land by wrongfully extending a mine under lands of other owners begins only from the time of actual discovery of the trespass, or the time when discovery was reasonably possible, at least so far as it applies to the recovery of compensation which would be allowable on a bill for an account in equity in a state where equity is administered through common-law forms of action.

(March 11, 1895.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Westmoreland County in favor of defendant in an action brought to recover the value of certain coal which had been taken by defendant from under land owned by the plaintiff. *Reversed.*

The facts are stated in the opinion.

Messrs. Williams, Sloan & Griffith and Atkinson & Peoples for appellant.

Messrs. James S. Moorhead and John B. Head for appellee.

Williams, J., delivered the opinion of the court:

The legal question on which this appeal depends is beset with difficulty. The interests to be affected by it must increase in magnitude as the value of the minerals in which this state abounds increases. It is not directly ruled by any of our own cases, and we are at liberty to treat it as a question of first impression. The facts are not in dispute. The plaintiff is the owner in fee simple of a lot of land lying in the outskirts of the borough of Connellsville, containing about one acre and a quarter. This lot is underlaid with coal, which has not been

severed from the surface by lease or sale, and which the plaintiff has made no effort to mine or remove. The defendant company owns a considerable body of coal lands in the same neighborhood, which adjoins and practically surrounds the plaintiff's land, and is engaged in mining and removing its coal through openings upon its own lands. In 1884, in the progress of its mining operations, the defendant company made an opening or passageway through the plaintiff's coal under one corner of his lot, which was from 75 to 100 feet in length, about 6 feet in height, and 8 to 9 feet wide. The coal removed, amounting to more than 4,000 bushels, was brought to the surface through the defendant's pits or openings on its own lands, and used or disposed of as its own. The plaintiff had no knowledge of the trespass upon him or the removal of his coal, and no means of knowledge within his reach. In 1891, some seven years after his coal was taken, as he alleges, he first became aware of his loss. In the following year he brought this action, and is met with the statute of limitations as a defense. The contention is that it began to run in 1884, when the coal was taken, and had barred his remedy one year before he knew that a cause of action had accrued. The court below so ruled. The correctness of this ruling is the only question now to be considered. When did the statute begin to run? The general rule is, as stated by the learned trial judge, that it begins to run from the act done, but this is not of universal application. The statute makes certain exceptions. As to all persons who may be, when the cause of action accrues, "within the age of twenty-one years, *femine coeet, non compos mentis*, imprisoned, or beyond sea," it is provided that the statute shall not begin to run until such disability ceases. In 1843 a supplementary statute restrained the running of the limitation still further so as to include a resident plaintiff, laboring under no disability whatever, if the defendant debtor or wrongdoer should be beyond sea when the cause of action arose. As to such a plaintiff the running of the statute does not begin until the return of the debtor or trespasser to this country, so that proceedings against him become possible. It is easy to see that the mischief which the statute was intended to remedy was delay in the asser-

NOTE.—The above case is a novel remarkable illustration of the exceptions to the statute of limitations which arise in cases of concealed causes of action as it involves ignorance of the trespass and lack of opportunity to discover it rather than actual concealment. See review of cases as to concealment by fraud, in note to *Shellenberger v. Ransom* (Feb.) 25 L. R. A. 564.

25 L. R. A.

tion of a legal right which it was practicable to assert. The remedy provided was a denial of process to one who had slumbered for six years during which process was within his reach. The cases in which this denial would work a positive and an apparent hardship, so far as they were foreseen by the law-makers, were provided for by the exceptions to which we have referred and by the Act of 1842. These have been extended by the courts so as to include other cases which, while not within the letter of the statute, were held to be within the spirit of the proviso. Thus, it was held in *Hall v. Vandegrift*, 3 Binn. 374, that "it is the spirit of the statute of limitations to allow twenty-one years from the time that a person might make entry on land and support an action" before taking away his remedy. For this reason it was decided that it did not run against one who had a possibility of title, but no present right of entry. Again, it was held that, when the plaintiff had been kept in ignorance of his rights by fraudulent practices on the part of the defendant, the statute did not begin to run against him until discovery of the fraud.

The earliest case I have found in which the courts of this state applied this doctrine in a common-law action is *Jones v. Rees*, found in 1 Smith's Laws, p. 80. The case was tried at circuit before Yeates and Smith, Justices. It appeared that Rees had sold a negro to Jones in 1786, alleging him to be a slave. The negro was in fact a freeman, but had been kept in ignorance of it by the fraudulent practices of Rees. He discovered the fraud and his own freedom in 1801, and brought an action against Jones for the purpose of having his freedom established in a court of law, and of recovering damages for his deprivation of it. He recovered. Jones then brought an action against Rees to recover the price paid for the negro some sixteen years before, and for damages. Rees set up the statute of limitations. The court refused to sustain the plea, giving as a reason therefor that, "whenever there is a fraud, the act of limitations is no plea, unless the fraud be discovered within the time;" that is, within the time fixed by the statute, or six years before suit brought. To make this entirely clear, it was added that, "while the slavery of the negro was uncontested, the plaintiff had no ground to suppose he had been injured or deceived; but, when he obtained his liberty in a due course of law, the plaintiff's cause of action accrued against the defendant."

This rule was applied in an action of ejectment in *Thompson v. Smith*, 7 Serg. & R. 209, 10 Am. Dec. 453, and was stated by Tilghman, *Ch. J.*, at page 214, as follows: "After the discovery of the fraud, a man has a right to avail himself of the statute; but so long as the fraud is unknown, pending the concealment of the fraud, the statute ought not to run. The discovery of the fraud gives a new cause of action." This rule has long been applied in equity, where two good reasons are given for it. The first is that it would be inequitable to permit a defendant to profit by his own fraud. The other is that,

one who cannot assert his right, because the necessary knowledge is improperly kept from him, is not within the mischief the statute was intended to remedy, but is within the spirit of the proviso that restrains its operation. Courts of equity go a step further still, and decline to apply the statute where the plaintiff neither knew, nor had reasonable means for knowing, of the existence of a cause of action. But if the cause of action be known, or might have been known by the exercise of vigilance in the use of means within reach, equity follows the law and applies the statute. *Hamilton v. Hamilton*, 18 Pa. 20, 55 Am. Dec. 585; *Neely's App.* 85 Pa. 387. Mere ignorance will not prevent the running of the statute in equity any more than a law; but there is no reason, resting on general principles, why ignorance that is the result of the defendant's conduct, and not of the stupidity or negligence of the plaintiff, should not prevent the running of the statute in favor of the wrongdoer.

It seems to be a general doctrine in courts of law that the plaintiff is bound to know of an invasion of the surface of his close. The fact that his land is a forest, and that the defendant goes into its interior to trespass by the cutting of timber, does not relieve against its operation. What is plainly visible he must see at his peril, unless, by actual fraud, his attention is diverted and his vigilance put to sleep. But ought this rule to extend to a subterranean trespass? The surface is visible and accessible. The owner may know of its condition without trespassing on others, and for that reason he is bound to know. The interior of the earth is invisible and inaccessible to the owner of the surface, unless he is engaged in mining operations upon his own land; and then he can reach no part of his own coal stratum except that which he is actually removing. If an adjoining landowner reaches the plaintiff's coal through subterranean ways that reach the surface on his own land and are under his actual control, the vigilance the law requires of the plaintiff upon the surface is powerless to detect the invasion by his neighbor of the coal 100 feet under the surface.

The case at bar affords an excellent illustration of ignorance due to the defendant's conduct, and without fault on the part of the plaintiff. The defendant was mining its own coal through its own shafts or drifts opened on its own lands. In the course of its operations, and for its own convenience, it pushed an entry or passage under the plaintiff's lands, and appropriated the coal removed therefrom. It was bound to know its own lines, and keep within them. If, by mistake or for any other reason, it did invade the mineral estate of another, and remove and appropriate the coal therefrom, good conscience required that it should disclose the fact, and pay for the coal taken. Its failure to do this is, in its effects, a fraud upon the injured owner; and if he has no knowledge of the trespass, and no means of knowledge, such a fraud, whether it be called constructive or actual, should protect him from the running of the statute. We have felt constrained to recognize the susceptibil-

ity of land to division into as many estates in fee simple as there are strata that make up the earth's crust, and to protect the owners of these separate estates from each other. Thus, the possession of one who has a title to the surface only does not extend to or affect any subjacent estate. The occupancy of a coal stratum for more than twenty-one years will not give title to the surface above it, or the oil or gas stratum below it. The law does not require impossibilities. It recognizes natural conditions, and the immutability of natural laws. The owner of the surface cannot see, and because he cannot see the law does not require him to take notice of, what goes on in the subterranean estates below him, with which he has no communication through openings within his inclosures or under his control. On the other hand, one who is in possession of a lower stratum is not bound to know, nor can he be affected by, what is going on upon the surface above him, or in a still lower estate under his feet. The owner of each stratum must, however, take notice of what affects his own estate so far as he is in possession of or has access to it. In the case before us no severance of the coal from the surface has taken place. The title of the plaintiff extends from the surface to the center, but actual possession is confined to the surface. Upon the surface he must be held to know all that the most careful observation by himself and his employes could reveal, unless his ignorance is induced by the fraudulent conduct of the wrongdoer. But in the coal veins, deep down in the earth, he cannot see. Neither in person nor by his servants nor employes can he explore their recesses in search for an intruder. If an adjoining owner goes beyond his own boundaries in the course of his mining operations, the owner on whom he enters has no means of knowledge within his reach. Nothing short of an accurate survey of the interior of his neighbor's mines would enable him to ascertain the fact. This would require the services of a competent mining engineer and his assistants, inside the mines of another, which he would have no right to insist upon. To require an owner, under such circumstances, to take notice of a trespass upon his underlying coal at the time it takes place, is to require an impossibility; and to hold that the statute begins to run at the date of the trespass is in most cases to take away the remedy of the injured party before he can know that an injury has been done him. A result so absurd and so unjust ought not to be possible.

In the English courts this question has arisen quite frequently. The old rule applied in the courts of law was that the statute might be successfully pleaded as running from the date of the trespass. In the courts of equity, where an account for the coal that had been taken was asked for, it was applied only from the discovery of the trespass. *MacSwiney, Mines, 548*. See also, *Illoven-den v. Lord Annesley*, 2 Sch. & Lef. 634. If, after discovery, or the happening of any circumstances calculated to put the owner on notice, he slept on his rights till the statutory period had expired, he was held bound

by the statute in equity precisely as he would have been at law. If he knew, or if by the exercise of reasonable care he might have known, of the trespass, the statute ran from the discovery, or the time when discovery could have been made. *Bainbridge, Mines, 515, 516*. It was against good conscience to permit one who had taken the property of another without the owner's knowledge, and who had failed to disclose or to account for what he had taken, to avail himself of the statute while the owner remained in ignorance of his loss. When compensation was sought by means of a bill for an account, it was held that the statute began to run at the time of discovery, regardless of the time of taking. The same question was also encountered in actions to recover for injuries done on the surface by subsidence due to the withdrawal of support. When the action was trespass, it was generally held that the statute ran from the date of the removal of the support, which was the trespass to which the injury was due; but, when the action was case, the subsidence was treated as the consequence of the wrongful removal of the coal or other underlying stratum, and the damages suffered as consequential. The happening of the injury was upon this ground held to give a cause of action, against which the statute would run only from its date. The removal of the supports might not be known to, or be discoverable by, the owner of the surface until the subsidence revealed it; and, unless the injury consequential to the trespass could be treated as creating a cause of action, in most cases redress for a substantial injury would be denied altogether. *Backhouse v. Ronomi*, 34 L. J. Q. B. 181, 9 H. L. Cas. 503; *Smith v. Thackeray*, 14 Am. L. Reg. (vol. 5, N. 8.) 761, and *note*. The reason for the distinction exists in the nature of things. The owner of land may be present by himself, or his servants on the surface of his possessions, no matter how extensive they may be. He is for this reason held to be constructively present wherever his title extends. He cannot be present in the interior of the earth. No amount of vigilance will enable him to detect the approach of a trespasser who may be working his way through the coal seams underlying adjoining lands. His senses cannot inform him of the encroachment by such trespasser upon the coal that is hidden in the rocks under his feet. He cannot reasonably be held to be constructively present where his presence is, in the nature of things, impossible. He must learn of such a trespass by other means than such as are within his own control, and, until these come within his reach, he is necessarily ignorant of his loss. He cannot reasonably be required to act until knowledge that action is needed is possible to him. We are disposed to hold, therefore, that the statute runs against an injury committed in or to a lower stratum from the time of actual discovery, or the time when discovery was reasonably possible. But it is enough for the purposes of this case to hold that, inasmuch as equity is administered in this state through the common-law forms of action, the plain-

tiff need not be turned out of a court of law in order to be admitted at the equity side of the same court. He may not be entitled to statutory damages, but he is entitled to compensation in the same manner that he would have been on a bill for an account. For this purpose, the equitable rule that the statute shall run only from discovery, or a time when discovery might have been made, should be applied by courts of law. It follows that the judgment in this case must be reversed, and a new trial had, in which the jury

should be instructed that, while the statute may be available as against the penal consequences of the trespass, it is not available as a defense against payment for the coal actually taken and converted to the use of the defendant. The statute will run against a claim for compensation from the time the existence of the claim was or might have been known to the plaintiff, the owner and occupier of the surface.

The judgment is reversed, and a venire facias de novo awarded.

FLORIDA SUPREME COURT.

Jonathan C. GREELEY, *Appt.*,

Newton WHITEHEAD.

(.....Fla.....)

- *1. In a suit against the maker of a promissory note, payable at a particular time and place, it is not necessary to allege in a declaration a presentation for payment at the time and place named, nor to prove such presentation at the trial in order to entitle the plaintiff to recover on such note. The maker of such note is still liable to pay though the note be not presented at the time and place designated, and it devolves upon him to show as matter of defense a readiness at the time and place to meet the note, and such defense must be set up by plea, and can only be in bar of damages and costs of suit.
2. The plea alleging the defense of readiness to pay at the time and place designated in a note must not only allege such fact, but also that the defendant has ever since been ready with the money then and there to pay the note, with *proferi in curia* of the money.
3. The maker of a note, payable at a particular time and place, can under proper plea avoid future interest, damages, and costs, by showing that he was ready with the money at the designated time and place to make payment, and has ever since kept the same there, but this defense may be waived by subsequent action inconsistent therewith.

(March 5, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Duval County in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

Statement by MARRY, *Ch. J.*:

Judgment was obtained in the circuit court

*Headnotes by MARRY, *Ch. J.*

NOTE.—The question of waiver by subsequent payment of interest of a maker's defense to a note that he was at all times ready to pay but that no demand was made at the time and place of payment seems to be a novel one. On the general subject of demand of payment of a negotiable note, see *Rosson v. Carrol (Teen.)* 12 L. R. A. 727, and *Turner v. Iron Chief Min. Co. (Wis.)* 5 L. R. A. 553, and *note*.

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in February, 1891, by appellee against appellant in an action of assumpsit on a promissory note, and an appeal entered. The note sued on is as follows:

"Jacksonville, Fla., Aug. 4, 1886.

"One year after date I promise to pay to the order of Newton Whitehead one thousand no-100 dollars, with interest from date at the rate of ten per cent per annum until paid, for value received; negotiable and payable at the Florida Savings Bank; and if not paid at maturity this note may be placed in the hands of an attorney-at-law for collection, and in that event it is agreed and promised by the makers and indorsers, severally, to pay an additional sum of one hundred dollars for attorney's fees.

"J. C. Greeley."

The declaration, filed in November, 1890, alleges that by the said note the defendant promised to pay the sum therein mentioned, with ten per cent interest, one year after date, at the Florida Savings Bank, together with an attorney fee of \$100 if the note was placed in the hands of an attorney-at-law for collection after maturity, but did not pay the same.

There is a count for \$100 for attorney fee due by reason of the said notes having, after maturity, been placed in the hands of an attorney-at-law for collection. Also counts for money loaned, and for interest on divers sums of money before that time forborne by plaintiff at the request of the defendant.

The defendant filed two pleas to the several counts of the declaration as follows: "That said promissory note declared upon is, by express terms in the same, made payable at the Florida Savings Bank one year after the date thereof; that defendant, at the time and place named for the payment of said note, had the amount of money ready to pay the same and interest thereon, and would have paid the same upon the presentation of said note, but that the same has never been presented for payment at the place named. For second plea defendant says that ever since said note became due he has had the amount named in said note, and interest, at the place named therein, and has been ready and willing to take up and pay the same, but that said note was never presented for payment; but instead thereof the plaintiffs has always declined presenting the same for payment, and requested payment of the interest on said note semi-annually, which was always

promptly paid. And this defendant now makes profert of the amount due on said note, and pays the same into court." A demurrer was sustained to the pleas, and defendant declining to further plead, judgment was rendered against him for \$1,189.42 and costs of suit.

Counsel filed in the circuit court an agreement in reference to the principal of the note paid into court by the defendant, but no statement of its contents need be made here.

As appears from the record, the only question presented is whether the court erred in sustaining the demurrer to the pleas.

Mr. R. B. Archibald for appellant.
Mr. John E. Hortridge for appellee.

Mabry, Ch. J., delivered the opinion of the court:

It is now the accepted doctrine in the United States that in a suit against the maker of a promissory note, payable at a particular time and place, it is not necessary to allege in the declaration a presentation for payment at the place named, or to prove such presentation at the trial in order to entitle the plaintiff to recover on such a note. What was the English rule on the subject prior to the decision in *Rouse v. Young*, 2 Brod. & B. 165, rendered in 1820, is uncertain, as there was great diversity of opinion on the subject among English judges. It was at that time decided by the house of lords that if a bill of exchange be accepted, payable at a particular place, the declaration must aver presentment at that place, and the averment must be proved. It seems that prior to that time the king's bench had followed the rule now accepted by the American courts. In 1839 the Supreme Court of the United States decided, in the case of *Wallace v. McConnell*, 38 U. S. 13 Pet. 136, 10 L. ed. 995, that in an action against the maker of a note, payable at a particular time and place, no demand for payment need be averred or proved; and since that decision the American courts have been practically unanimous in holding the same doctrine. *Reese v. Pack*, 6 Mich. 240; *Montgomery v. Tutt*, 11 Cal. 307; *Caldwell v. Cassidy*, 8 Cow. 271; *Wolcott v. Van Santvoord*, 17 Johns. 248, 8 Am. Dec. 396; *Hills v. Place*, 48 N. Y. 520, 8 Am. Rep. 568; *Payson v. Whitcomb*, 15 Pick. 212; *Carley v. Vance*, 17 Mass. 389; *Lyon v. Williamson*, 27 Me. 149; *Armistead v. Armisteads*, 10 Leigh, 526; *Washington v. Planters Bank*, 1 How. (Miss.) 230, 28 Am. Dec. 333; *Yeaton v. Berney*, 62 Ill. 61; *Humphreys v. Matthews*, 11 Ill. 471; *Ripka v. Pope*, 5 La. Ann. 61, 52 Am. Dec. 579; 3 Randolph, Com. Paper, § 1117; Story, Prom. Notes, § 228, and notes; Tiedeman, Com. Paper, § 310.

While the American courts uniformly hold that in a suit on a note against the maker it is unnecessary for a plaintiff to aver a presentation of the note for payment at the time and place designated for that purpose, it must not be supposed that the maker cannot set up as a matter of defense, so far as costs and damages are concerned, the fact that he was prepared with funds and ready to make payment of the note at said time and

place, and that the holder was not there to receive the money. The theory of the American courts is, that the maker of the note, being the principal debtor, is still liable to pay, though the note be not presented at the time and place designated for payment, and that it devolves upon him to show as a matter of defense a readiness with the money at the time and place to meet the note, and such defense must be set up by plea and can only be in bar of damages and costs. Such a plea, in order to be available, must allege that the maker was ready to pay the money at the time and place named; that he has ever since been ready there to pay the note, and that he brings the money into court for the plaintiff. *Carley v. Vance*, and *Lyon v. Williamson*, *supra*.

The first plea of the defendant below was clearly demurrable. It goes no further in its allegations than that the defendant, at the time and place named for the payment of the note, had the money ready to pay the same and interest thereon, and would have paid the same had it been presented for payment, which had never been done. It does not make a tender of the money in court, nor does it allege that defendant had, ever since the note matured, been ready with the money to pay. It falls far short of the requisites of a good plea setting up such a defense. *Forcheimer v. Holly*, 14 Fla. 239.

The second plea is more extensive in its allegations. It alleges that ever since the note became due defendant had the amount of money named therein and interest, at the designated place of payment, and had been ready and willing to pay the same, but the note was never presented for payment; that plaintiff had always declined to present the note for payment, and requested payment of the interest thereon semi-annually, which was always promptly paid. Profert of the amount due on the note was made and paid into court. Conceding that the allegation as to the *profert in curia*, in reference to which there is no contention here, is sufficient, it is evident that the second plea is good under the rule of pleading above stated, unless the averment relating to the payment of interest after maturity of the note renders it bad. It is insisted for appellee that the payment of interest on the note after it matured, as alleged in the plea, was a waiver by the maker of any defense that he might have set up by reason of a failure on the part of the holder to present the note for payment, and the rule as to a waiver of protest and notice by payment, or promise to pay, on the part of an indorser of a note, is invoked. The rule is well settled that a payment on a note, or a clear and explicit promise to pay it after maturity, by an indorser, with full knowledge of the fact that it had not been presented for payment, operates as a waiver of such presentation and protest. *Whitaker v. Morrison*, 1 Fla. 29, 44 Am. Dec. 627; *Curtis v. Sprague*, 51 Cal. 239; *Salisbury v. Kenick*, 44 Mo. 554; *Hughes v. Bowen*, 15 Iowa, 446; *Smith v. Curles*, 59 Ill. 221. The principle upon which the maker of a note is held liable is not exactly the same as that applicable to the liability of an indorser. The maker is

the primary debtor, and, as we have seen, no presentation at all is necessary to hold him liable. But while this is true, he may show by way of defense, in a suit against him on a promissory note, payable at a particular time and place, that he was then and there ready with the money to make payment, and has ever since continued so to be; and in that event, under proper plea with tender in court of the money due, he will not be liable for costs, damages, or expenses of the suit. In such a case he will have done everything under his obligation with the holder of the note to avoid costs, damages, or expenses, and in justice should not be burdened with them.

It will be observed that the second plea alleges, in addition to the readiness of the maker to pay the note and interest at the time and place of payment, that the holder declined to present the note for payment, but requested payment of the interest thereon semi-annually, which was promptly paid. The note was past due something over three years when suit was instituted on it, and from the allegations of the plea it is inferable that both maker and holder of the note acquiesced in a postponement of its payment, upon the payment of semi-annual interest thereon, but it is not made to appear that the postponement was for any fixed time. The interest on the note was ten per cent per annum, and it appears from the plea that, though the note was not presented for payment, semi-annual interest thereon was requested and paid. This of course was a recognition, on the part of the maker, that the holder was entitled to interest on the note so long as he permitted it to run, but it was then past due, and was liable to be sued on at any time at the option of the holder. The contract in the note is, that if not paid at maturity, it may be placed in the hands of an attorney for collection, and, in that event,

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an additional sum of \$100 for attorney fees was agreed to be paid. The contingency expressed in the note, upon which the liability to pay the attorney fee depended, to wit, the placing the note after maturity in the hands of an attorney for collection, is not denied; but the defense in the plea is that the defendant was all the time ready at the proper place to pay the note, which was never presented for payment, but only the interest thereon demanded, and which was promptly paid. If the plea had alleged that by agreement based on sufficient consideration the principal debt had been postponed for a definite time, and before the expiration of that time suit had been instituted, without presenting the note for payment, a different question would arise. But the plea here does not present such a defense. It appears to us that the payment of the interest on the note after its maturity, for the length of time and under the circumstances stated, amounts to a waiver of any defense that the maker might have had by reason of the failure of the holder to present the note at the time of its maturity. The right under the circumstances stated to cease paying interest on the note after maturity, by reason of a failure to present it at the time and place of payment would exist as well as an exemption from costs and expenses in the event of a suit, but the plea expressly alleges that defendant continued to pay semi-annual interest on the note after maturity. In the judgment of the court the second plea was also bad, and the court did not err in sustaining the demurrer to it.

The only questions here relate to the decision of the court on the demurrer to the pleas, and our conclusions thereon already stated result in *an affirmance of the judgment of the Circuit Court*, and an order will be entered accordingly.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina
v.
William HALL *et al.*, *Appls.*

(115 N. C. 811.)

The constructive presence of a murderer in the state where his victim is struck by a bullet fired across the state boundary is not sufficient to make him a fugitive from that state in the state from which the shot was fired, under a statute providing for the arrest of fugitives and their surrender pursuant to the act of congress relating to interstate extradition.

(Clark and Mac Rae, JJ., dissent.)

(December 27, 1894.)

APPEAL by defendants from an order of the Superior Court for Cherokee County refusing to discharge defendants upon habeas corpus from custody to which they had been committed awaiting arrival of extradition papers to remove them to Tennessee for trial upon the charge of murder. *Reversed.*

Andrew Bryson lived by Beaver Dam creek near the Unoka mountains. The deputy sheriff

of Cherokee county had advised John Dockry to procure a warrant and arrest Bryson. Dockry was duly deputed to make the arrest and summoned William Hall to assist him. They went in search of him and not finding him at home proceeded toward the house of another man where they suspected that he was.

The path between the two places ran near the state line between North Carolina and Tennessee and crossed the line in two places. On this path they met Bryson and stepped behind a tree to wait for him to come up. When he did so they called to him to stop, at the same time covering him with weapons. Bryson refused to submit and fired at them. Hall thereupon fired his gun and Bryson fell dead. It subsequently appeared that at the time of the killing deceased was in the state of Tennessee and the officers in the state of North Carolina. The officers were arrested and tried for murder but were freed on the ground that the North Carolina courts had no jurisdiction of the crime. They were then placed in custody to await extradition papers to take them to the state of Tennessee, after which they applied for this writ of habeas corpus and procured their release from custody.

NOTE.—Who are fugitives subject to extradition.

There is much uniformity in the cases upon this question.

Must have been in demanding state.

The American cases are unanimous in holding that a person cannot be a fugitive from justice unless he was in the demanding state when the crime was committed.

The crime must have been committed in the foreign state. *Re Heyward*, 1 Sandf. 701.

The presence of the accused in the demanding state at the time the offense was committed is a jurisdictional fact. *Re Mitchell*, 4 N. Y. Crim. Rep. 386.

One who at and continuously after the alleged time of the commission of a crime in another state has been within the state of Indiana, is not a fugitive from justice. *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 317.

A resident of Kentucky cannot be extradited to Alabama under a charge of violating the Alabama law against the agent of a corporation receiving a commission for supplies purchased by him for it, where he was not at the time in Alabama. *Ex parte Knowles*, 16 Ky. L. Rep. 263.

The crime must have been committed within the demanding state. *Re Fetter*, 23 N. J. L. 811, 57 Am. Dec. 382.

In *United States v. Fowkes*, 49 Fed. Rep. 50, one of the defenses made upon which the discharge from custody was based was that the prisoner had never been in the demanding state.

Where a person in one state sold a horse to a person in another state, and was extradited to the latter on the charge of obtaining money by false pretenses, the court held that he was not properly extradited, saying: "According to the provisions of this law (U. S. Rev. Stat. § 58) there must be not only the commission of the crime but the person must be a fugitive from the state in which it was committed, before the executive authority can be called into action. Jackson was not a fugitive. He had not in all his life been in Tennessee; had never fled from it; and his case did not fall within the positive terms of the law." *State v. Jackson*, 1 L. R. A. 370, 36 Fed. Rep. 263.

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The person must have fled from the demanding state. *Re Jackson*, 2 Flipp. 188.

The prisoner must have been in the state where the crime was committed and fled therefrom. *Ex parte McKean*, 3 Hughes, C. C. 23.

A person cannot be sent to a state for trial upon the charge of being accessory before the fact to murder committed there, if he never was in that state and whatever he did was done in the state of his domicile where he was arrested. *Ex parte Smith*, 3 McLean, 121.

But in England there seems to be a somewhat different view of the question.

In *Queen v. Nillins*, 58 L. J. M. C. 157, it was held that where one obtains goods by false pretenses by means of letters written to a foreign country, he is a fugitive criminal subject to extradition within the meaning of the statute providing that "any person accused or convicted of an extradition crime, committed within the jurisdiction of a foreign state, who is in or suspected of being in some part of her majesty's domain," may be extradited. And a similar ruling was made in *Reg. v. Jacob*, 46 L. T. N. S. 595.

No constructive presence.

The courts which have passed upon the question seem to agree with STATE V. HALL in holding that there can be no constructive presence.

The constructive commission of a crime in a state from which the accused never fled is not sufficient upon which to found extradition proceedings. *Jones v. Leonard*, 50 Iowa, 108, 33 Am. Rep. 116; *Wilcox v. Nolze*, 34 Ohio St. 520.

Crimes which are not actually but only constructively committed within the jurisdiction of the demanding state do not fall within the class intended by the constitution or act of congress. *Re Mohr*, 73 Ala. 503, 49 Am. Rep. 63.

Setting crime in motion.

One who after setting in motion the machinery which results in the crime, departs from the state before the consummation of the offense, is a fugitive from justice. *Re Cook*, 49 Fed. Rep. 333.

The purpose of the flight.

In one case it was held that, to be a fugitive from

Further facts appear in the opinion.

Mr. G. S. Ferguson, for appellants:

The facts agreed show that the prisoners never fled from the state of Tennessee. Therefore they were not fugitives under any of the definitions given by dictionaries and do not come within the description of the statute.

Code, § 1165.

Story says that "he had great doubts whether, upon principles of international law, and independent of any statutable provisions, or treaty stipulations, any court of justice was either bound in duty or authorized in its discretion to send back any offender to a foreign government, whose laws he was supposed to have violated.

United States v. Davis, 2 Sumn. 482, 486.

Jurisdiction of the offense or subject-matter, and jurisdiction to try the offender, are very different things. The first exists whenever the offense is committed within this state, and the second when the offender is brought into court, and not before.

Adams v. People, 1 N. Y. 179.

In *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, *Mr. Justice Harlan* says the act of congress did not impose upon the executive authority of the territory the duty of surrendering the appellant, unless it was made to appear in some proper way that he was a fugitive from justice.

justice a person must have left the state in which he committed the crime, for the purpose of escaping punishment for it. *Degant v. Michael*, 2 Ind. 306.

But the weight of authority is that the reason for leaving the state where the crime was committed is immaterial,—the mere fact of leaving after the commission of the crime being sufficient.

The fact that a person has been indicted for an offense which in its own nature implies the actual presence of the offender within the jurisdiction of the demanding state is sufficient prima facie evidence of his having fled from justice when found within another state. *Leary's Case*, 6 Abb. N. C. 67.

A person who commits a crime within a state and withdraws himself from such jurisdiction without waiting to abide the consequences of such act must be regarded as a fugitive from the justice of such state, whose laws he has infringed. *Re Voorhees*, 32 N. J. L. 141.

The fact that a person has committed a crime in one state and has been found in another establishes conclusively that he is a fugitive from justice. *People v. Pinkerton*, 17 Hun. 199.

It makes no difference whether a prosecution was commenced or not to make a person a fugitive from justice within the meaning of the statute of limitations. *United States v. Smith*, Brunner, Coll. & Am. Cas. 67.

To be a fugitive from justice within the meaning of the act of congress, it is not necessary that the person charged should have left the state in which the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that within another state he committed that which by its laws constitutes a crime, and when he is sought to be subjected to its criminal process for his offense he has left its jurisdiction and is found within the territory of another state. *Roberts v. Rilly*, 116 U. S. 97, 29 L. ed. 549; *Ex parte Brown*, 28 Fed. Rep. 653; *Re Keller*, 36 Fed. Rep. 681; *Re White*, 55 Fed. Rep. 54; *State v. Richter*, 37 Minn. 436; *Hibler v. State*, 43 Tex. 197.

A person may flee from justice although no pro-

cess has been issued against him. The departure of the offender from the vicinity of the place within which the offense was committed to his usual residence in another state for the purpose of avoiding punishment for that or any other offense, is a fleeing from justice. *United States v. White*, 5 Cranch, C. C. 38.

Under the act of congress the accused may insist upon proof that he was in the demanding state at the time he was alleged to have committed the crime charged and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. If the accused had in fact never been in the demanding state he could not be said to have fled from its justice. *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250.

One who goes into a state and commits a crime, and then returns home, is a fugitive from justice. *Re Roberts*, 24 Fed. Rep. 132; *Re Adams*, 7 Law Rep. 336; *Kingsbury's Case*, 106 Mass. 223; *Ex parte Swearingin*, 13 S. C. 74.

But Moore (*Extradition*, § 569) cites the case of Senator Patterson whose return was sought from the District of Columbia to South Carolina, but the court held that he was not a fugitive from justice, since he was sent by the people to represent them in Washington, and it was shown that he was in South Carolina after the commission of the alleged offense and that no attempt was made to arrest him.

In one case it was held that the fact that a fugitive has been brought into a state under a legal process is not sufficient to prevent the governor from arresting him and surrendering him to another state, as a fugitive from justice, found in his state. *People v. Sennott*, 20 Alb. L. J. 230 and 425.

But the contrary was held in *Daniels' Case*, Binns, *Justice* (7th ed.) p. 429, cited in 20 Alb. L. J. 427.

In the following cases the question of who is a fugitive from justice within the meaning of the exception in the statute of limitations was considered. *State v. Washburn*, 48 Mo. 240; *United States v. Brown*, 2 Low. Dec. 207; *United States v. O'Brian*, 3 Dill. 381.

It must appear to the governor of the state to whom such demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled by an indictment or affidavit certified as authentic by the governor of the state making the demand; and, second, that the person demanded is a fugitive from the justice of the state, the executive authority of which makes the demand.

Roberts v. Rilly, 116 U. S. 90, 29 L. ed. 544.

Constructive presence in the demanding state at the time of the alleged crime is not sufficient.

7 Am. & Eng. Encyclop. Law, *Extradition*, § 28, notes, and cases cited.

Mr. Frank I. Osborne, Atty-Gen., for the State.

Avery, J., delivered the opinion of the court:

The defendants were arrested and are now held under the statute (Code, § 1165), which provides that any one of certain judicial officers therein named, "on satisfactory information laid before him, that any fugitive in the state has committed, out of the state and within the United States, any offense which by the law of the state in which the offense

✓H. P. F.

was committed, is punishable either capitally or by imprisonment for one year or upwards in any state prison, shall have full power and authority, and is hereby required to issue a warrant for said fugitive and commit him to any jail within the state for the space of six months unless sooner demanded by the authorities of the state wherein the offense may have been committed, pursuant to the act of congress in that case made and provided," etc. It is manifest that the prisoners cannot be lawfully detained, under the unmistakable language of the law, unless it has been made to appear that they are liable to extradition under the act of congress, passed in pursuance of article 4, § 2, clause 2, of the Constitution of the United States, in order to provide for the surrender of persons charged with criminal offenses "who shall flee from justice and be found in another state." The prisoners were tried for murder in Cherokee county, and upon appeal it was held (114 N. C. 909), that, if the deceased at the time of receiving the fatal injury was in the state of Tennessee, and the prisoners were in the state of North Carolina, the courts of the former commonwealth alone had jurisdiction of the offense. The prisoners, if such were the facts, were deemed by the law to have accompanied the deadly missile sent by them across the border, and to have been constructively present when the fatal wound was actually inflicted. As our statute confers no power to detain in custody or to surrender, at the demand of the executive of another state, any person who does not fall within the definition of a "fugitive from justice," according to the interpretation given by the courts of the United States to the clause of the Federal Constitution providing for interstate extradition, and the act of congress passed in pursuance of it, the only question before us is whether a person can, in contemplation of law, "flee from justice" in the state of Tennessee when he has never been actually, but only constructively, within its territorial limits. Upon this question there is abundant authority, emanating, not only from the foremost text-writers and some of the ablest jurists of the most respectable state courts, but from the Supreme Court of the United States, whose peculiar province it is to declare what interpretation shall be given to the Federal Constitution and the statutes enacted by congress in pursuance of its provisions, which are declared by that instrument to be the supreme law of the land. If we can surrender under our statute only fugitives within the meaning of the act of congress, it would seem sufficient to cite *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, where it is held that a person arrested as a fugitive has a right "to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged, and consequently withdrew from her jurisdiction, so that he could not be reached by her criminal process." It is admitted that the prisoners have never withdrawn from the jurisdiction of the courts of Tennessee, and have never been, either at the time when the homicide was committed or since, exposed to arrest under

process issuing from them. But in a case involving so important a principle, and calculated to excite general interest on the part especially of the legal profession, we feel warranted in not only citing but quoting from other authorities. Where a person is charged with cheating by false pretenses, by means of a misrepresentation in writing sent to another state, whereby he procures something of value in the state to which such writing goes, he is deemed to be constructively present where the false pretense is successfully used, and where the money or property is obtained, and is consequently liable to be indicted and punished there, if he comes within the reach of the process of its courts. *People v. Adams*, 3 Denio, 190, 45 Am. Dec. 468. But the supreme court of Alabama, in a case exactly in point (*Re Mohr*, 78 Ala. 503, 49 Am. Rep. 63), states the principle applicable here with great clearness and force. The defendant was charged with cheating by false pretenses a prosecutor in the state of Pennsylvania, though it was admitted that he had never actually gone within the limits of that state. The court said: "It is clear to our minds that crimes which are not actually, but are only constructively, committed within the jurisdiction of the demanding state do not fall within the class of cases intended to be embraced by the constitution or act of congress. Such, at least, is the rule, unless the criminal afterwards goes into such state and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is, not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have fled from a state, in the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime." That court cited to sustain this view among other authorities, *Whart. Crim. Pl.* 8th ed. 281; *Kingsbury's Case*, 106 Mass. 228; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; and *Wilcox v. Nokes*, 84 Ohio St. 520. *Bouvier* (Law Dict. 551) defines a "fugitive from justice" as "one who, having committed a crime within one jurisdiction, goes into another in order to evade the law and avoid punishment." The same writer says, also, that the executive of a state cannot be called upon to deliver up a person charged with a criminal offense in another state, unless it appear that such person "is a fugitive from justice." *Rapalje* (Law Dict. 555) defines a "fugitive from justice" as "one who, having committed a crime in one jurisdiction, flees therefrom into another jurisdiction in order to escape punishment." See also 1 *Abbott*, Law Dict. 508, for definition of "fleeing."

To hold that a person who is liable to indictment only by reason of his constructive presence is a fugitive from the justice of a state within whose limits he has never gone since the commission of the offense, involves as great an error as to maintain that one who has stood still, and never ventured within the reach of another, has fled from him to avoid injury. One who has never fled cannot be a fugitive. *Jones v. Leonard*, 50 Iowa, 106, 82 Am. Rep. 116; 7 *Am. & Eng. Encyclop.*

Law, p. 646, and note 1, Id. 647. Moore, in his work on Extradition (vol. 2, §§ 581 *et seq.*) after quoting the extract already given from *Reggel's Case*, cites a number of other cases, wherein governors of states, under well-considered opinions of their legal advisers, have recognized and acted upon the principle that a person cannot be said to flee from a place where he has never actually been, but to which by a legal fiction he is deemed to have followed an agency or instrumentality, put in motion by him, to accomplish a criminal purpose. Spear (Law of Extradition, pp. 396-400) cites and discusses the authorities bearing upon the question whether a person can be a fugitive from a state into which he has never entered, and not only reaches the same conclusion at which we have arrived, but maintains, *arguendo*, that a person who has been extradited as a fugitive cannot be sent back from the demanding state, on requisition of the executive who surrendered him, to answer a crime committed while he was a fugitive, because one who is forcibly taken away does not, in contemplation of law or in fact, flee from justice. The author says that to assume that an abduction by force, though under legal process, is a fleeing, "is a gross absurdity, quite as bad as the theory of fugitives by construction." Had it not been provided by the Constitution of the United States (art. 4, § 2, cl. 2) that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he has fled be delivered up," etc., the states, as to the right to demand and the power to surrender fugitives from justice, would have sustained relations to each other analogous to those existing between independent nations. *State v. Outshall*, 110 N. C. 588, 16 L. R. A. 180. If no stipulation by treaty were now in force requiring the government of the United States to surrender, on requisition of the authorities of Canada, persons charged with murder in that dominion, those guilty of such crimes would find this country a safe asylum. In the absence of any provision of law imposing upon the executive of the state of North Carolina the duty of surrendering, on requisition of the governors of other states, any person charged with a criminal offense in the demanding states, except such as shall be shown to have fled from justice within the meaning of the Federal Constitution, the governor must search in vain for authority to issue a warrant of extradition, in a case like this before us, as was in effect conceded in *Re Sultan* (decided at this term), reported in 115 N. C. 57, *post*, 294. While a statute passed now, and making it murder to willfully put in motion within the state of North Carolina any force which should kill a human being in a neighboring state, might not be amenable to such constitutional objection as that discussed in *State v. Knight*, Taylor & C. (N. C.) 65 (44), it would as to this case be an *ex post facto* law. But in the exercise of its reserved sovereign powers, the state may, as an act of comity to a sister state, provide by statute for the surrender, upon requisition

tion, of persons who, like the prisoners, are indictable for murder in another state, though they have never fled from justice. If it shall be proved that the prisoners were in fact in North Carolina and the deceased in Tennessee when the fatal wound was inflicted, a law may still be enacted giving the governor the authority to issue his warrant and deliver them on requisition. Meantime it may be asked, What can be done to provide for this *casus omissus*? We may answer, in the language of Spear (*supra*, p. 400): "Nothing, by any extradition process, until there is some authority of law for it. . . . State statutes may be enacted to furnish a remedy not now supplied by either federal or state law." Were the courts, without any semblance of right, to supply the legislative omission, it would be a criminal usurpation of authority, more pernicious to the public interests than the escape of, not two, but scores of criminals. Appellate courts cannot deliberately legislate for the punishment of crime without incurring a moral accountability as grave as that of the criminal who suffers by the usurpation.

The attorney-general, with commendable frankness, admitted that he could find no authority to sustain his contention. It is not pretended that a single appellate court, federal or state, or a respectable law-writer, has given any other interpretation to the law than that adopted by us. Courts cannot amend or override constitutions, and statutes, and, upon the higher-law idea, anticipate dilatory legislatures by providing for the safety of the public in the event that anarchists should project deadly missiles across a state border. Mobs can be suppressed under the common law wherever they may assemble for an unlawful purpose and attempt to put such purpose into execution. But, if they could not, it would be the duty of the legislature, not of the courts, to provide for their suppression. If there is any foundation for apprehending that the disorderly elements of society are watching for opportunity to take life and destroy property, provided they can see a way of escape through the loopholes of defective laws, the representatives of the people must be trusted to meet, if not anticipate, emergencies as they arise. Neither actual nor possible consequences should deter judges from executing the law as it is plainly written. The *argumentum ab inconvenienti*, when used to bring about a modification of a well-established principle of law, should be addressed to the law-maker, whose province it is to provide a remedy for any evils growing out of its enforcement. Addressed to judges under such circumstances it is an invitation or a temptation offered to violate their sacred obligations in order to appease the public. In *Spier's Case*, 12 N. C. 491, the supreme court declared the prisoner entitled to his discharge upon a writ of habeas corpus where the term of the court expired pending his trial for murder, because he could not be again put in jeopardy for that offense. The defect in the law was subsequently remedied by statute allowing the court to continue into the next week if a felony were being tried when

the week expired. But the court, composed of Taylor, Hall, and Henderson, did not hesitate for a moment because a guilty man might escape. On the contrary, Judge Hall said: "The guilt or innocence of the prisoner is as little the subject of inquiry as the merits of any case can be when it is brought before this court on a collateral question of law." Courts enforce laws, not simply to punish the guilty, but as well to protect the innocent. The law which fails to provide for the extradition of a guilty man must be understood and adhered to, because it may be invoked as protection to the innocent, who are prosecuted without cause, against the annoyance, expense, and invasion of personal liberty involved in being extradited. There was error.

The prisoner should have been discharged.

Clark, J., dissenting:

It is a fact agreed in this petition that the defendants, being in this state, slew the deceased, who was over the line in Tennessee. The defendants were indicted in this state for the murder, and convicted. On appeal, the conviction was reversed, this court holding (*State v. Hall*, 114 N. C. 909) that there was a defect of jurisdiction because the offense was committed in Tennessee, and that in legal contemplation the parties committing the crime were in Tennessee. If they were in Tennessee when they committed the crime, they are now in North Carolina, and in legal contemplation are necessarily fugitives from justice. If they were not in Tennessee, but in North Carolina, when they committed the crime, then it was error to hold that the defendants could not be convicted in North Carolina. They should be tried in the jurisdiction in which they were when the offense was perpetrated. That has been held to be in Tennessee. If that is sound law, and the defendants were then in law in Tennessee, and now in fact are in North Carolina, they are in legal contemplation, and within the language and purport of the extradition law, "fugitives from justice." This term is intended to embrace those who, having committed a crime in one state, endeavor to evade justice by being in another state, whither the ordinary process of the state where the crime was committed will not reach them. That is the situation of these defendants. They are sheltering themselves from process by being in another state. They are charged with murder in Tennessee, and are now where the ordinary process of the courts of that state cannot reach them. They can only be had for trial in the state of the commission of the crime by application to the governor of the state where they are to be found. They are proper subjects of extradition. If a mob occupying the Jersey side of the Hudson should shell the city of New York, or from the opposite shore of the Delaware should cannonade the city of Philadelphia, they would be liable to no punishment in New Jersey, under the decisions of the courts, because, "in contemplation of law," the mobs are in New York and Pennsylvania. But if it is true, as is contended by the defendants, that

the members of the mob cannot be extradited because the mob never was in those cities, it would be a singular state of things. This ruling would also place Savannah, Memphis, St. Louis, Cincinnati, Louisville, and hundreds of other cities and towns at the mercy of any mob which might assemble, with weapons of long range, across the state line. The preamble to the constitution of these states recites that it was ordained "to form a more perfect union and insure domestic tranquillity." Article 4, § 2, cl. 2, provides "that any person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." It would be a restricted construction, and little calculated to "form a more perfect union and establish domestic tranquillity," to hold that a "fugitive from justice" in the purview of this provision applies only to persons who, being actually as well as potentially in the state where the crime was committed, afterwards departed the same. A person who places himself outside the limits of the state from thence to commit the crime within said state, and ever afterwards avoids going into said state to avoid arrest, as truly "flees from justice" as he who, having committed a crime, flees from the state subsequently. If an infernal machine sent by mail or express from a distant state explodes and kills the receiver, it is murder committed in the latter state. The sender skulking in another state to avoid arrest is as truly a fugitive from justice as if he had accompanied the machine to its destination and then fled. The constitutional provision for extradition, and the laws passed in pursuance thereof, it should be remembered, are not criminal, but remedial, provisions. They should therefore be liberally construed to effect the purpose intended to be served, which is to extend into another state, through the medium of its executive, the process of the state whose laws have been violated. This process, having no validity beyond its borders, can only be made available to arrest the person charged with crime by virtue of the governor of the state, where such person is to be found, acting under the extradition, just as a magistrate of one county may indorse a summons issued by a justice of the peace in another county, under the Code. Civilized man must recoil from the practical ruling that the territory adjacent to state boundaries is a "no man's land," and that murder is privileged if committed across a state line. It may be safely said that the judge who first laid down a ruling from which such result practically follows did not foresee the purport and effect of his decision. We are called upon to correct, not to perpetuate, his errors, though others have since followed him. It is true that this restricted construction has been placed on this clause by several courts and text-writers, but their opinions are merely of "persuasive authority," as we have often held, and entitled only to the weight due to the reasons they give. Years ago *Chancellor*

Kent (1 Com. 477) said that it would not do "to press too strongly the rule of *stare decisis*, when it is recollected that over one thousand cases in the English and American books have been overruled. Even a series of decisions are not always conclusive, and the revision of a decision often resolves itself into a mere question of expediency. His remark has received added force since by the fact that overruled cases now number several thousand. Especially a constitutional provision cannot be nullified or rendered of no effect by the erroneous ruling of a judge. When the choice is presented us it is his error, and not the constitution, which must be disregarded. This is clearly so if the constitution is superior to the power of a court to amend it by erroneous interpretation. Courts do not yet claim infallibility, and are not above correcting errors, especially in a matter so clearly against the very intent and meaning of the Federal Constitution as a ruling that, though a murder has been committed in the United States, yet a state may be powerless either to try the murderer when found in its borders or to surrender him to another state where he may be tried. There is no authority or precedent in this state, and, this being with us a case "of novel impression," we are not hampered from giving such construction to the clause as is most consonant to our views of its true intent and purport. It is true the several states might pass statutes broader than the clause quoted from the Federal Constitution, but it is also true that some of them might fail to do so. The Federal Constitution does not contemplate leaving the security of so many cities and towns, lying near state boundaries, dependent upon the inadvertence or unwillingness of the legislature of a neighboring state to pass an extradition law more liberal than the Federal Constitution.

Besides our statute (Code, § 1165) is broader, and authorizes the arrest of "any fugitive" who has committed the crimes therein specified "out of the state and within the United States." A fugitive from justice is simply one who, having committed a crime within a state, keeps himself beyond the ordinary process of the courts of such state. The two cases cited from the Supreme Court of the United States (*Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, and *Roberts v. Reilly*, 116 U. S. 90, 29 L. ed. 544), read according to the spirit instead of the letter, sustain, rather than militate against, this view; in which case he can be demanded of the executive of any state in which he may be found. Even if there had been no constitutional provision and no statute, the comity existing between states in a federal union would authorize the surrender to another state of a person who has committed murder in that state while standing in this state. This comity has been extended to recognize corporations chartered in other states and in other cases. Comity certainly should recognize that murder is a high offense against the laws of a sister state, and we should refuse to shelter the offender when demanded for trial. In refusing to discharge the prisoner I think there was no error.

MacRae, J.: I join in the above dissent.

Re William SULTAN.

(115 N. C. 57.)

1. The departure of a purchaser of goods to his home in another state after making criminally false representations in reliance on which the goods were subsequently delivered to a common carrier and shipped to him, is within the law a flight from justice for which he may be surrendered on a requisition.
2. The motive and purpose of an extradition proceeding which may be considered by the governor as a ground for refusing or revoking the issuance of his warrant for the fugitive cannot be inquired into in a habeas corpus proceeding.

(November 12, 1894.)

CERTIORARI to the Superior Court for Craven County to review an order releasing from custody in a habeas corpus proceeding one for whom the governor had issued a warrant for the purpose of returning him to the governor of Pennsylvania as a fugitive from justice. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. O. H. Gulon and W. W. Clark for plaintiff in certiorari.

Messrs. C. R. Thomas and P. H. Pelletier, for defendant in certiorari:

To be found in another state, after commission of a crime, without actual flight, constitutes one a fugitive from justice.

Paschal, Anno. Const. § 224, p. 230.

To be a fugitive from justice in the sense of the acts of congress regulating the subject and the constitution, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding prosecution anticipated or begun, but simply that having within a state committed that offense which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left the jurisdiction and is found within the territory of another state.

Roberts v. Reilly, 116 U. S. 97, 29 L. ed. 549.

Sultan made the false pretenses in Pennsylvania. Sultan was corporally present in Pennsylvania when he made the false pretenses. Sultan obtained the goods upon his false pretenses so made. The goods were delivered to Sultan's agent the common carrier in Pennsylvania, such common carrier, the railroad company, standing in all respects in Sultan's "shoes."

Benjamin, Sales, § 181, p. 160.

The question is, when Sultan was sought to be subjected to the criminal process of Pennsylvania, was the crime then complete, or had he committed a crime against the laws of that commonwealth?

Re Cook, 49 Fed. Rep. 833; *State v. Weather- spoon*, 88 N. C. 19; Moore, Extradition & Interstate Rendition, pp. 930-944.

The forum that first takes cognizance of the offense, whether it be the forum of the utter-

NOTE.—As to who are fugitives subject to extradition, see note to case immediately preceding this one.

ing of the pretense, or that of the receiving of the goods, attaches to itself jurisdiction.

Moore, *Extradition & Interstate Rendition*, note 1, p. 948; Whart. Crim. L. § 1206, and note 1.

Where a man is stricken in one state and dies in another, the person who committed the injury could be demanded as a fugitive from justice on a charge of murder by the state in which the mortal wound was inflicted.

Whart. Crim. L. § 292, note 2; 1 Bishop, Crim. L. § 118; *United States v. Guiteau*, 1 Mackey, 498, 47 Am. Rep. 247.

The judiciary may review, not control, the action of the governor as to points of law; but cannot interfere with such action as to any matter of discretion.

Re Hughes, 61 N. C. 57.

Burwell, J., delivered the opinion of the court:

The record shows that the governor of the state of Pennsylvania made a requisition on the governor of this state for the arrest of the petitioner, William Sultan, who had been indicted in the former state for obtaining goods under false pretenses from the firm of Morris Newberger & Son, of the city of Philadelphia. His excellency, the governor, upon an examination of the requisition and the accompanying papers, issued his warrant in due form for the arrest of the alleged fugitive, and his delivery to the agent of the state of Pennsylvania. Thereupon, a writ of habeas corpus was sued out in his behalf, and upon hearing the matter his honor discharged the petitioner from custody, assigning two causes for his action: First, his finding as a fact that the petitioner was not a fugitive from justice; and, second, that the process was instituted and procured for the purpose of enforcing and collecting a debt due to Morris Newberger & Son.

1. The indictment found against the petitioner in the city and county of Philadelphia charges the petitioner with having obtained from Morris Newberger & Son, on the 17th day of September, 1892, certain goods, by certain false and fraudulent pretenses. It is in proper form, and it is duly certified that the offense therein charged is a crime under the laws of the state of Pennsylvania. The guilt or innocence of the petitioner cannot be inquired of in this proceeding. It is not pretended that the petitioner was not in the city of Philadelphia on the 17th day of September, 1892, the date when it is charged in the indictment that he made the false pretense and thereby obtained the goods. If, therefore, we consider only the allegation of the indictment, and the fact that the person therein charged with a crime against the laws of Pennsylvania is now in this state, we must conclude that, being within this jurisdiction, he is here to be considered a fugitive from justice. This seems to be conceded.

But it appears from the affidavit of Morris Newberger, which constitutes a part of the document upon which the governor issued his warrant, and from the affidavit of the petitioner, that the goods, which in the indictment are said to have been obtained by

the petitioner on the 17th day of September, 1892, the date of the alleged false representation, were not in fact delivered to him on that day, but were on the 6th day of October, 1892, delivered by Morris Newberger & Son to a common carrier in the city of Philadelphia, consigned to the petitioner at Newbern, in this state, where the petitioner resided, and whither he had gone after making a contract on the 17th of September for the shipment of the goods to him at his home, in this state. Assuming, therefore, that the petitioner, being in the city of Philadelphia on September 17, 1892, made, then and there, to citizens of Pennsylvania, false and fraudulent pretenses, contriving and intending by means thereof to induce them to deliver on October 6, 1892, certain goods to a common carrier in said city for shipment to him in this state, and thereafter, but prior to October 6, left that state, and returned to his home here, we think he is a "fugitive from justice." As we have said, the truth or falsity of the charge that he made the false pretenses cannot be inquired into. If the delivery to the common carrier be considered a delivery to him (and we see no reason why it should not be so considered), the whole crime, if there was one, was committed within the jurisdiction of the court where the indictment has been found.

But it does not seem to us to be essential that we should hold the delivery to the carrier equivalent to a delivery to the petitioner, before we can adjudge that the crime charged was committed within the jurisdiction of the Pennsylvania court, for, if the false pretense was used in that state by the petitioner, there present, to induce a citizen of that state to part with his property by sending it to the petitioner in this state, and the petitioner then fraudulently obtained here the possession of the goods, the court of that state has jurisdiction of the offense, and the court of this state has jurisdiction also. It is said: "Where a false pretense is uttered in A., and the money obtained in B., the venue may be laid either in A. or B. This, in England, is finally settled by statute, which, however, is in this respect affirmatory of the common law. In several instances it has been held that the forum that first takes cognizance of the offense, whether it be the forum of the uttering of the pretense, or that of the forwarding of the goods, attaches to itself jurisdiction." Whart. Crim. L. § 1206. This is quoted with approval in 2 Moore, on *Extradition and Interstate Rendition*, p. 942, and that author adds: "This rule does not apply to false pretenses only, but obtains in regard to various other kinds, to the commission of which several facts, which may occur at different times and places, are essential. In such a case it may be held that a man may be regarded as a fugitive from the justice of the state where, being corporally present, he commits any of the criminal acts that respectively give jurisdiction to punish the offense. . . . As the law does not separate the elements so as to destroy jurisdiction of the offense, we should not divide them so as to defeat the recovery of jurisdiction over the offender."

It seems that if a person, being beyond the limits of the state, by means of a false pretense communicated in some way—as by letter—to a person in this state, obtains goods from that person, he may be indicted here, though he has never actually come within the state, and, if afterwards found within the jurisdiction of our courts, may be arrested and tried. 1 Bishop, Crim. L. 7th ed. § 109; *State v. Hall*, 114 N. C. 909. It may be that he could not be brought by extradition proceedings into the state, for in such case he might not be considered “a fugitive from justice,” but if he voluntarily comes within the jurisdiction he may be punished. As is said in *People v. Adams*, 3 Denio, 190, 45 Am. Dec. 468, “Impotent, indeed, must our laws be, if the contriver of the mischief, by whose efforts alone the cheat was effected, can escape punishment on the ground that he was out of the state when his fraudulent machinations were concocted, and when they took effect within it.” *A fortiori* should he be punishable here, if he was actually present in the state when he concocted his fraudulent machinations, and only retired from the state after he had put them in operation. If, therefore, the petitioner did go to the city of Philadelphia, and there make to Morris Newberger & Son false and fraudulent pretenses, and thereby induced them to sell him goods to be shipped to him at his home, in this state, and the goods were so sent, he is amenable to the laws of the state of Pennsylvania. He was actually in that state when the crime charged against him was begun. Now, when he is sought by extradition process, the crime is completed. After beginning the perpetration of the crime, he left that state. The purpose he had in view in leaving the state is immaterial. *Kingsbury's Case*, 106 Mass. 228; *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544. He is found here, and must be deemed a fugitive from the justice of that state within whose borders he, being actually present, put in operation an offense against her laws. *Re Cook*, 49 Fed. Rep. 885. Upon this subject, in the last-cited case, Jenkins, J., said: “The purpose of the constitutional provision was that criminals should find no asylum within any state of the Union; that ‘the law might everywhere, and in all cases, be vindicated.’ It will not do to refine too curiously upon such enactments, so that the very design of the law shall prove abortive; so that that shall become a shield and a protection which was designed as a weapon of offense. Can it be that one may not be regarded as a fugitive from justice, who, within a state, hires another to kill and murder, but, before the killing, departs the jurisdiction, to avoid the consequences of the murder he has designed? Can it be that if one within a state makes false representations to procure the goods of another, and departs that state before that other actually parts with his property on the faith of these representations, he may not be deemed a fugitive from justice? Or, to use the forcible illustration of counsel at the argument, if one places a dynamite bomb, with clock attachment, on the premises of another, that

will explode only after the lapse of a certain time, and death results, so that the act is murder, but departs the state before the explosion, to avoid the consequences of his act, is he not to be regarded as a fugitive from justice? To put the question is to answer it. The subsequent event was the consequence of the act, naturally resulting from it. The subsequent event was designed to happen from and by reason of the act done. The event, when it occurs as the consequence of the act, gives quality to the act, rendering it criminal. The result was the foreseen and designed consequence of the act, stamping it as a crime. It is immaterial whether the agency employed be an inanimate object or a sentient being. The result was designed by, and naturally flowed from, his original act, which, by reason of the result and the foreseen and intended result, is criminal. Departure from the jurisdiction after the commission of the act, in furtherance of the crime subsequently consummated, is a flight from justice, within the meaning of the law.”

2. We think that his honor also erred when he undertook to inquire into the motive and purpose of this extradition proceeding. In such matters the judiciary may review and control the action of the governor in regard to points of law, but cannot interfere with such action in regard to any matter within the discretion of the governor. *Hughes' Case*, 61 N. C. 57. The executive and judicial are co-ordinate departments of the government. The judiciary will control and correct the acts of the executive officers only when they are acting contrary to law, or without its sanction. In this matter, as we have said, the governor was authorized by the law, upon the document laid before him, to issue his warrant for the arrest and delivery of the petitioner. The law which clothes him with the power to issue that warrant invests him with a discretion not to issue it, or, if he has issued it, to revoke it, if in his opinion his warrant is sought, not to aid in bringing the alleged criminal to trial for his offense, but for some other ulterior purpose. It has been well said: “In our polity the judiciary have a power and are clothed with a duty unique in the history of the governments, viz., the power and duty to declare legislative enactments and executive acts which are in conflict with our written constitutions to be, for that reason, void, and of no effect. In this, America has taught the world the greatest lesson in government and law it has ever learned, namely, that law is not binding alone upon the subject, and that the conception of law never reaches its full development until it attains complete supremacy, in the form of written constitutions, which are the supreme law of the land, since their provisions are obligatory both upon the state and upon those subjected to its rule, and equally enforceable against both, and therefore law, in the strictest sense of the term.” As, in the performance of its “unique duty,” the judiciary will declare no enactment of the legislative department void because unconstitutional, unless it is plainly so, likewise it will, with equal solicitude, abstain from encroachment on the

province of the executive department, and will never declare the acts of its officers illegal unless clearly so, and not within the scope of that discretion with which the law itself has clothed them. The judiciary cannot review or control the executive in its exercise of that discretion.

See 1001 *sed.*

STATE of North Carolina

v.

A. WERNWAG, *Appd.*

(.....N. G.....)

A sale of fresh meat to a hotel keeper within a district within which a license was required is made where a dealer outside of such district on a telephonic message to bring some meat of a certain description brought the meat in his wagon and delivered it in that district, since the title did not pass and the goods were not ascertained until they were received by the purchaser.

(April 30, 1895.)

A PPEAL by defendant from a judgment of the Criminal Court for Buncombe County convicting him of selling meat without a license in violation of the ordinances of the city of Asheville. *Affirmed.*

The facts are stated in the opinion.

Mr. Frank I. Osborne, Atty Gen., for the State.

Montgomery, J., delivered the opinion of the court:

The city of Asheville, by one of its ordinances, prohibits by fine the sale of fresh meats, without a license first had from the city, within a radius of three fourths of a mile from the court-house as the center of the circle, except at the market established by the city. The defendant, who lived and conducted the business of seller of fresh meats outside of the three-fourths mile limit, received a telephonic message from C. H. Southwick, manager of an hotel inside of the limit, to bring to him at the hotel some fresh meats, the prices being agreed on. Agreeably to this message, the defendant brought, in his own wagon, the meats to the hotel, and delivered the same, receiving payment afterwards. In making this transaction, did the defendant violate the city ordinance, and thereby become liable for the fine imposed by the city? We are of the opinion that he did. In the first place, the goods ordered were not of a specific character, and therefore the contract was only executory. The witness said, "I telephoned to the defendant to send me some fresh beef and fresh mutton, describing such as I desired." It cannot be doubted that if the meat, when delivered at the hotel, had not been of the kind ordered, the buyer could have refused to receive it. "Where there is a sale of goods generally, no property in them passes

until delivery, because until then the very goods sold are not ascertained." *Benj. Sales, § 815.* The general rule is that, if it is a part of the contract of sale that the seller shall deliver the property sold at some place specified, and receive payment on delivery, title will not pass until such delivery. *Id. § 825; Edmondson v. Fort, 75 N. C. 405.*

2. The transaction was executory. The difference between this and a sale is that in the latter the goods which are the subject of the contract become the property of the buyer immediately upon the conclusion of the contract, regardless of delivery, and the risk of loss or injury is upon the buyer; whereas in an executory contract the title to the goods is in the seller until the contract is executed. If, in this case, the fresh meats had been lost or destroyed on their way from the defendant's shop to the hotel, how could it be thought that the proprietor of the hotel would be compelled to pay for that which he had never received, and which the defendant promised to deliver to him at his hotel in good condition? The plain meaning of this matter is this: The hotel manager sent a message to a seller of meats outside of the three-fourths mile limit: "Bring me some fresh meats of a certain description. If they are such as I order, I will take them, and pay you for them; if they are not of the kind I order, I will not." Surely there is no sale in this.

3. The transaction cannot be a sale. In a bargain and sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, without regard to whether the goods are delivered to the buyer or remain in the possession of the seller. *Lester v. East, 49 Ind. 588.* If, by the terms of the contract, the seller is required to send or forward the goods to the buyer, the title and risk remain in the seller until the transference is at an end, after which time the title is vested in the buyer. *Bloyd v. Pollock, 27 W. Va. 75; Taylor v. Cole, 111 Mass. 363; Fry v. Lucas, 29 Pa. 356.* The cases of *Armstrong v. Best, 112 N. C. 59,* and *Ober v. Smith, 78 N. C. 313,* are easily to be distinguished from the cases above cited, and the points are not of the same character with those. In *Armstrong v. Best,* and *Ober v. Smith,* the orders for goods were written in North Carolina, and sent by letter to Baltimore. The goods were selected by the sellers, and delivered to common carriers, unconditionally, for the purchasers. The delivery to the common carriers completed the contract, and upon that completion our court held that the contract was governed by the laws of North Carolina, and not that the sale was complete when the goods were ordered in North Carolina.

There is no merit in the exception made by the defendant to the court's allowing an amendment to the warrant issued by the mayor. The amendment did not change the nature of the action, and therefore the power of the court to allow an amendment was unrestricted. *State v. Vaughan, 91 N. C. 535; State v. Norman, 110 N. C. 484.*

There was no error in the judgment of the court below, and the same is affirmed.

NOTE.—In connection with the above case in respect to the place where a sale is perfected, see *Com. v. Hess (Pa.) 7 L. R. A. 177,* and *note.*

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MONTANA SUPREME COURT.

STATE of Montana, *ex rel.* Lucien EAVES
et al.,

v.

J. E. RICKARDS *et al.*

(.....Mont.....)

1. The lowest bidder although offering a bond for the performance of the contract cannot compel the award to him of a contract for the publication and annotation of codes which by the Constitution and the Act of March 7, 1895, the state furnishing board is required to let to the "lowest responsible bidder therefor," the statute also requiring that the type-setting, printing, and binding shall all be done within the state, and that the publisher shall keep sufficient copies to supply all demands for not less than eight years, and a full complete set of stereotyped matrices of every page of type used.

2. A corporation is not disqualified to bid for a contract to be let by the state furnishing board by reason of the fact that its business manager, who was not a stockholder or officer of the company and whose salary or position would not be in any way affected by the contract, was a member of the legislative assembly which passed the act providing for the letting of such contract.

(May 6, 1895.)

APPPLICATION for a writ of mandamus to compel defendants as the state furnishing board to award relators the contract for the printing of the public statutes. *Dismissed.*

Statement by De Witt, J.:

The matter before us is a decision upon the return of an alternative writ of mandamus. The respondents, constituting the state furnishing board, let a contract to the Intermountain Publishing Company for printing, annotating, and binding the codes which were adopted at the fourth session of the legislative assembly. The act of the legislature, approved March 7, 1895, as to the printing of the codes, provided, among other things:

"Sec. 4. The said codes, as compiled and codified by said commissioner, shall be annotated by the publisher thereof as fully and completely as Hill's Annotated Statutes and Codes of the state of Washington, in so far as the reports of the supreme court of the state of California are contained, and shall contain full annotations of the Montana Reports to April 1, 1895. They shall be published in two royal octavo volumes, equal in size, quality of paper, press work and binding, and similar in respect to the type used, to said Hill's Codes.

"Sec. 5. The state furnishing board of the state of Montana are required to immediately contract for the publication and annotation of said codes, as specified in this act, contracting with the lowest responsible bidder

therefor, which contract must not exceed the sum of eight thousand five hundred and fifty-five dollars for the publication and annotation of one thousand sets, containing two thousand, three hundred pages, or less, and two and 25-100 dollars for each additional page.

"Sec. 6. The contract shall specify that one thousand sets shall be printed, published and delivered to the secretary of state, on or before the 30th day of June, 1895. That the type-setting, printing and binding of said codes shall all be done within the state of Montana. That the publisher shall keep on hand, and for sale, at price not to exceed ten dollars per set, a sufficient number of copies of said codes to supply all demands for a period of not less than eight years. That the publisher shall also make and keep on hand a full and complete set of stereotype matrices of each and every page of type used in printing the codes."

As to public printing, the constitution of the state provides as follows: "All stationery, printing, fuel, and lights used in the legislative and other departments of government, shall be furnished, and the printing and binding and distribution of the laws, journals, and department reports and other printing and binding, and the repairing and furnishing the halls and rooms used for the meeting of the legislative assembly, and its committees, shall be performed under contract to be given to the lowest responsible bidder, below such maximum price, and under such regulations as may be prescribed by law. No member or officer of any department of the government shall be in any way interested in such contract; and all such contracts shall be subject to the approval of the governor and state treasurer." Article 5, § 30.

The application for the writ sets forth that on or about March 17, 1895, the state furnishing board caused to be published the following notice: "Proposals for Printing. Office State Furnishing Board, Helena, Montana, March 13, 1895. Notice is hereby given that the state furnishing board, in accordance with the provisions of an act entitled, 'An act to provide for the compilation, codification, publication, distribution, and sale of the Code of Civil Procedure, Civil Code, Penal Code, and the Political Code,' approved March 7, 1895, will receive proposals for the printing, binding, publication, and annotation of the Political, Civil, Penal Code, and the Code of Civil Procedure of the state of Montana, as codified by the code commissioners, in two royal octavo volumes, equal in size, quality of paper, presswork, and binding, and similar in all respects to the type used, to Hill's Annotated Statutes and Codes of the state of Washington, as fully and completely as Hill's Codes are annotated, in so far as the reports of the supreme court of the state of California are contained, and, as well, full annotations of the Montana Reports to April 1, 1895. All bids must be filed with the secretary of this

NOTE.—The rights of the lowest bidder for a public contract are the subject of a note to Thomas v. Mason (W. Va.) 26 L. R. A. 727.
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board on or before April 4, 1895, and be indorsed 'Proposals for Printing Codes of Montana.' The board reserve the right to reject any and all bids. J. E. Rickards, L. Rotwitt, H. J. Haskell, State Furnishing Board." The relators further state in their affidavit upon which they ask for the writ of mandamus that, in pursuance to said notice, they submitted to the board a bid for the annotating, printing, and binding of said codes, in the sum of \$7,795, and \$2.25 per page for each page exceeding 2,300, and that they submitted another bid to annotate, print and bind, and deliver the required number of volumes for the sum of \$8,290; that each of said bids was below the maximum provided by law to be paid for said service, and also lower than that of any other bid submitted; that they offered to execute a good and sufficient bond in the sum of \$10,000, or in any other sum which the board might require. They allege, further, that they are experienced publishers, and responsible and capable artisans, engaged in devoting their services, skill, experience, and ability to their business; that they are financially able to procure the services of competent and skillful codifiers and annotators to aid them, and are competent and responsible for the faithful execution of the work in a skillful and workmanlike manner. They set forth, further, that other proposals or bids were filed; that the board examined the bids on April 4, 1895, and that the bid of the relators upon the first proposition submitted was \$760 less than that of the Intermountain Publishing Company, and, upon the second proposition submitted, \$265 less than the bid of said company. They further set out in their affidavit that the Intermountain Publishing Company is disqualified to contract for said work, because, as they are informed and believe, James H. Monteith is a member of said company as a stockholder and officer therein, and business manager thereof, actively and personally engaged in the management and promotion of the interests of said company, and as such is interested in the contract; and that the said James H. Monteith is now, and during all the times herein mentioned was, a member of the legislative department of the state, as representative from Silver Bow county, which legislature passed the act for said printing, binding, and annotating the codes. Relators further set up that by virtue of the facts stated it was the duty of the state furnishing board to award said contract to relators, and that they demanded that such action be taken by the board, but that, notwithstanding the facts set up, the board wrongfully, arbitrarily, and in disregard of the duty enjoined upon it, and contrary to the provisions of the constitution and laws, wrongfully resolved and pretended to award said contract to the Intermountain Publishing Company. Relators allege that they are beneficially interested by reason of their being bidders, as described, and being entitled to the award of said contract, and also by reason of their being citizens and tax-payers of the state. They prayed a writ commanding the board to award said contract to them.

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Upon this affidavit an alternative writ was issued, commanding the said board to convene and revoke the award of the contract to the Intermountain Publishing Company, and award the same to the relators, as the lowest responsible bidders, or to show cause on the 18th of April why they had not so done. The respondents filed a demurrer, and a motion to quash. Decision was reserved upon the questions raised by said motion and demurrer, and respondents were ordered to file their answer. The answer being filed, there appeared to be a denial of most of the material allegations of the affidavit, and it seemed that there were raised questions of fact essential to the determination of the matter. This court thereupon appointed a referee, and in the order appointing him defined the issues upon which he should take testimony.

The issues of fact, as set forth in the order of reference were as follows: "(1) Was James H. Monteith, mentioned in the affidavit in this case, a stockholder of the Intermountain Publishing Company at the time of the awarding of the contract herein mentioned to the Intermountain Publishing Company, or at any other time mentioned in said affidavit? (2) Is the said James H. Monteith interested, or was he at the time of the letting of the contract interested, in any manner whatever, in the contract awarded as aforesaid to the said Intermountain Publishing Company? If so, how, and to what extent? (3) Did the relators, in making their alleged bid, offer to execute or deliver to said board a good and sufficient bond or undertaking, or any bond or undertaking, for the sum mentioned in the affidavit, or any sum, for the performance of the contract? (4) Did the state furnishing board, in awarding the contract in question, make inquiry as to whether the relators were financially able to procure the services of competent and skillful codifiers and annotators; and, if so, what inquiry did they make? (5) Did said board, in letting the said contract, make inquiry as to whether relators were competent or responsible for the performance of the contract in a skillful and workmanlike manner, according to the requirements of law; and, if so, what inquiry was made? (6) Did the board, in awarding the said contract, make inquiry as to whether the relators were able to annotate the said codes as fully and completely as Hill's Annotated Statutes and Codes of Washington are annotated, in so far as the reports of the state of California are contained; and, if so, what inquiry was made? (7) Did the said board, in awarding the said contract, make inquiry as to whether relators were capable, and could do or cause to be done the type-setting, printing, and binding of the said codes within the state of Montana, or could have published the same as required by law; and, if so, what inquiry was made? (8) Did the state furnishing board, before awarding said contract, meet for the purpose of considering bids submitted to them, and what examination did they make of said bids? Did they hear relators, and other persons who had presented bids? What inquiry did they make as to the ability

and qualification of said bidders to perform the said work? What inquiry did they make as to the responsibility of the several bidders, financially and otherwise? Was the determination of the said board to award the contract to the Intermountain Publishing Company based upon the facts inquired into by them?"

The referee has filed a voluminous report. Counsel argued the law of the case fully upon the motion to quash and the demurrer, and have also discussed the questions of law and fact since the filing of the referee's report.

Messrs. Wilbur F. Sanders and E. N. Harwood for relators.

Messrs. Henri J. Haskell, Atty-Gen., William Scallon, E. S. Booth, and Miss Ella L. Knowles, Asst. Atty-Gen., for respondents.

De Witt, J., delivered the opinion of the court:

As we have viewed this case from its inception, there seem to be only two main propositions for the decision of this court: (1) Had the state furnishing board, in awarding this contract, discretionary powers? This is the question of law in the case. (2) If the first proposition be answered in the affirmative, did the board wisely exercise such discretion, or did they, as alleged by the relators, exercise it "wrongfully, arbitrarily, and in disregard of duty?"

We will first address our attention to the question of law. It is true that the relators were the lowest bidders for this contract, and it is probably true that they offered to give a bond for the faithful execution of the same if it were awarded to them, and they allege that they were competent and skillful for the performance of the service. But does this conclude the state furnishing board? Is the offer of the lowest bid and the tendering of a bond, sufficient to constitute one the lowest responsible bidder? The authorities do not so hold. The board must let the contract to the lowest responsible bidder. Responsibility includes judgment, skill, ability, capacity, and integrity, and it is the duty of the furnishing board to wisely and honestly determine this question of responsibility. It is said in *Merrill on Mandamus* (section 117): "The law generally requires public officers who are charged with letting contracts for public work to accept the lowest bid therefor, and to make the contract accordingly. When such bidder has fully complied on his part with the requirements of the law, he may by the writ of mandamus compel the officer to make the contract with him. The writ has been considered appropriate in relation to a contract for constructing county buildings (*Boren v. Darke County Comrs.* 21 Ohio St. 811; *State v. Licking County Comrs.* 26 Ohio St. 581); for state printing (*State v. Barnes*, 85 Ohio St. 136; *State v. Printing Comrs.* 18 Ohio St. 886; *American Clock Co. v. Licking County Comrs.* 31 Ohio St. 415); for articles to be purchased for use of the county for building a bridge (*People v. Buffalo County Comrs.* 4 Neb. 150); for re-

pairing the Erie canal. *People v. Contracting Board*, 46 Barb. 254. When the officer is allowed a discretion in the matter, the writ will be refused. *Id.*, 27 N. Y. 878. It has been refused because the officer could decline the bids if he deemed them to be excessive or disadvantageous to the state (*Id.*, 38 N. Y. 882); because the officer was only required to let the contract to the lowest bidder if he was responsible (*Hoole v. Kinkead*, 16 Nev. 217), or if he furnished adequate security (*People v. Fay*, 8 Lana. 898); because the contract was to be let to the lowest responsible bidder, and the contract in the case required, for its fulfillment, pecuniary ability, judgment, and skill (*Com. v. Mitchell*, 82 Pa. 343); and because in the advertisement the right to reject any and all bids was reserved. *Hanlin v. Independent Dist. of Charles City*, 66 Iowa, 69.

We quote also, from the following authorities:

It is held in *Douglass v. Com.*, 108 Pa. 559, as follows: "In the Act of Assembly approved May 23, 1874 (Pub. Laws, 233), directing contracts for supplies to be awarded to the lowest responsible bidder, the word 'responsible' does not refer to pecuniary ability only. The act calls for an exercise of discretionary powers on the part of the city officers; and if they act in good faith, although erroneously or indiscretely, mandamus will not lie to compel them to change their decision. They may be ordered by mandamus to proceed to do their duty of deciding and acting according to their best judgment, but the court will not direct them in what manner to decide." See also, *Com. v. Mitchell*, 82 Pa. 343, as follows: "The word 'responsible' in the 6th section of the Act of 23d of May, 1874, has a broader meaning than is involved in the pecuniary ability to make a good contract by security for its faithful performance, and where the term is applied to contracts requiring for their execution, not only pecuniary ability, but also judgment and skill, the statute imposes, not merely a ministerial duty upon the city authorities, but also duties and powers which are deliberative and discretionary; and therefore, where these authorities have exercised a discretion, mandamus will not lie to compel them to modify their decision, even though their action was erroneous, in the absence of clear proof of fraud or bad faith."

It is said in *Kelly v. Chicago*, 62 Ill. 282, as follows: "The complainants have merely submitted a proposal to make a certain contract with the board. How do they found upon that a right to have the board make the contract with them? The notice for proposals expressly reserved the right to reject any bid. The charter did not make it the absolute duty of the board to let the contract to the lowest bidder. It provides that 'all contracts shall be awarded by said board to the lowest reliable and responsible bidder.' These qualities of being reliable and responsible, it is obvious, were of the utmost importance in the construction of a work of this magnitude. And the complainants must have been the possessors of these requisites, as well as being the lowest bidders, to make

a case of duty on the part of the board to award the contract to them. It was for the board to determine whether the complainants were reliable and responsible. It exercised its judgment upon the question, and found they were not so, and for that reason awarded the contract to another bidder." See also, the following from *Hoole v. Kinkead*, 16 Nev. 220: "Section 5 of the Statute referred to provides that 'said board may adopt or reject any and all bids not deemed reasonable or satisfactory, but in determining bids for the same work or material, the lowest responsible bid shall be taken.' Laws 1881, p. 59. The provision that they shall take the lowest responsible bid is mandatory, and they had no power or authority to accept any other; but in ascertaining whether or not a bidder was responsible they were required to deliberate and decide, and in doing so they exercised judicial, not ministerial, functions. And, in deciding upon the responsibility of bidders, it was their duty to consider, not only their pecuniary ability to perform the contract, but it was their right and duty to inquire and ascertain which ones, in point of skill, ability, and integrity, would be most likely to do faithful, conscientious work, and fulfill the contract promptly, according to its letter and spirit. In *Com. v. Mitchell*, 82 Pa. 349, a case similar to this, and under a statute requiring a contract for stationery, etc., to be given to the 'lowest responsible bidder,' the court thus forcibly expresses itself: 'It is scarcely open to doubt but that the word under consideration ["responsible"], as used in the statute, means something more than pecuniary ability. In a contract such as the one in controversy the work must be promptly, faithfully, and well done. It must, or ought to be, conscientious work. To do such work requires prompt, skillful, and faithful men. A dishonest contractor may impose work upon the city, in spite of the utmost caution of the superintending engineer, apparently good, and even capable of bearing its duty for a time, which in the end may prove to be a total failure, and worse than useless. Granted, that from such a contractor pecuniary damages may be recovered by an action at law. That is, at best, but a last resort, that often produces more vexation than profit,—a mere patch upon a bad job; an exceedingly meager compensation, at best, for the delay and incalculable damage resulting to a great city from the want of a competent supply of water. The city requires honest work, not lawsuits. Were we to accept the interpretation insisted upon by the relators, the difference of a single dollar in a bid for the most important contract might determine the question in favor of some unskillful rogue, as against an upright and skillful mechanic. Again, we know that, as a rule, cheap work and cheap workmen are but convertible terms for poor work and poor workmen, and if the city, for the mere sake of cheapness, must put up with these, it is indeed in a most unfortunate position.'"

We take the following from the syllabus of *People v. Dorsheimer*, 55 How. Pr. 118: "It is provided by chapter 634 of Laws of

1875 (pages 809, 810) that all contracts for work to be done upon the new capitol shall be awarded to the lowest bona fide responsible bidder or bidders. Held, that the statute requires the successful bidder to be a responsible one,—that is, 'able to respond or to answer in accordance with what is expected or demanded,'—in addition to the giving of the bond for the faithful performance of the contract. He is not to be deemed a responsible bidder because he offers adequate security for the performance of the contract. Where the contracting board has passed upon the pecuniary responsibility of a bidder, and rejected his bid because their conclusion was unfavorable to him in that particular, the court will not interfere, so long as there has been no abuse of discretion." See also, remarks of the supreme court of Massachusetts in the case of *Mayo v. Hampden County Comrs.*, 141 Mass. 74: "We need not consider whether a private person can maintain a petition for a writ of mandamus to compel public officers to perform their duties, or to direct the manner in which they shall perform them. It is enough for the decision of this case that there has been on the part of the respondents no neglect to perform their duty, and no error in the manner in which they have performed it. County commissioners are not required by law to accept the lowest proposal for public works. The statute provides that all contracts for public works made by them shall, if exceeding \$300 in amount, be made in writing, after notice for proposals therefor has been published at least three times in some newspaper published in the county, city, or town interested in the work. Pub. Stat. chap. 22, § 22. It does not provide that they shall accept the lowest proposal. It is clearly the intention of the legislature that the county commissioners, after inviting competition by public notice, shall have the authority to make such contract as in their judgment the interests of the county require. In the case at bar the commissioners fully complied with the statute. If, upon examining the various proposals, they were satisfied that Mayo, the lowest bidder, was an irresponsible person, unfit and incompetent to perform the work proposed, it was their right and duty to reject his proposal, and to make a contract with some other person, such as, in their judgment, was the most advantageous to the county."

Mr. High, in his work on Extraordinary Legal Remedies, after reviewing the Ohio decisions, says: "The better doctrine, however, as to all cases of this nature, and one which has the support of an almost uniform current of authority, is that the duties of officers intrusted with the letting of contracts for works of public improvement to the lowest bidder are not duties of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond control of the courts by mandamus. And the true theory of all statutes requiring the letting of such contracts to the lowest bidder is that they are designed for the benefit and protection of the public, rather than for that of the bidders, and that

they confer no absolute right upon a bidder to enforce the letting of the contract by mandamus after it has already been awarded to another. In all such cases the spirit, rather than the strict letter, of the law requiring the work to be let to the lowest bidder, should be kept in view. And where the right of the officers to enter into the contract is itself somewhat doubtful mandamus will not lie. Nor does the mere issuing of proposals, by officers intrusted with letting contracts, inviting bids for the performance of the work, without binding themselves to award the contract to the lowest bidder, create such an obligation on the part of the officers as to entitle the lowest bidder to the aid of a mandamus to obtain the contract." See also, *State v. McGrath*, 91 Mo. 886; *Findley v. Pittsburgh*, 82 Pa. 351; *Madison v. Baltimore Harbor Board*, 76 Md. 395; *State v. Scott*, 17 Neb. 686; *People v. Contracting Board*, 88 N. Y. 382; High, Extr. Legal Rem. § 48; and also the exhaustive note upon the whole subject found in *Anderson v. St. Louis Public Schools*, 26 L. R. A. 707, [122 Mo. 61].

We quote these authorities simply as to the law as it is applicable to the case at bar. There are some propositions discussed and decided in them which are not now before us, and upon which we do not express an opinion. We are wholly satisfied, from the authorities, that the state furnishing board in this case had discretionary power. It is the intention of the law that the board shall determine who is the lowest responsible bidder.

Before leaving the law of the case, we observe that it is held by many authorities that bidders other than those to whom the contract is awarded, such as relators here, have no standing in court to compel by mandamus the letting of the contract to them. See part of the cases above cited, and *Anderson v. St. Louis Public Schools*, *supra*, and cases. It has also been urgently argued that the affidavit and writ in this case are insufficient, but these, and some other points raised in this case, we prefer to pass, and reserve an opinion thereupon, and to decide the case upon the merits of the facts as returned by the referee. It is a grave and serious matter if a state board, instead of fairly and honestly awarding a contract, act "wrongfully, arbitrarily, and in disregard of their duty," as charged in relators' affidavit, or act through favoritism and for the purpose of usurping state patronage for personal ends, as argued by relators' counsel. If such a wrongful course is taken by a state board, it appears that there is some method of reviewing it by a court. How such action by a board shall be reached by the court is not necessary to determine. The gravity of the charges against the board in this case has led us to pass all preliminary questions in the case, and to enter upon the merits of the facts.

Having determined the question of law, which we noted above as the first matter for consideration, we will now examine the facts and endeavor to ascertain whether the board acted "wrongfully, arbitrarily, and in disregard of duty," or whether they fairly and

honestly exercised the discretion vested in them. In a case which was relied upon by the relators it is said: "The learned counsel of appellant has directed most of his argument to this question. The argument against the writ is, in substance, that the statute requires the auditor to examine the proceedings, and satisfy himself that they are legal, before signing; and that if he has examined them, and become satisfied that they are not legal, the most that can be said is that he has committed an error in a matter confided to his discretion, and that the function of the writ is not to review such exercise of discretion. It must be acknowledged that this argument is exceedingly plausible. There are innumerable cases in which it is laid down that mandamus cannot issue to control discretion. The rule, which is undoubtedly correct when properly understood, has been expressed in various forms. It has been repeatedly said that the writ cannot perform the functions of a writ of error; that it cannot issue to revise judicial action, but can only compel the performance of ministerial functions; and that it will issue to compel a tribunal to act in some way, but not in any particular way. These formulas undoubtedly express a truth, but they express it in inaccurate and misleading manner; and, by reasoning from them as if literally and in all cases true, courts have sometimes been led into error, and have frequently been forced to call acts 'ministerial' which are plainly not so. An examination of the authorities will demonstrate the inaccuracy of the above phrases. Thus it is not accurate to say that the writ will not issue to control discretion; for it is well settled that it may issue to correct an abuse of discretion, if the case is otherwise proper. *Ex parte Bradley*, 74 U. S. 7 Wall. 377, 19 L. ed. 219; *State v. Lafayette County Ct.* 41 Mo. 226; *Glencoe v. People*, 78 Ill. 389; *People v. New York Super. Ct.* 10 Wend. 285; *Stockton & V. R. Co. v. Stockton*, 51 Cal. 339; *Tapping, Mandamus*, 14." Quoted from *Wood v. Strother*, 76 Cal. 545. Therefore, let us inquire whether there is a showing in this case of an abuse of discretion by the state furnishing board.

After the advertisement for bids, the board met to examine the same; present, a full board. The meeting was commenced April 4, and continued to April 5. All the bids were opened by the board in the presence of the bidders. The bidders then discussed and explained their bids, and their capacity to perform the work. In the order of reference the referee was directed to ascertain what inquiry the board made upon the various points set out in the order of reference. The examination of the witnesses by the relators sought to develop as a fact that the board did not themselves ask questions of the different bidders, and therefore did not make inquiry. But the testimony is that the bidders talked and explained exhaustively. It is a matter of no consequence whether the board obtained their information and facts by asking questions themselves, or whether the information came from the persons who possessed the same voluntarily. In fact, one witness says that

at one time the bidders all talked at once, and that the board had nothing to do but to listen. Mr. Ross, one of the relators, testified that he and his partner, Mr. Eaves, and Mr. Bond and Mr. Monteith, two other bidders, and others, were accorded a full hearing before the board, touching the merits of the several bids submitted, as well as the conditions under which the law required the codes to be printed. The governor, president of the board, testified that Mr. Eaves, one of the relators, admitted that he had not as good a plant as some of the bidders, but always fell back on the argument that he could give a bond, which in itself should be a sufficient guaranty of their ability. The governor says that he had information that the relators were not a well-equipped firm, or capable of doing the work. He says he learned that it was a mechanical impossibility for one publishing house to get out the codes by the 1st of July. He says that Mr. Monteith stated to the board that with the full equipment of the Intermountain Publishing Company it would be a mechanical impossibility for their house to get the codes out without assistance from some other printing house, and that they had entered into an arrangement with a capable printing establishment, and that with their help it would take all the time given by law to do the work. The governor says that he was satisfied by general information that the business and financial ability of the relators was not such as would guarantee the completion of the work. The governor says that he had no commercial reports as to the relators, but he said, "You know, we get our impression of these things as we get our impression of business men and firms generally." He says that the question of the financial responsibility of the relators was frequently (expressed) in his office while the matter was pending. He says his information was that the relators were one of the smallest printing firms in the state, and that he looked at that as he looked at any business proposition. He states that Mr. Eaves said that his firm could bind books, but they had no thorough bindery. The attorney-general says that Mr. Monteith, of the Intermountain Publishing Company, and Mr. Eaves, of the relators, and Mr. Bond, of the Standard Publishing Company, made explanation of their bids, that the board listened, and that questions were propounded, and that the board had a full hearing. The board then adjourned until the next day, for the purpose of inquiring into the ability of the parties to perform the work. They then had before them *Judge* Wade, and questioned him as to making the annotations. The board heard all the bidders discuss their ability to perform the work, and the conversation was only about the merits of the different bidders. The board paid great attention to the question of the time in which the work could be gotten out, it being required by law that it should be completed by July 1. The attorney-general says the board considered two propositions: First, which of the bidders had the ability to perform the contract; and, second, as to the annotations to be used,—and that the bidders furnished the informa-

tion and the evidence. Mr. Eaves himself says that Mr. Monteith fully explained his bid, and stated that the attorneys of the state desired the Deering annotations, which annotations the Intermountain Publishing Company proposed to give, while the relators proposed to give annotations by *Judge* Wade and others. Mr. Monteith, manager of the Intermountain Publishing Company, as a witness, testified before the referee that he had explained his bid, and how it was specific and unequivocal, while the others were ambiguous. He stated that he represented one of the largest printing establishments in the state, and that it would crowd them to complete the work if they entered upon it at once. Mr. Monteith says that the governor, as chairman of the board, stated that the board desired all the information they could get, and that they were arriving at this information through the course of the conversation which they were having at that time. Mr. Monteith said that at the two meetings of the board the chairman stated that they were there for the purpose of hearing the bidders in relation to their bids. Mr. Monteith stated to the board that he had inquired as to the ability of Ross, Frank, and Eaves to perform the labor; that he was informed by printers of Helena that they were incompetent to perform the contract if awarded to them; that they had no stereotype plant; that they had no bindery, and that the capacity of their press was such that it was inadequate for performing the services; that their financial standing was such that supplies were sent to them with the bill of lading attached to the draft, c. o. d. In the presence of the board, Mr. Bond asked Mr. Eaves if they had a stereotype plant. Mr. Eaves admitted that they had none. Mr. Bond asked him if they had a bindery. Mr. Eaves admitted that they had none. Mr. Eaves admitted that they had not yet made arrangements for a stereotype plant, but they had made arrangements for binding. Mr. Bond testified that Mr. Eaves was heard by the board, and set forth the merits of his bid and his capacity.

We do not purpose to recite this testimony any further. It covers 263 type-written pages, as reported by the referee. The most searching examination was made by able counsel into the acts of the board. While we do not pass upon the competency or incompetency of all the testimony introduced before the referee, we are perfectly satisfied that it appears that the state furnishing board made a diligent and careful inquiry into the skill, competency, and ability of both the Intermountain Publishing Company and the relators herein. It appears that they considered all the facts and information which they could reasonably be expected to obtain, and that they acted wisely and discretely, and not arbitrarily and wrongfully, upon the information before them. To say that the board acted wrongfully and arbitrarily and in disregard of duty is wholly unsustained by the evidence. It is to be observed that there was a difference of only \$265 upon a contract of some \$8,000. With this slight difference in figures, and this

thorough showing of fair dealing by the board, it would be a remarkable precedent for a court to hold that the action of the board should be disturbed by mandamus. It is to be observed, further, that the board did not act hastily. After a sitting of an hour and a half at the first session, the board adjourned without taking action, for the purpose of making further inquiries, and upon reassembling they gave everybody an ample opportunity to be heard.

There is one other matter left for consideration. The relators alleged that the Inter-mountain Publishing Company is disqualified to receive the award of this contract, because Mr. Monteith was a member of the legislative assembly at all times mentioned in the affidavit, and, as relators are informed and believe, is a member of said publishing company, as a stockholder and officer therein, and business manager thereof, actively engaged in the management and promotion of the interests of said company, and as such is interested in the contract. On the argument made upon the return of the referee's report, relators do not point out to us one syllable of testimony offered by them showing or tending to show that Mr. Monteith held a single share of stock in the Inter-mountain Publishing Company, or that he had one dollar's worth of interest in that concern. Nor have we found such testimony in the report. Upon the contrary, Mr. Monteith testified that he had no interest in the contract, or the proceeds or profits thereof, and that he had not even a contingent interest in the profits of the publishing company; that he is paid a fixed salary, and always has been; that the obtaining of the contract would not affect his salary in any way whatever; that he has no interest in the Inter-

mountain Publishing Company, and did not, at any of the times mentioned, own any of its stock. The only showing of Mr. Monteith's connection with the publishing company is that which was admitted by the pleadings, to wit, that he was and is business manager. But it clearly appears that the obtaining or the losing of this contract would not affect his position as manager, or his salary, in any way whatever.

We have given this case a more lengthy consideration than we at first intended, or perhaps the case deserves. But we have done this by reason of the public character of the acts of the state furnishing board, and by reason of the fact that fairness and honesty must be demanded in the acts of such board; and we believe it a wholesome precedent to inquire closely into the conduct of the board. We have heard the case twice argued, once upon the law and once upon the facts, and we have appointed an able and competent referee to make diligent investigation into the facts. The matter of printing and annotating the codes is a great public enterprise, which should be proceeded with at once, but should not be proceeded with at all, as it has been intimated, if there was fraud, collusion, and arbitrary action by the board. When the time comes that a showing is made of such conduct by the officers of any state institution, and the matter is brought to the attention of this court in a procedure by which it can be reviewed, it will receive a prompt judgment of condemnation.

The writ of mandamus is dismissed.

Pemberton, Ch. J., and Hunt, J., concur.

CONNECTICUT SUPREME COURT OF ERRORS.

John BYRNE, *Appt.*,
v.

SCHUYLER ELECTRIC MANUFACTURING CO. *et al.*

(.....Conn.....)

1. A transfer by a corporation of its entire assets and property of every description to another company in consideration of shares of stock in the latter made, not with the intention of winding up its affairs and dividing the stock among its own stockholders, nor as a temporary arrangement, but as a permanent investment, is *ultra vires* and may be set aside in an action by a non-assenting stockholder.

2. The profitableness or unprofitable-

NOTE.—The authorities as to the effect on a corporation of the total abandonment of its business are well presented in the report of the above case which excellently represents the law of the subject. As to forfeiture of franchise by migration from the state of incorporation, see *note* to North & South Rolling Stock Co. v. People (11.) 24 L. R. A. 462, also *Simmons v. Norfolk & B. S. B. Co.* (N. C.) 23 L. R. A. 677.
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ness of a transaction by a corporation which is *ultra vires* does not affect the right of a stockholder to contest it.

(January 8, 1896.)

A PPEAL by plaintiff from a judgment of the Superior Court for Hartford County in favor of defendants in an action brought to rescind a contract by which one of the defendant corporations sold to the other its property for stock in the latter company. *Reversed.*

The facts are stated in the opinion.

Messrs. Frank Sullivan Smith and Watrous & Buckland, for appellants:

In the absence of authority, express or implied, such a subscription is absolutely prohibited by law.

Unless such authority be expressly given it will not be implied by law as one of the incidental powers necessary to the proper exercise of the corporate functions.

Cent. R. Co. of New Jersey v. Pennsylvania R. Co. 31 N. J. Eq. 475; 23 Am. & Eng. Encyclop. Law, p. 798; *Denny Hotel Co. v. Schram*, 6 Wash. 184; *Buckeye Marble & Freestone Co. v. Harvey*, 18 L. R. A. 252, 92 Tenn.

115; *Mechanics & Workmen's Mut. Sav. Bank & Bldg. Assn. of New Haven v. Meriden Agency Co.* 24 Conn. 159.

In case of the total abandonment of the business of a corporation, and the disposing of all of its assets, there is only one way sanctioned by law whereby that can be effected with justice to all parties, and that is by a bona fide sale for cash or its equivalent.

Mason v. Pewabic Min. Co. 183 U. S. 50, 83 L. ed. 524; *Sigourney v. Munn*, 7 Conn. 11; *Dickinson v. Dickinson*, 29 Conn. 600; *People v. Ballard*, 17 L. R. A. 737, 184 N. Y. 269; *Easun v. Buckeye Brewing Co.* 51 Fed. Rep. 156; *Buckeye Marble & Freestone Co. v. Harvey, supra*; *Graham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52; *Morawetz, Priv. Corp.* §§ 181, 208; *Island City Sav. Bank v. Sachleben*, 87 Tex. 425; *Cook, Stock & Stockholders*, §§ 80, 629, 667, 668, and cases cited; *Kean v. Johnson*, 9 N. J. Eq. 401; *Hayden v. Official Hotel Red Book & Directory Co.* 42 Fed. Rep. 875; *Ervin v. Oregon R. & Nav. Co.* 27 Fed. Rep. 635.

Of the all-important meeting of October 17, the plaintiff had no notice except by telegram received on that day, too late to attend the meeting.

Under such circumstances the doings of directors, in matters vital to the corporate welfare, are void.

Bank of Little Rock v. McCarthy, 55 Ark. 473; *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99, note.

A single stockholder has the right to enjoin *ultra vires* acts, or to set them aside if consummated.

Cook, Stock & Stockholders, § 666.

Messrs. C. E. Perkins and E. Henry Hyde, for appellees:

The question is, Can a corporation which is insolvent and unable to carry on its business, with no resource but to go into insolvency and be wound up to the total destruction of all value of its stock, transfer its property to another corporation and receive payment therefor in its stock without the consent of every one of its stockholders?

This question first arose, in 1850, in *Hodges v. New England Screw Co.*, 1 R. I. 347, 58 Am. Dec. 624. There a corporation sold a rolling mill to another corporation and took stock in the latter in payment. The court, while intimating that the transaction was valid, decided the case on the ground that in the absence of fraud or other special ground a court of equity would not interfere.

In 1856, the precise question arose in *Treadwell v. Sulisbury Mfg. Co.*, 7 Gray, 393, 66 Am. Dec. 490. There the court says: "Nor can we see anything in the proposed sale to a new corporation and the receipt of their stock in payment which makes the transaction illegal."

This case was approved in *Evans v. Boston Heating Co.* 157 Mass. 37. See also *Easun v. Buckeye Brewing Co.* 51 Fed. Rep. 156; *Buford v. Kookuk N. L. Packet Co.* 8 Mo. App. 169; *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543; *Lusman v. Lebanon Valley R. Co.* 80 Pa. 43, 72 Am. Dec. 685; *Cook, Stock & Stockholders*, §§ 636, 668; 1 *Morawetz, Priv. Corp.* §§ 415, 417.

There are cases where it has been held that 26 L. R. A.

where a solvent corporation is carrying on business, a majority of the stockholders cannot sell it out to another corporation for stock in the latter, contrary to the wishes of the minority, thereby forcing them to become stockholders in a new corporation, without any reason or necessity therefor.

Mason v. Pewabic Min. Co. 183 U. S. 50, 83 L. ed. 524; *People v. Ballard*, 17 L. R. A. 737, 184 N. Y. 269, 136 N. Y. 639.

Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, holds that it is not necessarily illegal for a corporation to sell its property and take stock in another company in payment for it.

The question in all such cases is whether the taking the stock is incidental to and necessary for the better carrying on of its business.

1 *Morawetz, Priv. Corp.* § 481; *Booth v. Robinson*, 55 Md. 419; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co. supra*.

In *Eggleston v. Doolittle*, 83 Conn. 896, a Baptist society was unable to support longer the preaching of the gospel, and it voted to sell the land on which its church stood, which was all the property it had, and have its church moved to New Hartford, to be used by the Baptist society there. Some of the society objected, but the court approved the transaction, and said: "We are of the opinion that the society acted wisely, as well as legally, in disposing of their property in the manner specified."

Whatever may be the abstract rule of law in this case, this court, as a court of equity, will not now interfere and set aside all these conveyances, and break up a well-established business of six years' standing, merely for the pleasure of Mr. Byrne, without any benefit to him, but with very great and irreparable injury to others.

Hodges v. New England Screw Co. 1 R. I. 347, 58 Am. Dec. 624.

The doctrine of *ultra vires* will not be enforced, even in actions at law, where it would be unjust.

Rider Life Bfst Co. v. Roach, 97 N. Y. 878; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Atlantic State Bank of Brooklyn v. Savery*, 82 N. Y. 291; *Palmer v. Mead*, 7 Conn. 149; 1 Story, Eq. Jur. § 693.

Andrews, Ok. J., delivered the opinion of the court:

The Schuyler Electric Manufacturing Company is a corporation chartered by the legislature of this state, and is located at Hartford. The Schuyler Electric Company is a corporation formed under and pursuant to the joint-stock acts of the state, and is located at Middletown. For convenience, we may call the first-named company the "Hartford Corporation," and the other the "Middletown Corporation." The Hartford corporation was chartered "for the purpose of manufacturing, buying, selling, and dealing in all kinds of machinery, appliances, and apparatus adapted to the purposes of producing and distributing light, heat, or power by the use of electricity, and with power to manufacture and sell plants for furnishing electric light, heat, or power, and generally to manufacture such articles incidental to its business as it may deem for its interest." Its capital stock

was of two kinds,—preferred stock, to the amount of \$350,000, and common stock, amounting to \$150,000. The common stock might be increased to an amount not exceeding \$500,000, but only for the purpose of paying off and retiring a corresponding amount of the preferred stock. But no payment was to be made which should reduce the assets of the company below the sum of \$150,000. The articles of agreement of the Middletown corporation are not given, but it is stated that that corporation was formed to continue the same business which the Hartford corporation was chartered to carry on. By an agreement between these two corporations, made on the 17th day of October, 1887, the Hartford corporation undertook to convey, and did, in point of form, convey, assign, and transfer to the Middletown corporation "its entire assets, including its letters-patent, stock, bonds, choses in action, and property of every description," and received in pay therefor 2000 shares of the capital stock of the latter corporation, of the nominal value of \$100 each. These shares of stock were subscribed for and issued to certain persons who had been named as trustees for that purpose by the Hartford corporation, and who subscribed as such trustees, and were so named in the issue of the same. The Middletown company accepted said transfer of property as full payment for the said shares of its stock. The property so transferred consisted of the various letters-patent covering the system of electric manufacture and lighting according to which the Hartford corporation manufactured its electrical apparatus, and the machinery, tools, and appliances with which it performed its work. It was the property without which it was and is impossible for that corporation to carry on its manufacture, and without which it is put entirely out of business and out of all active existence. And the Schuyler Electric Manufacturing Company, instead of being engaged in the manufacture for which it was created, has become simply a *cestui que trust* of 2000 shares of the capital stock of another corporation. The case shows that the officers and managers of this corporation have made the sale and taken the stock as above mentioned, not with the intention of winding up its affairs, and dividing the stock so received among their own stockholders, nor as a temporary arrangement resorted to merely to carry the corporation over a period of distress, but with the intention to hold it as a permanent investment. To sum it all up, the result is to practically dissolve the Schuyler Electric Manufacturing Company, and to transfer its business to the Schuyler Electric Company.

The plaintiff is the owner of 250 shares of the common and 10 shares of the preferred stock of the Hartford corporation. He has at all times objected to all votes and acts of that corporation pursuant to which it transferred its assets and all its property to the Middletown corporation, and became the owner of the stock of the latter company. He brought the present action to the superior court, after the corporation and the directors had refused to take any action to rescind the

said contract, averring in his complaint that the said agreement of the Hartford corporation was a fraud upon him, was *ultra vires* and void, and asked the court so to declare, and to afford him some remedy, either by an injunction or by the appointment of a receiver. Both said corporations were made defendants, and they both came into court and made answer. Their second defense sets forth the several votes of the Hartford corporation according to which the Middletown corporation was organized; alleges that the Hartford corporation was insolvent; that the Middletown corporation was organized for the purpose of continuing the business of the Hartford corporation; that all the assets and property were transferred and the stock received in payment, as is hereinbefore stated; and then says that, "if the plan for continuing the business of the said Schuyler Manufacturing Company by the organization of the Schuyler Electric Company had not been carried out, the said Schuyler Electric Manufacturing Company would have been compelled to wind up its affairs either under a receiver or in insolvency, and in either case the assets of said corporation in the judgment of the directors would have yielded not much, if anything, more than enough to pay creditors, and the preferred stock would have been of little value, and the common stock of no value whatever;" and so the defendants aver that they did not act fraudulently towards the plaintiff, but in good faith, and for the best interests of the said corporation and all its stockholders. The state referee to whom the case was committed found the facts generally in accordance with the defendants' claims. The superior court accepted his report, found the facts to be as stated therein, and rendered judgment for the defendants to recover their costs. From that judgment the plaintiff appealed to this court.

Among the reasons of appeal are "that the acts of the stockholders and directors of the Schuyler Electric Manufacturing Company in authorizing the subscription to the stock of said Schuyler Electric Company were constructively fraudulent, *ultra vires*, and void as against a non-assenting stockholder; that the transfer of the assets of the said Schuyler Electric Manufacturing Company in the manner set forth was likewise constructively fraudulent, *ultra vires*, and void." These reasons of appeal present the two sides of the one transaction which is the subject of the plaintiff's complaint. Their full significance can only be appreciated when they are considered in connection with the purpose for which the property of the Hartford corporation was sold, and the stock of the Middletown corporation taken in payment, as set forth in the second defense, and found true by the referee. That purpose was to keep the Hartford corporation in nominal existence, and at the same time carry on its business through the agency of the Middletown corporation, upon the hope that the Hartford stock would become valuable by the successful operation of the Middletown company, and so, in effect, make the stockholders in the Hartford corporation stockholders in the

Middletown one. A nominal corporation was to be maintained in Hartford; a real one, in Middletown. And although the entire property and assets of the Hartford corporation were thus invested in a new business, and its stockholders are to gain or lose as that business is successful or otherwise, that new business is carried on under a different charter, and under different rules, in forming which the stockholders of the Hartford company have no voice, and under the direction of officers unaccountable to them. The Hartford corporation is the beneficial owner of four fifths of the Middletown stock, but it can have no control over its business. It cannot have any direct control, for it is not the legal owner of that stock; and there is nothing in the agreement between these corporations to show that it can have any control over the action of the trustees. A unanimous vote of the Hartford stockholders could not displace one of the trustees, and appoint another in his stead. If one of them should die, a like unanimous vote could not name his successor. This is the scope of the reasons of appeal. The plaintiff insists that this is an arrangement into which he cannot lawfully be taken against his will, and he says the superior court erred because its judgment forced him into this scheme, when he had all along protested against it. Is, then, the plaintiff correct when he says there is error in the judgment of the superior court? That is, is the agreement which the Schuyler Electric Manufacturing Company undertook to make with the Schuyler Electric Company *ultra vires*?

An act is *ultra vires* of a corporation when it is not within the power of the corporation to perform it. The charter of any corporation is its enabling act. The corporation is empowered to do those things only for which it is created, and to do them in the manner specified in the charter. This is especially the rule in the case of private trading or manufacturing corporations. "The charter is the full measure of the powers which the corporation possesses. It cannot lawfully exercise any others. In ordinary cases every corporation is just what the incorporating act has made it, and is capable of exercising its faculties only in the manner the act authorizes." *Farrell v. Winchester Ave R. Co.* 61 Conn. 127; *Berlin v. New Britain School Section*, 9 Conn. 180; *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 587, 10 L. ed. 907, Taney, Ch. J. And, as charters of this kind are usually granted at the request of the incorporators, they are construed most strongly, against the corporation. Nothing is granted except what is given expressly or by fair implication. And no other powers can be implied except such as are necessary and proper to carry into effect the powers expressly granted. 2 Kent, Com. 298; *New York Firemen's Ins. Co. v. Ely*, 5 Conn. 560; *Mechanics & Workmen's Mut. Sav. Bank & Bldg. Assn. v. Meriden Agency Co.* 24 Conn. 159; *Sumner v. Marcy*, 3 Woodb. & M. 112, Fed. Cas. No. 13,609; *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43; Endlich Interpretation of Statutes, § 354; Sutherland, Stat. Constr. § 325.

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It is not claimed that there is in the charter of the Hartford corporation any express authority to make such an agreement as it did make with the Middletown corporation. And if, upon the true construction of the charter of that corporation, it does not appear to have been the intention of the legislature, expressed or implied, that that corporation should have power to enter into such an agreement as the one now under consideration, then that agreement must be treated as illegal and wholly void. *Riche v. Ashbury Railway Carriage Co.* L. R. 9 Exch. 262. And, as the rule of construction given in the cases we have cited is to be applied, then no such intention does appear. It is consistent, however, with these cases and the rule of construction they establish that a corporation may carry on its business in the way in which such a business is usually carried on. It would not be questioned in the case of a trading corporation that it should trade. A manufacturing corporation is, on the contrary, ordinarily expected to retain its assets in its own business, not to sell and invest in the stock of another. The legislature fixes the amount of the capital of a manufacturing corporation, because it is expected that the corporation will employ it all in its own business. The Hartford corporation or any other like corporation might sell its assets in part or in whole if it was done in the usual course of business. It might take the stock of another corporation in payment if it was done in the carrying on of its own business. But the agreement made with the Middletown corporation was not of this kind. That agreement was not the carrying on of its business, but the ending of its business. It put the Hartford corporation out of all business, and out of active existence, and undertook to embark and continue its entire capital in the business of the Middletown company. Nor do the cases cited deny that a corporation, under some circumstances, might expend its whole capital in the purchase of the stock of another corporation; as if such purchase was made for the purpose of selling the stock, and not permanently to hold it. This is what was said to be lawful in *Hodges v. New England Screw Co.*, 1 R. I. 347, 53 Am. Dec. 624. So, too, if such a purchase was made by a corporation in embarrassed circumstances, as the most advantageous way of closing its affairs, paying its debts, and settling with its stockholders, it would be legitimate. This was what was done, and decided to be proper, in *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 405, 66 Am. Dec. 490. This case was referred to in *Keans v. Boston Heating Co.*, 157 Mass. 87, by the court as approving it. It was held, however, that the sale in the latter case had received the implied sanction of the legislature. *Easton v. Buckeye Brewing Co.*, 51 Fed. Rep. 156, arose in Ohio. The defendant a corporation organized under the laws of that state, had contracted to sell all its plant and assets to the plaintiff, and to take in payment the stock and bonds of another corporation to be organized to carry on the business. The corporation was solvent, and doing a profitable business. The suit was brought to recover

damages of the defendants for not fulfilling that contract. It was held that the contract was *ultra vires* under the law of Ohio; that one incorporation could not become the owner of the stock of another, unless authority to do so was conferred by its charter; citing *Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati*, 86 Ohio St. 350, 38 Am. Rep. 594, and *Coppin v. Greenlees*, 38 Ohio St. 275, 43 Am. Rep. 426. In discussing the case the court said: "An insolvent corporation, contemplating voluntary dissolution, by consent of its stockholders, might have the right to dispose of its property, and accept in whole or in part, for the purchase price thereof, stock in another corporation, this stock either to be sold, and the proceeds thereof distributed to its creditors, or to be apportioned in kind to such creditors or stockholders as the terms of dissolution might provide." In the case of *Buford v. Keokuk N. L. Packet Co.*, 8 Mo. App. 159, it was held that in ordinary cases the directors and the majority of the stockholders could not sell out the property of a corporation; but that the officers of a corporation which was on the eve of dissolution by operation of law might, in the exercise of a sound discretion, transfer its assets to another corporation, and take in payment the stock of such other corporation, and convert it into money for the purpose of liquidation. *Miners' Ditch Co. v. Zellerbach*, 87 Cal. 543, 99 Am. Dec. 80, was like this: The plaintiff was organized to dig and maintain ditches for the purpose of supplying water to the miners in Nevada county. It owned several ditches suitable and used for that purpose. The Eureka Lake Company was another corporation organized for a like purpose, and was doing business which was in competition with the business of the Miners' Company. These two companies, by an agreement which was intended to be only temporary, united their stock and property. The defendant was a mortgagee, and, as such, in possession of certain of the ditches of the plaintiff company. The suit was to recover the possession of the ditches, the complaint alleging that the agreement by which the two companies became united was *ultra vires* and void. It was held not to be so; and, whether it was so or not, the plaintiff could not, against its own mortgages, set up that the contract was illegal. Other cases bearing on this subject are *People v. Ballard*, 184 N. Y. 269, 17 L. R. A. 737, 136 N. Y. 639; *Boston & P. R. Corp. v. New York & N. E. R. Co.* 18 R. I. 260; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.* 127 N. Y. 252; *Pearson v. Concord R. Corp.* 62 N. H. 537; *Central R. Co. of New Jersey v. Pennsylvania R. Co.* 81 N. J. Eq. 475; *Central R. Co. of Georgia v. Collins*, 40 Ga. 583; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252; 25 Am. & Eng. Encyclop. Law, p. 798; *Cook, Stock & Stockholders*, 3d ed. 64, 313; *Morawetz, Priv. Corp.* § 493.

It may be stated as a general rule, we think (subject, possibly, to some exceptions), that a corporation may not become a stockholder in another corporation for the purpose of holding the stock permanently, unless ex-

pressly authorized to do so. A solvent corporation may buy and sell the stock of another corporation if done in the usual course of business, and may become the owner of such stock if taken in payment for debts. But an insolvent corporation may take the stock of another corporation only for the purpose of closing up its business, to be divided in kind, or to be converted into money, and divided among its creditors and shareholders. The defendants, though not admitting the correctness of the rule as just stated, place the stress of their defense on other grounds. They say that the directors of the corporation and all the stockholders, except the plaintiff, consented to the agreement before it was entered into, and ratified the action taken pursuant to it after the action was had; and they say that the plaintiff is bound by such consent and ratification; that the plaintiff does not show that he is injured, or that he would be benefited if the agreement should be declared to be void; that, in fact, the action taken is advantageous to the plaintiff, and its defeat would be to the injury of all the other stockholders. And they also say that the plaintiff, by his own laches, is debarred of all right to have the agreement disturbed. These considerations are urged with great force and ability, and are entitled to careful examination. It is true that *ultra vires* is a doctrine which has not at all times received from the courts a perfectly consistent application. An act done or a contract entered into by a corporation may be alleged to be *ultra vires* of the corporation. The objection may come from the state, from a dissenting stockholder, or from the party with whom the contract is made; and the courts often give a different meaning to the term according to the source whence the objection comes. An act or a contract may be *ultra vires* if the state objects when it would not be so held if the objection came from a stockholder or from a contracting party. In this case we are dealing with this doctrine only as it may be invoked by a non-assenting stockholder. And this is to be determined by the obligation into which the stockholder has entered by becoming a member of the corporation.

A leading and perhaps the earliest case in which the reciprocal obligations of a corporation and its stockholders are discussed is *Livingston v. Lynch*, 4 Johns. Ch. 573, 1 L. ed. 941, decided in 1820 by Chancellor Kent. He held that the charter of a corporation was a contract between the corporation and its stockholders, and that neither the directors nor a majority of the members could bind a minority without their assent in any matter not expressly or impliedly authorized by the charter. The case of *Harford & N. H. R. Co. v. Cronwell*, 5 Hill, 385, is to the same effect. These cases have been followed by very many others down to the present time. *Morawetz, Priv. Corp.* § 1047; *Cook, Stock & Stockholders*, § 666; and the cases cited under each of these sections. *Natusch v. Irving*, 2 Coop. & Cott. 358, is an English case, which held exactly to the same results. This case was decided by Lord Eldon in 1824. Other English cases are *Simpson v.*

Westminster Palace Hotel Co. 8 H. L. Cas. 712; *Pickering v. Stephenson*, L. R. 14 Eq. 322; *Lyde v. Eastern Bengal R. Co.* 86 Beav. 16. It seems to be the settled law of America and England that any act or proposed act of a corporation, or of the directors, or of a majority of the stockholders, which is not within the express or implied power of the charter of incorporation,—in other words, any *ultra vires* act,—is a breach of the contract between the corporation and each of the stockholders, and that consequently any one or more of the stockholders may object thereto, and compel the corporation to observe the terms of the contract set forth in the charter. Therefore, it results that neither the directors nor a majority of the stockholders can sell the corporate property against the dissent of any stockholder. This is entirely clear in the case of a solvent corporation. *Abbot v. American Hard Rubber Co.* 83 Barb. 578; *March v. Eastern R. Co.* 43 N. H. 523; *Lauman v. Lebanon Valley R. Co.* 30 Pa. 43, 73 Am. Dec. 685; *Morawetz, Priv. Corp.* §§ 274, 521, 518. And although the corporation is actually insolvent, if the purpose of the sale is not the bona fide winding up of its business, but is the continuance of the business in another corporation, the rule is not changed. A dissenting stockholder may interfere and prevent the sale. *Kean v. Johnson*, 9 N. J. Eq. 401; *Boston & P. R. Corp. v. New York & N. E. R. Co.* 18 R. I. 260. The reasons are well stated by *Chief Justice Lowrie* in *Lauman v. Lebanon Valley R. Co. supra*. In that case the defendant company had undertaken to consolidate with another railroad company, to transfer all its property to, and take in payment the stock of, the other corporation. The plaintiff was a dissenting stockholder. *Judge Lowrie* said: "The majority of the members of a corporation cannot be authorized to deplete the interest of a dissenting stockholder by a transfer of the whole of its property to another company, without first giving security for the interest of such dissenting stockholder. . . . The contract of consolidation is an act of dissolution in form and substance, and the corporation cannot, in the act of dissolution, dispose of the rights of its stockholders. The act of dissolution, like the act of association, is not a corporate act, but an act of the members of the corporation. They may commit to their officers the business of effecting it in its details, but they are not required to do so by the terms of their association, and in effecting such a purpose the officers would be rather trustees of the members than corporate functionaries. Thus, it follows quite obviously that no corporate act can settle the terms of the dissolution or distribute the effects among the members, and that the company cannot decide what the plaintiff shall take for his interest." Also *Black v. Delaware & R. Canal Co.* 22 N. J. Eq. 415; *Mason v. Pewabic Min. Co.* 138 U. S. 50, 83 L. ed. 524; *Beman v. Rufford*, 1 Sim. N. S. 564.

The state referee finds that "the plaintiff failed to show that he was in any way injured by the transaction of which he complains; nor does it appear that he will be in 28 L. R. A.

any way benefited if the relief is granted him." It does not seem to this court that the question of the profitableness or the unprofitableness of the transaction affects at all the plaintiff's right. In the case of *Beman v. Rufford*, last cited, the vice-chancellor, *Baron Cranworth*, said: "The bill is filed by the shareholders of the Oxford, etc., Railroad Company, and the principle on which they are entitled to file it on behalf of themselves and all other shareholders is that this court will not allow any of them to say that they are not interested in preventing the law of their company from being violated. It will not allow any of them to speculate as to whether it would be more advantageous to do something which their charter does not authorize to be done; and therefore it is that a very small number, or, indeed, one of the shareholders, may file a bill on behalf of the whole body, although at a meeting a large majority of the other shareholders may have sanctioned that course of proceeding which the bill complains of. The shareholders so filing this bill say that the company, with the directors of it, have entered into a contract different from that which was contemplated by the charter, and so to apply the funds, which the plaintiffs say are their funds, in a mode in which they were never authorized to be applied; and therefore they seek to restrain them." That case was brought by the plaintiffs, three shareholders of the Oxford, etc., Railroad Company, against that company, its directors, etc., to prevent a certain agreement made with another railroad company from being carried into effect. And an injunction was granted. In the case of *Central R. Co. of Georgia v. Collins*, 40 Ga. 582, the court, in rendering judgment, said: "We do not think the profitableness of this contract to the stockholders of the Central Railroad Company, has anything to do with the matter. These stockholders have a right, at their pleasure, to stand on their contract. If the charters do not give to these companies the right to go into this new enterprise, any one stockholder has the right to object. He is not to be forced into an enterprise not included in the charter. That it will be to his interest is no excuse; that is for him to judge. By becoming a stockholder, he has contracted that a majority of the stockholders shall manage the affairs of the company within its proper sphere as a corporation, but no further; and any attempt to use the funds or pledge the credit of the company not within the legitimate scope of the charter is a violation of the contract which the stockholders have made with each other, and of the rights—contract rights—of any stockholder who chooses to say, 'I am not willing.' It may be that it will be to his advantage, but he may not think so, and he has a legal right to insist upon it that the company shall keep within the powers granted to it by its charter." *Stevens v. Rutland & B. R. Co.* 29 Vt. 545; *Hoole v. Great Western R. Co.* L. R. 3 Ch. 262.

The claim that the plaintiff is chargeable with laches, we think, is fully disposed of by the finding. The meeting of the directors

of the Hartford corporation at which the agreement was made to transfer all the assets to the Middletown corporation was held on the 17th day of October, 1887. By some oversight, notice of this meeting was not sent to the plaintiff. The omission was discovered, and a notice was sent by telegram to New York, directed to the plaintiff's place of business, which he received on the 17th, but too late to attend the meeting. He telegraphed in reply, protesting against the meeting, and denying the right of the directors to hold the meeting. The finding then proceeds: "Immediately upon learning that a sale of the assets of the Schuyler Electric Manufacturing Company had taken place, the plaintiff served upon said company and upon its directors a notice requesting that suit be instituted by said corporation for the purpose of setting aside said contract, agreement, and sale, and for other purposes set forth in said notice. Said directors refused to cause the institution of said proceedings; and on the 7th day of March,

1888, the plaintiff caused to be presented to the stockholders of said company, at their annual meeting, holden on said day (and at which meeting the stockholders ratified the said agreement), a written notice and demand that a suit be brought to set aside said contract. Said stockholders neglected and refused to take the action requested by said notice, and thereupon, as soon as possible, the plaintiff instituted the present suit. I find that the failure to give seasonable notice to the plaintiff was not intentional, but accidental." Laches is defined as "inexcusable delay in asserting a right." One who acts as soon as possible after learning of his right, or that his right has been invaded, cannot be charged with delay. We think *there is error in the judgment of the Superior Court, and it is set aside*. The case is remanded, to be proceeded with according to law.

The other Judges concur, except Prentice, J., who dissents.

MINNESOTA SUPREME COURT.

Joshua O. CATER, *Appt.*,

v.

NORTHWESTERN TELEPHONE
EXCHANGE CO., *Resp.*

(.....Minn.....)

"The defendant, under legislative authority (Gen. Stat. 1894, § 2641), constructed along the side of a country highway (the fee of which was in plaintiff) a telephone line, consisting of poles planted in the ground upon which wires were strung. It did not interfere with the safety and convenience of ordinary travel, or unreasonably or materially impair plaintiff's special easements in the highway as owner of the abutting land. Held, that it did not impose an additional servitude upon the highway.

(*Start, Ch. J., and Buck, J., dissent.*)

(April 30, 1895.)

APPPEAL by plaintiff from a judgment of the District Court for Sherburne County in favor of defendant in an action brought to compel defendant to remove its poles and wires from a highway in front of plaintiff's property. *Affirmed.*

The facts are stated in the opinions.

Messrs. Oscar Taylor and Bruckart & Brower, for appellant:

Appellant is the owner of the real estate

*Headnote by MITCHELL, J.

NOTE.—The unsettled state of the law on the question presented in the above case is well indicated by the division of the court upon it. The prior decisions on the subject are compiled in a note to *People v. Eaton* (Mich.) 24 L. R. A. 721, which shows the majority of the cases to be against the decision there made as well as that in the present case. The later case of *Bels v. American Teleph. & Tel. Co.* (N. Y.) 25 L. R. A. 640, is also on the other side and with the majority. 28 L. R. A.

whereupon respondent entered, and occupies and possesses, and has the right to the exclusive occupancy and possession of said real estate, subject only to the easement of the public for its use as a road or highway.

Nicholson v. New York & N. H. R. Co. 23 Conn. 85, 56 Am. Dec. 890; *Presbyterian Soc. Trustees in Waterloo v. Auburn & R. R. Co.* 8 Hill. 567; *Springfield v. Connecticut River R. Co.* 4 Cush. 68; *Imlay v. Union Branch R. Co.* 26 Conn. 249, 68 Am. Dec. 892; *Barclay v. Howell*, 81 U. S. 6 Pet. 498, 8 L. ed. 477; Minn. Stat. Const. art. 1, § 18.

The use to which respondent has appropriated the land is not consistent with, nor incidental to, the use of the land by the public for a highway—its possession is adverse and exclusive to, and of, the public, and the owner of the land.

Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186; *Williams v. New York Cent. R. Co.* 16 N. Y. 97, 69 Am. Dec. 651; *Mason v. New York Cent. R. Co.* 24 N. Y. 661.

The entry of respondent and its appropriation of appellant's land was an invasion of appellant's right, and a depriving him of the exercise and enjoyment of such right; this respondent could not lawfully do.

Bohman v. Green Bay & L. P. R. Co. 80 Wis. 105; *Wheeler v. Essex Public Road Board*, 89 N. J. L. 291; *Penraon v. Johnson*, 54 Miss. 259; *Chicago v. Barbican*, 80 Ill. 482; *Bensley v. Mountain Lake Water Co.* 18 Cal. 318; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 18 Wall. 166, 20 L. ed. 557; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Indianapolis, R. & W. R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624.

It was not competent for the legislature to undertake the appropriation of appellant's property to respondent, and the legislation in that regard is void.

Re New York & H. R. Co's Petition v. Kip, 46

N. Y. 546, 7 Am. Rep. 885; *Thacher v. Dartmouth Bridge Co.* 18 Pick. 501; *Brooklyn v. Patchen*, 8 Wend. 47; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Boston & L. R. Corp. v. Salem & L. R. Co.* 2 Gray, 1.

The municipality, by reason of its general control, is not authorized and has not the power to impose an additional or new use upon public highways.

State v. Trenton, 86 N. J. L. 79; *Union Twp. Committee v. Rader*, 89 N. J. L. 509; *Allen v. Jones*, 47 Ind. 438; *United States v. Harris*, 1 Sumn. 21; *Barclay v. Howell*, 31 U. S. 6 Pet. 498, 8 L. ed. 477; *Adams v. Emerson*, 6 Pick. 57; *Tucker v. Eldred*, 6 R. 1. 404; *Woodruff v. Neal*, 28 Conn. 185; *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58; *Williams v. Natural Bridge Pl. Road Co.* 21 Mo. 580; *Gidney v. Earl*, 12 Wend. 98; *Rogers v. Bradshaw*, 20 Johns. 735; *Cox v. Louisville, N. A. & C. R. Co.* 48 Ind. 178; *Overman v. May*, 35 Iowa, 89; *Small v. Pennell*, 31 Me. 287; *Old Town v. Dooley*, 81 Ill. 255.

The interest of the adjacent owner in the soil is such that he may maintain an action for anything placed thereon, not an incident of its public use as a highway.

Re Bloomfield & R. Nat. Gas Light Co's Petition v. Calkins, 63 N. Y. 886; *Kane v. Baltimore*, 15 Md. 240; *Barclay v. Howell and Gidney v. Earl*, *supra*; *Robbins v. Borman*, 1 Pick. 122; *Lewis v. Jones*, 1 Pa. 336, 44 Am. Dec. 138; *Chess v. Manown*, 3 Watts, 219.

The taking possession of land against the will of the owner, for any other use or purpose than that for which it has been lawfully appropriated, is unlawful, and the mandate in this regard cannot be disregarded.

Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453; *American Rapid Teleg. Co. v. Connecticut Teleg. Co.* 49 Conn. 852, 44 Am. Rep. 237; *Cheapeake & P. Teleg. Co. v. Baltimore & O. Teleg. Co.* 66 Md. 399, 59 Am. Rep. 172; *Brooms v. New York & N. J. Teleg. Co.* 43 N. J. Eq. 141; *State v. Newark*, 49 N. J. L. 344; *Willis v. Erie Teleg. & Teleg. Co.* 37 Minn. 347; *Stowers v. Postal Teleg. Cable Co.* 13 L. R. A. 864, 68 Miss. 559; *Pacific Postal Teleg. Cable Co. v. Irvine*, 49 Fed. Rep. 113; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Rich v. Minneapolis*, 37 Minn. 428; *Ellsworth v. Lord*, 40 Minn. 337; *Lamm v. Chicago, St. P. M. & O. R. Co.* 10 L. R. A. 268, 45 Minn. 71; *Schurmer v. St. Paul & P. R. Co.* 10 Minn. 82, 88 Am. Dec. 59; *Harrington v. St. Paul & S. C. R. Co.* 17 Minn. 215; *Carls v. Stillwater Street R. & Transfer Co.* 28 Minn. 373, 41 Am. Rep. 290; *Adams v. Hastings & D. R. Co.* 18 Minn. 260; *Gray v. First Div. St. Paul & P. R. Co.* 13 Minn. 315; *Molitor v. First Div. St. Paul & P. R. Co.* 14 Minn. 285.

The right to "take" private property only exists for the public, and no private interest, however weighty, can call it into exercise.

2 Kent, Com. 299; *Stuart v. Palmer*, 74 N. Y. 133; *Johnson v. Joliet & O. R. Co.* 23 Ill. 202; *Garin v. Dausman*, 114 Ind. 429; *State v. Fond du Lac*, 43 Wis. 237; *Whiteford v. Phinney*, 53 Mich. 130; *Smith v. Rochester*, 92 N. Y. 463; *Walker v. Old Colony & N. R. Co.* 103 Mass. 10, 4 Am. Rep. 509; *Pettigrew v. Evansville*, 25 Wis. 225, 3 Am. Rep. 50; *North-*

ern Transp. Co. of Ohio v. Chicago, 99 U. S. 635, 25 L. ed. 336.

The owner of the fee where a highway is laid over his land parts only with such right as the public easement requires, and all others are reserved to the owner of the fee and are recognized as property rights, among which is the right of free access to and from his adjacent land and the public highway.

Hovey v. Mayo, 43 Me. 323; *Transylvania University v. Lexington*, 3 B. Mon. 35, 38 Am. Dec. 173; *Mayhew v. Norton*, 17 Pick. 857, 28 Am. Dec. 302; *note: Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *McCaffrey v. Smith*, 41 Ill. 117.

The amount of actual injury inflicted by the willful invasion of a right of another is held not to be material, and where the relief sought is the restraining of a wrongful act, injurious to the right of the petitioner, equity affords the relief by the writ of injunction.

Hilliard, Inj. §§ 13-15; *Hill v. United States*, 149 U. S. 594, 37 L. ed. 862; *Osborne v. Missouri Pac. R. Co.* 147 U. S. 248, 37 L. ed. 155; *Kiddall v. Trimble*, 1 Md. Ch. 147; *West v. Walker*, 8 N. J. Eq. 279; *Hanson v. Gardiner*, 7 Ves. Jr. 308; 2 Story, Eq. § 928; *Courthope v. Mapplenden*, 10 Ves. Jr. 291; *Crockford v. Alexander*, 15 Ves. Jr. 188; *Livingston v. Livingston*, 6 Johns. Ch. 497, 2 L. ed. 196, 10 Am. Dec. 353.

A trespass depriving one of a right will be enjoined, because where continued it works irreparable injury.

Cheapeake & O. Canal Co. v. Young, 3 Md. 489; *Shipley v. Ritter*, 7 Md. 413, 61 Am. Dec. 371; *Gilbert v. Arnold*, 80 Md. 37; *Leonard v. Diamond*, 31 Md. 538; *West v. Walker*, *supra*; *Cooper, Eq.* 152, 154; *Mitford, Eq.* by Jeremy, 137; *Livingston v. Livingston*, *supra*; *Whitechurch v. Holworthy*, 19 Ves. Jr. 213; *Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co.* 82 N. Y. 476.

Respondent's admitted acts constituted a "taking" of appellant's property, thereby depriving him of the free enjoyment of his own — this is a wrong which courts of equity will restrain.

Adams v. Chicago, B. & N. R. Co. 1 L. R. A. 493, 39 Minn. 286; *Elliott, Roads & Streets*, 536 *et seq.*

Messrs. Hale, Morgan & Montgomery, for respondent:

The highways of the state are within the general control of the legislature. It has full power and jurisdiction over them and may consent to their use for the purposes of a telephone line as a means to promote trade and facilitate communications in the daily transaction of business between the citizens of one community with those of another, and to accommodate the public at large in these respects.

Newell v. Minneapolis, L. & M. R. Co. 35 Minn. 112, 59 Am. Rep. 303; *Julia Bldg. Assn. v. Bell Teleg. Co.* 88 Mo. 253, 57 Am. Rep. 893; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Chase v. Sutton Mfg. Co.* 4 Cush. 152; *Boston v. Richardson*, 13 Allen, 146; *McCormick v. District of Columbia*, 4 Mackey, 896, 54 Am. Rep. 284; *Irvine v. Great Southern Teleg. Co.* 37 La. Ann. 63; *Keasbey, Electric Wires*, pp. 82, 83.

Defendant's entry upon the highway, under legislative authority, is in any event lawful, and will not be enjoined unless grounds for the issuance of an injunction exist in this as in other cases; that is to say, defendant is rightfully in the highway so far as the public is concerned, and all claim that plaintiff can have against it is to compensation for whatever damages he may have sustained.

Plaintiff will not be entitled to an injunction simply because he owns the fee and because the defendant has erected its poles on the highway. If the case complained of works no injury to the plaintiff, or, again, if he has an adequate remedy at law, no injunction can be granted.

Goodrich v. Moore, 2 Minn. 61, 72 Am. Dec. 74; *Maddox, Inj.* —; *Roberts v. Anderson*, 2 Johns. Ch. 202, 1 L. ed. 348; *Bassett v. Salisbury Mfg. Co.* 47 N. H. 426; 10 Am. & Eng. Encyclop. Law, p. 783; *Hart v. Marshall*, 4 Minn. 294; *Cockey v. Carroll*, 4 Md. Ch. 344; *Morris Canal & Bkg. Co. v. Central R. Co. of New Jersey*, 16 N. J. Eq. 419; *Carlisle v. Stevenson*, 8 Md. Ch. 505; *Waldron v. Marsh*, 5 Cal. 119; *Spangler v. Cleveland*, 43 Ohio St. 526; *Harrington v. St. Paul & S. C. R. Co.* 17 Minn. 215.

The difference in the value of the farm with the highway upon it, without the poles standing in the highway, and its value as it is to-day, with the highway upon it, and the poles standing in the highway, is the full measure of plaintiff's damages; in other words, the damages are entirely certain, so far as the rule by which to estimate them is concerned, so that no cause of "irreparable damage" can occur in such case.

Dill. Mun. Corp. § 552; *Harrington v. St. Paul & S. O. R. Co.* *supra*; *Smith v. Point Pleasant & O. R. R. Co.* 23 W. Va. 451; *Spencer v. Point Pleasant & O. R. R. Co.* 23 W. Va. 407; *Stetson v. Chicago & E. R. Co.* 75 Ill. 74; *Peoria & R. I. R. Co. v. Schertz*, 84 Ill. 135.

Where a railway has been laid in a street by authority of the legislative power, an injured party who has a remedy by way of damages for any direct injury, is not entitled to an injunction.

Lyland v. Short-Route Railway Transfer Co. 10 Ky. L. Rep. 900; *Adler v. Metropolitan Elec. R. Co.* 138 N. Y. 173; *Indianapolis, B. & W. R. Co. v. Hartley*, 87 Ill. 439, 16 Am. Rep. 624; *Presbyterian Soc. Trustees in Waterloo v. Auburn & R. R. Co.* 8 Hill, 567; *Williams v. New York Cent. R. Co.* 16 N. Y. 97, 69 Am. Dec. 651; *Mahon v. New York Cent. R. Co.* 24 N. Y. 658; *Springfield v. Connecticut River R. Co.* 4 Cush. 63; *Haynes v. Thomas*, 7 Ind. 39; *Tate v. Ohio & M. R. Co.* 7 Ind. 480; *Nicholson v. New York & N. H. R. Co.* 23 Conn. 83, 56 Am. Dec. 890; *Burkam v. Ohio & M. R. Co.* 122 Ind. 844; *Indiana, B. & W. R. Co. v. Eberle*, 110 Ind. 542, 59 Am. Rep. 225; *Mills, Em. Dom.* § 204; *Kaiser v. St. Paul, S. & T. F. R. Co.* 22 Minn. 149; *Jerome v. Ross*, 7 Johns. Ch. 315, 2 L. ed. 305, 11 Am. Dec. 484.

Mitchell, J., delivered the opinion of the court:

The defendant is a domestic corporation authorized to erect and maintain telephone exchanges and lines. It has constructed a telephone line between the cities of Minneapolis and St. Cloud, a part of which is on

and along the side of a rural highway, the fee of which, subject to the public easement, is in the plaintiff, who is the owner of the abutting land. It was built without his consent and against his protest. It consists of poles planted in the soil at a distance of 170 feet from each other, upon which wires are stretched. The defendant claims the right to construct and maintain this line solely by virtue of Gen. Stat. 1894, § 2641.* This action was brought to compel the defendant to remove its poles and wires from the highway. It is not claimed that the line is not constructed in strict accordance with the requirements of the statute. Neither did the plaintiff either allege or prove that it has caused any substantial pecuniary damage or injury to himself or his property. He plants himself squarely upon the proposition that the erection and maintenance of telephone poles and wires is not within the public easement in a highway, but constitutes the imposition of an additional servitude upon his land; and that is the question presented by this appeal. The question is *res integra* in this state, and the decisions upon it, as well as upon the kindred one as to telegraph lines, in other states, are conflicting. Hence we feel at liberty to decide the question entirely upon principle.

From the manner in which the case has been discussed by counsel, we assume that defendant's telephone line is for the use of the public upon payment of certain charges. Therefore, the use to which the highway has been appropriated by the defendant is a public one. The transmission of intelligence by telegraph or telephone is a business of a public character, to be conducted under public control, in the same manner as the transportation of persons or property by common carriers. But, of course, the fact that this is a public use gives the legislature no right to authorize the taking of private property for it without paying compensation. The proposition is equally elementary that the acquisition by the public of one easement in land gives no right to another and different easement. The public cannot go beyond, but must be confined within, the general purpose for which the easement was granted or acquired from the owner of the soil. Hence whether an easement authorizes the use of land in a particular way depends upon the nature and extent of the easement. These propositions are so nearly axiomatic that they will not be disputed by any one. The question, then, is, What is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway

*"Any telegraph or telephone corporation organized under this title has power and right to use the public roads and highways in this state, on the line of their route, for the purpose of erecting posts or poles on or along the same to sustain the wires or fixtures; provided, that the same shall be so located as in no way to interfere with the safety or convenience of ordinary travel on or over the said roads or highways."

was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals,—constituting, respectively, the *iter*, the *actus*, and the *via* of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use. Another proposition, which we believe to be sound, is that the public easement in a highway is not limited to travel or transportation of persons or property in movable vehicles. This is, doubtless, the principal and most necessary use of highways, and in a less advanced state of society was the only known use, as the etymology of the word "way" indicates. And the courts, which, as a rule, are exceedingly conservative in following old definitions, have often seemed inclined to adhere to this original conception of the purpose of a highway, and to exclude every form of use that does not strictly come within it. But it is now universally conceded that urban highways may be used for constructing sewers and laying pipes for the transmission of gas, water, and the like for public use. Some courts put this on the ground that these uses are merely incidental to and in aid of travel on the streets. Other courts put it on the ground that such uses are contemplated when the easement in urban ways is acquired, but not in the case of rural highways. But it seems to us that neither of these reasons is either correct or satisfactory. The uses referred to of urban streets are not in aid of travel, but are themselves independent and primary uses, although all within the general purpose for which highways are designed. Neither can a distinction between urban and rural ways be sustained on the ground that such uses were contemplated when the public easement was acquired in the former but not when the easement was acquired in the latter. As a matter of fact, most of these uses were unknown when the public easement was acquired in many of the streets in the older cities. Indeed, many of what are now urban highways were merely country roads when the public acquired its easement in them, and doubtless many highways that are now merely country roads will in time become urban streets. When such changes occur, will the abutting owners be entitled to new compensation before the public can build sewers or lay water or gas pipes in these streets?

It seems to us that a limitation of the pub-

lic easement in highways to travel and the transportation of persons and property in movable vehicles is too narrow. In our judgment, public highways, whether urban or rural, are designed as avenues of communication; and, if the original conception of a highway was limited to travel and transportation of property in movable vehicles, it was because these were the only modes of communication then known; that as civilization advanced, and new and improved methods of communication and transportation were developed, these are all in aid of and within the general purpose for which highways are designed. Whether it be travel, the transportation of persons and property, or the transmission of intelligence, and whether accomplished by old methods or by new ones, they are all included within the public "highway easement," and impose no additional servitude on the land, provided they are not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, and provided they do not unreasonably impair the special easements of abutting owners in the street for purposes of access, light, and air. It is impracticable, as well as dangerous, to attempt to lay down, except in this general form, any rule or test of universal application as to what is or what is not a legitimate "street or highway use." Courts have often attempted to do so, but have always been compelled by the logic of events to shift their ground. The only safe way is to keep in mind the general purpose of highways, and adopt a gradual process of inclusion and exclusion as cases arise. This court has held, in common with the great majority of courts, that an ordinary commercial railroad imposes an additional servitude on a street, and we applied a test as to what did and did not constitute an additional servitude. As far as it went, and as applied to such a case, the test was doubtless correct; but, after all, the bottom fact upon which the decision really rests was that such an appropriation of a street was practically subversive of its use by the public in the ordinary way, and also unreasonably impaired the special easement of abutting owners. So, too, the New York elevated railway cases were discussed and reasoned at great length; but in their final analysis the real ground upon which those structures were held to impose an additional servitude was, not that they were immovable, or were above the surface of the ground, but because they unreasonably impaired the easements of abutting owners in the streets for purposes of access, light, and air. How far a particular method of using a street must interfere with other methods of its use by the public, or with the special easements of abutting owners, in order to constitute an additional servitude or amount to a nuisance, is not involved in the present case. An argument sometimes advanced why telegraph and telephone lines constitute an additional servitude is that the structures are immovable. It is said that "the primary law of the street is motion." It is true, motion is the law of the street, in the sense that the person or thing to be transmitted or transported must

move; but it is not true in the sense that the medium or agency by or through which it is conveyed or transmitted must move. Pipes laid for the transmission of water, gas, and steam are immovable. So are the tracks of street railways, also the poles and wires of the trolley system. And it can make no difference in principle whether the immovable structure is on, under, or above the surface of the ground, for the rights of the owner of the fee are the same in either case. Subject only to the public easement for highway purposes, he remains the owner of the land upward and downward indefinitely. If the transmission of intelligence by telegraph or telephone is not included in the public easement in a highway, it would be equally an invasion of his rights of property, even if the wires were placed underground. If an immovable structure in a highway constitutes an additional servitude, it is not merely because it is immovable, but because it unreasonably interferes with the general use of the street by the public, or because it unreasonably impairs the special easements of abutting owners."

It can hardly be necessary to say that the fact that telephone and telegraph lines are owned by private companies, and not by the state, is not material, provided they are authorized by the state, and are devoted to a public use. No such structures can be put in the highways except by authority of the state, and then only for a public use. The state can say how they shall be constructed and operated. When public interests demand, the state can require the wires to be put under ground, as they, doubtless, should be in cities of any considerable size. So far as there is any distinction between rural and urban highways, there would be much more reason for holding such structures an additional servitude in the latter than in the former. It is a matter of common knowledge that telegraph and telephone lines along the side of a country road rarely, if ever, appreciably interfere with either public travel or the easements of the abutting landowner; whereas in the cities, especially on business streets, where the buildings extend out to the line of the street, the numerous wires stretched upon the cross-arms frequently materially interfere with access, light, and air, as well as render protection of the buildings more difficult in case of fire.

There is a further consideration that is entitled to weight. We cannot pretend ignorance of the fact that in this state, from the earliest times, the right to appropriate highways for telegraph lines has been asserted, and almost universally acquiesced in by the owners of abutting estates. The legislature has for nearly thirty years assumed that this right existed, by enacting a statute authorizing it. In 1881, when the newer invention of telephones was coming into general use, the legislature amended the statute extending the same right to telephone companies. This has also been generally acquiesced in by the public. This constitutes a popular construction of "the law of the road," and a popular verdict as to what public convenience requires, which courts can hardly afford to

ignore. The telephone is still a comparatively new invention. Notwithstanding the high charges for its use which the proprietors of the patents have been enabled to exact, it has already become a common medium of communication, not only between residents of the same city, but also between neighboring towns and villages, and, with the development of the long-distance telephone, even between towns and cities hundreds of miles apart. With the expiration of the patents, the charges for its use are now being rapidly reduced. The present possibilities of the telephone as a means of communication are very great. It is not impossible that it may soon become a common and cheap mode of communication, not merely between towns, but also between residents of the country and of the towns, or even between the rural residents themselves. It may be, as advocated by many as to telegraphs, that the government will at some day assume the function of furnishing all such service to the public. Telephone lines must be placed in the highways. It is the only practicable place to put them. The only question is whether a new right to do so must be acquired from the owners of property abutting on the highways.

We are not unmindful that private property cannot be taken for a public use without compensation, however important that public use is. We are not forgetful of the fact that care should be taken that, in the popular zeal for modern public improvements, the burden of furnishing these improvements should not be shifted from the public, and imposed upon any particular class of individuals. But viewing, as we do, highways as being designed as public avenues of travel, traffic, and communication, the use of which is not necessarily limited to travel and the transportation of property in moving vehicles, but extends as well to communication by the transmission of intelligence, it seems to us that such a use of a highway is within the general purpose for which highways are designed, and, within the limitations which we have suggested, does not impose an additional servitude upon the land; in short, that it is merely a newly discovered method of using the old public easement.

We have thus far referred to the appropriation of highways for telegraphs and for telephones as if both stood on the same ground, and involved the same principle. But the only question before us is whether a telephone line imposes an additional servitude on a highway; and the decision of the court must be deemed to be confined to that question, leaving the question as to telegraph lines to be authoritatively decided when it is presented and argued, so that, if there be any distinction between the two, an opportunity may be given to point it out.

Order affirmed.

Start, Ch. J.:

I dissent. The *locus in quo* in this case is a country highway, the title in fee of which, subject to the public easement, is in the appellant. The respondent is a corporation of this state, and, as such, authorized to erect

and maintain telephone exchanges and lines. It has constructed and operates such a line between the cities of Minneapolis and St. Cloud, and in so doing, without the consent and against the protest of the appellant, it entered upon the highway in question, and erected and now maintains poles, planted in the soil thereof, and upon them stretched the wires used for its telephone line. The respondent claims the right to so erect and maintain the poles and wires in this highway without compensation to appellant, by virtue of legislative authority. Gen. Stat. 1894, § 2641. Whether or not his claim is valid depends upon what answer shall be given to the question, Is the erection and maintenance, under legislative authority, of poles and wires in a rural highway, for a telephone line, an additional servitude, for which the abutting landowner is entitled to compensation? An answer to this question involves a consideration of the purposes of which a highway in the country, in this state, is acquired. Is the right to establish and operate telephone lines therein, under legislative authority, included by implication in such purposes? If such use of the highway is outside of the scope of the public easement therein, then it is an additional servitude, for which the owner of the soil has never been compensated, and the legislature cannot authorize such use except upon condition that compensation be made to the owner. A highway primarily is simply a public easement or servitude, for travel and passage of persons, animals, and things, carrying with it, as an incident, the right of the public to use the soil for the purpose of the repair and improvement of the way, and, in cities and populous places, the further right to use the street for the more general purposes of sewerage, the distribution of water and light, and the furtherance of public health, safety, and convenience. The owner of the land over which the highway passes retains the fee thereof and all rights of property therein not incompatible with the public easement therein, as here defined. 2 Dill. Mun. Corp. § 688; Ang. & D. Highways, § 301.

While the fundamental idea of a highway is that it is for public travel, yet the purposes for which it was acquired are not limited to travel and passage in the then known vehicles and methods, for all new vehicles and methods of travel thereon, which are not inconsistent with the safe and practical use of the highway for travel in the ordinary methods, are included in the public easement. Accordingly, it has been held by nearly all recent authorities that the operation of a street railway for the transportation of persons only, whether the motive power is animal or mechanical, including electricity, with the necessary poles and wires to communicate the power to the car or vehicle to be moved, is not an additional servitude. *Taggart v. Newport Street R. Co.* 16 R. I. 668, 7 L. R. A. 205; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 880. The authorities, in reference to such street railways proceeded upon the basis that such new use of the street is similar to that for which the street was originally acquired; or, in other words,

it is merely a newly discovered method of exercising the old public easement, for travel and passage of persons and things along the public street. This principle has been extended, by a limited number of adjudged cases, to the erection and use of telephone and telegraph poles and wires in the streets, for the purpose of transmitting intelligence. The analogy, however, between a telephone line and the purposes for which a country highway is acquired is remote, if not fanciful; and it is safe to say that such use of the highway was not within the contemplation of the parties when the damages for the public easement were assessed or the right of passage dedicated. The use of the highway for a telephone line is essentially distinct from its use for travel. The right of the public in the ordinary highway is to pass along upon it, not to remain stationary; and it would be just as reasonable to claim that towers erected in the highway for the purpose of transmitting intelligence by signal-lights were not an additional servitude as to make such a claim for telephone poles. In each case there would be an exclusive use and possession of a portion of the highway, in no manner connected with the movement of vehicles or cars of any kind, which cannot be properly regarded as a new method of exercising the old public easement for travel and passage. The adjudged cases upon this subject are conflicting, but the later cases and the weight of authority sustain the doctrine that a telegraph or telephone line along the highway, where the fee thereof is in the abutting owner, is foreign to its use, and an additional servitude, for which such owner is entitled to compensation; and that the legislature cannot authorize the imposition of such servitude without also providing for such compensation. *Willis v. Erie Teleg. & Teleph. Co.* 37 Minn. 847; *Board of Trade Teleg. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Broome v. New York & N. J. Teleph. Co.* 42 N. J. Eq. 141; *Western U. Teleg. Co. v. Williams*, 86 Va. 698, 8 L. R. A. 429; *Stowers v. Postal Teleg. Cable Co.* 68 Miss. 559, 12 L. R. A. 869; *Cheapeake & P. Teleph. Co. v. Mackenzie*, 74 Md. 36; *Pacific Postal Teleg. Cable Co. v. Irvine*, 49 Fed. Rep. 113; *Lewis, Em. Dom.* § 131; *Eels v. American Teleph. & Teleg. Co.* 143 N. Y. 133, 25 L. R. A. 640; *Elliott, Roads & Streets*, 534; *Tiedeman, Mun. Corp.* § 297. The opposite doctrine is held in the following cases, by a divided court, except in the last case cited, and in that one the fee was in the public: *Pierce v. Drew*, 186 Mass. 75, 49 Am. Rep. 7; *Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398; *People v. Eaton*, 100 Mich. 208, 24 L. R. A. 721; *Irvine v. Great Southern Teleph. Co.* 87 Ia. Ann. 63.

In the first two cases the dissenting opinions are so vigorous as to largely neutralize the decisions as authorities outside of the jurisdiction of the court announcing them. The latest decision upon this question is that of the New York court of appeals in the case of *Eels v. American Teleph. & Teleg. Co.* which was in all substantial particulars similar to the one at bar. It ably discusses the question on principle, and reaches the unanimous con-

clusion that the occupation of a rural highway by a telegraph and telephone company for the erection of its poles is an additional servitude, for which the owner of the fee is entitled to compensation.

I am of the opinion, upon both principle and authority, that the planting of telephone posts upon a public highway in the country, the fee whereof is in the abutting owner, is an additional servitude, and appropriation of private property, and unlawful as to such owner, unless the right to do so is acquired by contract or condemnation. In reaching this conclusion, I am not unmindful of the fact that the use of the telephone is a beneficial and public use; but private property cannot be taken for public use without compensation first paid or secured, no matter how small its value. This is the constitutional right of the humblest individual, which must not be lost sight of in our enthusiasm over the public benefits conferred by the telegraph and telephone, or in our desire to promote the public welfare.

Buck, J.:

I also dissent from the opinion of the majority of the court, and, while it is perhaps unnecessary for me to say anything in addition to what is said by the Chief Justice, yet the importance of the question involved may justify me in stating my own views on the subject. There are several methods by which a highway may be established; for instance, by condemnation, dedication, and by prescription. In the case of condemnation, damages are usually assessed by way of compensation for the injury sustained. But, in case of dedication and prescription, damages are not assessed, although in law all of these methods are equally effective. Yet, when, as in cases of prescription (where) a man's property is secured for public use without compensation, there should not be added to such property a greater burden than was contemplated by the owner when he suffered his rights in the premises to become inferior to those of the public. It is a well-established rule of law that the owner of land burdened with a highway has all of the rights of the soil not inconsistent with its use for public purposes and for which it was originally established. The title to the soil remains in the owner, and any interference with it by any one to the injury of the owner, and not consistent with the purpose for which it was originally established, renders the person so interfering liable in damages. The constitutional provision, so familiar to all, that private property shall not be taken for public use without just compensation first paid or secured, ought to stand as a continual barrier against all wrongful encroachments upon private rights. The aggregate of the private rights injuriously affected by the majority opinion in this state is very great, possibly greater than those which will be benefited by the result of that opinion. The owners of urban, suburban, and rural property are very numerous, and must necessarily be thus seriously affected in many instances. Now, a public highway is established for an uninterrupted passage for animals and vehi-

cles, and to allow persons to pass and repass, to go and return, at their pleasure, and without interruption. It is an easement which the public have in the land, with the incidental right on the part of the public authorities to keep it in repair. The damages are accepted by the owner with the understanding that it is for this purpose that the highway is established. Or, if the highway is established by dedication or user, the same implication would arise. Now, is the erection of telephone poles in a street or highway, with its numerous wires connecting the poles upon crossbars, an entirely new use of the highway, and an additional burden to the owner, for which additional compensation should be provided, or is it a mere modification of the public servitude? If it is a change wholly foreign to the ordinary purposes of a highway, then the adjoining owner is entitled to compensation.

Dillon on Municipal Corporations (vol. 2, § 678a) says: "On the whole, the safer and sounder view is that such use of the street or highway, attended, as it may be, especially in cities, with serious damages and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles such owner to compensation for such use, and for any actual injury to his property caused by poles and lines of wires placed in front thereof." In the prevailing opinion in this case it is said that, "if there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing, and growing as civilization advances." If by this is meant that certain changed conditions may arise which, for the first time, demand the application of the common law to such changed conditions, the statement may be correct; but the law itself always existed, although it may never before have been applied or called into actual operation, and especially so as to establish a precedent. Public sentiment may change, and the onward spirit of the times demand that it shall have its way, but the well-established principles of the common law are unchangeable, and the private right which existed 50, 100 or 1000 years ago should now be as sacred and inviolate as then. The current of public sentiment, changing though it may, does not create new rights; and while it does, step by step, insidiously attempt to appropriate private property for new uses, it should not be granted success, under the guise of great public benefit, to the injury of the individual. And while we speak of private or individual rights in this case, where only one individual's rights are to be determined, yet, in a broader sense, a great body of the public may be seriously affected by it, and who are remediless under the rule laid down in the majority opinion.

Now, a new use, even if beneficial to the public, does not necessarily create a new right as against the owner of the land. The primary question is, Does it constitute an essential change, so as to create an additional burden? If so, then it is immaterial how beneficial the new and improved methods of public travel or the transmission of intel-

ligence by telegraph or telephone, or whether the business is to be conducted under public control. It is also quite immaterial that the erection of these telephone poles was authorized by a legislative enactment. It needs something more than a legislative consent to deprive a man of his property or prevent his absolute control of it. The state itself would have just as much right to erect telephone polls in the highway as to authorize any corporation or private person to do so, and in neither case should it be permitted without compensation. Such an appropriating of the streets is destructive of the ordinary use as public ways, and inconsistent with the purpose for which they were originally established. In the case of *Eels v. American Teleph. & Teleg. Co.*, 143 N. Y. 133, 25 L. R. A. 640, Justice Peckham, speaking of certain prior decisions of the New York circuit court of appeals, said: "They show that the primary or fundamental idea of a highway is that it is a place for uninterrupted passage by men, animals, and vehicles, and a place by which to afford light, air, and access to the property of the abutting owners, who in this respect enjoy a greater interest in the street than the general public, even though this land stops with the exterior lines of the street. It is not a place which can be permanently and exclusively appropriated to the use of any person or corporation, no matter what the business or object of the latter may be. It was because the highway was permanently and to some extent exclusively appropriated by the elevated railroads that it was held that their erection without the consent of abutting owners was illegal." This was said of the streets in New York City, where the title of the streets is in the city. It seems to me that this rule can be applied in this state with much greater force, where the fee in the street is in the abutting owner. The principle announced in the majority opinion would, of course, apply to our large and populous cities, as well as to rural property. It is a well-known fact that the streets in our cities are lined with these telegraph and telephone poles, covered with crossbars, and strung with numerous wires, making these erections in some respects dangerous, and interfering with the free and convenient use of the property. If one person or company can do this, another one may do the same. The mere fact that the owner may have access to his abutting property because there is a sufficient space left between those poles for him to pass is certainly a poor justification for creating an additional burden upon his property, without giving him any remedy for damages. In large cities these numerous erections may exclude light and air, besides being an inconvenience in the use of the street, and a nuisance in several other respects. And the erections are not to be temporary, but permanent, continuous, and excluding the use by the public of that portion of the highway occupied by them. Such an exclusive use of a portion of the highway,

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whether old or new, it seems to me, is not included within the public highway easement. If telegraph and telephone poles 2 feet in diameter, and 30 or 40 feet high, covered with crossbars and numerous wires strung from one pole to another, erected in the highway in front of a man's residence or business property, can be there permanently maintained, why cannot a guard-house be erected there also as a permanent structure, upon the ground that the poles and wires need protection against predators or injury? The erection of telegraph and telephone poles is not merely a new method of exercising old rights, but the addition of a new servitude and essentially a new burden upon the street. Viewed in this light, if the necessities or luxuries of modern life are needed, let those who seek their enjoyment and benefit pay for them, and not secure them at the expense of additional burdens imposed upon private property. It is this compulsory yielding up of private rights and private property to concentrated power and wealth in the hands of the few, under the demands of a so-called "progressive civilization," that needs judicial care and its conservative force to see that no new appropriation of lands not embraced in the original dedication or condemnation shall be permitted. If the erection of telephone and telegraph poles in our public streets and highways is simply a new and improved method of the use of the street, I fail to see why any legislative permission was necessary, because the telephone company would in such case have the same right to the use of the street as any traveler thereon.

But suppose the right to erect these electrical lines was included in the original establishment of the public streets and highways; yet it must be conceded that they do constitute damages in a greater or less degree, and in condemnation cases, must the municipalities pay the abutting owner for such damages? By what constitutional provision or statutory law are municipal corporations authorized to levy a tax to pay the damages for a private individual or a corporation to erect these polls and carry on the telephone or telegraph business? I assume that no such right exists, and shall we not in the coming time be met with this serious question of whether, upon the exercise of the power of eminent domain by condemnation proceedings, the possible or probable erection of such poles will not constitute an element of damage, to be assessed and paid by the people to the abutting owner before his property can be taken for public use? And in such case will not further complications arise in case of the vacation of the streets or highways where these erections have been made? The great weight of authorities is against the view of the majority of this court, and the late decisions of eminent courts are in accordance with the views which I have endeavored to express.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts

v.

Morris A. HAYDEN.

(.....Mass.....)

1. That a person exempt from jury duty serves as a grand juror does not render the action of the jury in finding an indictment void.
2. That one of the grand jurors is one of the witnesses upon whose testimony an

indictment is found will not render the indictment void.

3. A motion to dismiss an indictment cannot be based on facts not appearing on the record.
4. One with whom a person is alleged to have unlawfully intermarried while having a wife living is competent to testify to the fact of the marriage which is alleged to be unlawful.
5. A record of marriage attested by an assistant registrar is admissible in evi-

NOTE.—Competency of evidence before grand jury.

- I. Confessions, admissions, and refusal to testify.
 - a. Accused.
 - b. Accomplices and joint defendants.
- II. Evidence of criminals.
- III. Depositions and affidavits.
- IV. Documents.
- V. Minutes.
- VI. Swearing of witnesses.
- VII. Witnesses generally.
- VIII. Prosecutor.
- IX. Wife as witness.
- X. Hearing witnesses in open court.
- XI. Indictment on evidence partly incompetent.
- XII. Physicians.
- XIII. Evidence generally.
- XIV. Rumor.
- XV. Time.

Indictments are valid if based on voluntary confessions of the accused, but if the accused was compelled to testify, or the confession was extorted by hope or fear, the indictment is invalid, and as to indictments obtained through confessions of an accomplice there is some conflict of authority. It is not a valid objection that indictments were based on evidence of criminals. Under 11 and 12 Vict., chap. 42, § 17, depositions may be used before the grand jury if the witness is too ill to attend and due notice of taking is given. Documentary evidence before the grand jury must be clearly competent or it may vitiate the indictment. In Iowa a grand jury may indict on minutes of the committing magistrate.

The foreman of the grand jury is authorized by statutes generally to administer the oath to witness. The mode of giving the oath before the grand jury will not be inquired into by evidence of the grand jurors, but if it appears that the oath given to witness was insufficient this may validate.

If the grand jury could not administer the oath to witnesses not listed, the indictment is invalid—if properly objected to.

If the prosecuting witness is incompetent to testify or prosecute, the indictment will be invalid if objected to in time.

Where statutes allow husband or wife to testify against the other in sexual crimes, the indictment on such evidence will be sustained.

It is improper to have the witnesses examined in open court, although this was done in the Earl of Shaftesbury Case, *infra*.

If part only of the evidence is incompetent, the indictment will be sustained.

I. Confessions, admissions, and refusal to testify.

a. Accused.

An indictment will not be invalid because it is found upon voluntary confessions made by the accused before the grand jury or upon admissions made by him in a civil case, or because part of the 28 L. R. A.

evidence upon which the indictment was found was a confession by the accused. *People v. King*, 28 Cal. 235 (mo. qu.); *State v. Doneilon*, 45 La. Ann. 744 (mo. qu.); *Mackin v. People*, 115 Ill. 812, 53 Am. Rep. 167 (obj.); *Com. v. Taylor*, 12 Pa. Co. Ct. Rep. 328 (ev.); *Menchee v. State* (Tex.) Oct. 20, 1894 (mo. qu.); *United States v. Kirkwood*, 5 Utah, 123 (ev.); *People v. Lauder*, 83 Mich. 109 (mo. qu.).

So even where a statute exempts a witness in a gambling case from all prosecutions against himself for his testimony thereon, if he makes a voluntary statement against another in a robbery case, but thereby implicates himself in a gambling case,—an indictment may be found against him on such evidence. *People v. Reggel*, 8 Utah, 21 (mo. new tr.).

So where the accused had appeared before the grand jury and gave evidence against another, charging him with murder, such evidence cannot be called a confession and what he said may be the basis of an indictment against himself. *State v. Broughton*, 20 N. C. 96, 45 Am. Dec. 507 (obj. to ev. mo. new tr.).

Where the grand jurors may act on their own knowledge and bias or prejudice is no objection, an indictment found by the grand jury is valid, although one of the members before their meeting secreted himself in a room with an officer and heard the accused admit his crime. *Com. v. Woodward*, 157 Mass. 518 (pl. abate.).

See also the main case, *Com. v. HAYDEN* (Mass.)

There are some cases that sustain indictments based upon defendants' confessions where the objection was not raised in the proper manner or was made too late and turned upon a question of pleading and practice. *People v. Northey*, 77 Cal. 618 (mo. set aside); *Pointer v. State*, 89 Ind. 255 (pl. abate.); *Owens v. State*, 2 Head, 455 (mo. qu.); *State v. Burlingham*, 15 Me. 104 (mo. qu.); *United States v. Brown*, 1 Sawy. 531.

And a defendant cannot claim that his reports of monthly sales of liquor filed as required by statute as public record, upon which an indictment was found, was compulsory crimination of himself. *State v. Smith*, 74 Iowa, 590 (mo. set aside).

The minutes of the testimony taken before the grand jury cannot be used by the defendant to show that he was under the influence of threats and promises when making certain alleged statements and confessions. *State v. Ostrander*, 18 Iowa, 435 (ev.).

An inspection of the evidence before the grand jury will be denied if the court had the power to make it, where the indictment was found mainly on the confession made by the accused to a witness examined before the grand jury and there is no necessity shown for an inspection of the evidence. *People v. Jaehne*, 4 N. Y. Crim. Rep. 181 (mo. to inspect).

The refusal to allow proof by grand jurors that the evidence of a witness given before them as to defendant's confession was different from that on

denance under statutes making such records made by town clerks admissible, providing for registrars in certain places to whom the statutes relative to clerks shall be applicable, and permitting them to appoint assistants whose attestations shall be of the same effect as the registrars.

6. Circumstantial or presumptive proof of authority to solemnize a marriage admissible under Pub. Stat., chap. 145, § 81, is shown by testimony of the one claiming authority that he is an ordained minister and pastor of a certain church.

7. The fact that at the time one accused of polygamy contracted his alleged polygamous marriage, he had a bona fide and reasonable belief that his former

wife was dead, does not constitute a defense under Massachusetts statutes.

(May 21, 1895.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an indictment for polygamy which resulted in his conviction. *Overruled.*

The facts are stated in the opinion.

Messrs. C. P. Sullivan and F. F. Sullivan for defendant.

Mr. M. J. Sughrue for the Commonwealth.

the trial, was proper. *Little v. Com.* 25 Gratt. 990 (ev.).

That a person may have been required to testify before a grand jury on another charge on matters that would be material to this charge is not cause to set aside the indictment unless it appears from the indorsement on the indictment that it was found in whole or in part on his evidence. *State v. Hawks*, 56 Minn. 129 (mo. qu.).

And where the defendant was compelled to testify before the grand jury, or confessions were obtained from him by hope inspired by assurances of immunity, and such confessions caused the indictment, the same is invalid as no one can be compelled in a criminal case to be a witness against himself. *State v. Froiseth*, 16 Minn. 296 (mo. set aside); *Corley v. State*, 50 Ark. 305 (ev.); *United States v. Charles*, 2 Cranch, C. C. 76 (ev.; mo. new tr.); *People v. Haines*, 6 N. Y. Crim. Rep. 103 (mo. set aside); *Boone v. People*, 148 Ill. 440 (mo. qu.).

Under Texas Penal Code, article 367, providing for exemption from prosecution on evidence revealed by the accused before the grand jury, a party so testifying cannot thereafter be convicted on such evidence. *Elliott v. State* (Tex.) April 23, 1892 (new tr.).

And in *People v. Singer*, 18 Abb. N. C. 96, 5 N. Y. Crim. Rep. 2 (mo. qu.), where the accused was required to appear before the grand jury and answer questions, although she was cautioned by the district attorney that she need not criminate herself, it was held that the indictment should be quashed, as N. Y. Const., art. 1, § 6, provides that no person should be compelled in any criminal case to be a witness against himself.

Under N. Y. Penal Code, § 79, providing that in a bribery case a person testifying to giving a bribe is not liable to an indictment, where the grand jury indicted a witness on evidence disclosed before them, of having given money to police commissioners, the indictment should be dismissed. *People v. Spencer*, 66 Hun, 149 (obj.).

The surgeon attending a duel cannot be compelled to testify where such testimony would tend to criminate the witness, where he claims his privilege. *Cullen v. Com.* 24 Gratt. 624 (ev.).

In *State v. Clifford*, 36 Iowa, 550 (ev.), it was said that the grand jury have no right to compel the defendant in custody and charged with the crime inquired about, to give testimony before them. A statement so procured is not voluntary.

The fact that the accused was brought into court in the presence of the grand jury hand-cuffed, and that they may there have seen him thus secured, was not ground for new trial. *Com. v. Weber*, 187 Pa. 153 (mo. new tr.).

b. Accomplices and joint defendants.

Some cases hold that an indictment based upon evidence of an accomplice will be valid. *State v. Frisell*, 111 N. C. 722 (mo. qu.); *King v. Dodd*, 128 L. R. A.

Leach, C. C. 155 (case 85) (pl. abate.); *State v. Wolcott*, 21 Conn. 272 (mo. ar.).

But in *State v. Krider*, 78 N. C. 481 (mo. ar.), where there were two defendants and an indictment was found by examining each before the grand jury against the other, it was held that in the absence of any statute it could not be permitted and the indictment was held invalid.

And in *United States v. Farrington*, 5 Fed. Rep. 343 (mo. qu.), where an attorney read to the grand jury the evidence of a defendant L, who was examined as a witness compulsorily before the commissioner against this defendant F, and the incompetent evidence was blended with the competent evidence, the indictment was quashed.

Where several were indicted for murder on an objection made to the testimony of H, on the ground that while confined in jail for the murder of B, he was taken to the grand jury room without the order of court, and upon his evidence the indictment was returned, it was held that an accomplice was not incompetent, but that a conviction could not be had upon his evidence uncorroborated. *Wright v. State*, 43 Tex. 170 (ev.).

II. Evidence of criminals.

Under N. Y. Penal Code, § 314, providing that a person convicted of felony is a competent witness, an indictment may be found on his evidence. *People v. Stokes*, 30 Abb. N. C. 200 (dem.; mo. dismiss).

And Ky. Crim. Code, § 107, providing that a grand jury cannot receive any but legal evidence, is only directory; and Ky. Civil Code, § 808, providing that a convict shall not testify, does not apply in criminal cases, and an indictment may be based on the evidence of a convict. *Com. v. Minor*, 39 Ky. 555 (mo. set. aside).

And in *King v. Earl of Shaftesbury*, 8 How. St. Tr. 759, 771, 774, 775, 780, 781, the court refused to allow the grand jury to prosecute the inquiry as to the witnesses before them having been criminals.

The state will not be required to furnish a bill of particulars as to the residence of the witnesses for the prosecution in order to allow the defendant to ascertain their credibility. *Com. v. Applegate*, 1 Pa. Dist. Rep. 127 (bill part.).

But in *Republica v. Shaffer*, 1 U. S. 1 Dall. 236, 1 L. ed. 116 (instruct. to gr. jur.), it was said that "diligent inquiry" means diligently to inquire into the circumstances of the charge and credibility of the witness who supports it and from the whole decide whether the person accused shall be put upon trial.

III. Depositions and affidavits.

Under 11 & 12 Vict., chap. 42, § 17, providing that a deposition may be read on trial, where the witness is dead, or too ill to be present; such deposition may be read before the grand jury where due notice was given of the taking and the witness is too ill to attend. *Reg. v. Clements*, 2 Den. C. C. 251, 3 Cox, C. C. 191, Temp. & M. 579, 20 L. J. M. C. 193, 15

Barker, J., delivered the opinion of the court:

1. Special police officers are not exempt from service as grand jurors. Pub. Stat. chap. 170, § 2. Nor does the fact that a juror is exempt absolutely disqualify him from service. He may be excused at his own election, or may be excused to by any party; but, if he serves, the action of the grand jury or traverse jury is not made void. *Munroe v. Brigham*, 19 Pick. 868. See also *Wassum v. Feeney*, 121 Mass. 98, 28 Am. Rep. 258; *Moebis v. Wolffsohn*, 148 Mass. 180.

2. There is neither authority nor reason for the contention that the indictment was void

because one of the grand jurors appeared as a witness before the grand jury of which he was a member at the same sitting of the court at which the indictment was presented. A grand jury may properly act upon the personal knowledge of any of its members, communicated to his fellows under no other sanction than the grand juror's oath. *Com. v. Woodward*, 187 Mass. 516. And there is no impropriety or wrong to the accused in having a grand juror, who has personal knowledge as to matters inquired of by his grand jury, sworn, and testify as a witness. Indeed, there may, under our practice, be some incidental benefit to the accused in that course, as in that

Jur. 407 (ev.); *Reg. v. Wilson*, 12 Cox, C. C. 622 (ev.); *Reg. v. Gerrans*, 84 L. T. N. S. 145, 18 Cox, C. C. 158 (ev.); *Reg. v. Hughes*, 12 Cox, C. C. 623, note (ev.); *Reg. v. Beaver*, 10 Cox, C. C. 274 (ev.).

In *Reg. v. Bullard*, 12 Cox, C. C. 353, 14 Moak, Eng. Rep. 608 (ev.), it was held that the grand jury could use a deposition of an absent witness without any showing of inability to be present, and the court said they were a secret tribunal and might lay by the heels in jail the most powerful man in the kingdom by finding a bill against him, and for that purpose might even read a paragraph from a newspaper. (But see next case.)

Affidavits before a magistrate not in the presence of the accused cannot be used before a grand jury in the absence of the witnesses, the court refusing to follow. *Reg. v. Bullard, supra*; *Reg. v. Carbray*, 12 Q. L. R. 100, 2 B. 1887 (mo. for use of ev.).

So the deposition of an absent witness was held not admissible before the grand jury without medical evidence of his illness, and the fact that the witness was in bed and had his head shaved was not sufficient. *Reg. v. Phillips*, 1 Fost. & F. 105 (ev.).

Where a witness refused to testify in a case of rape the grand jury were not allowed to use her deposition taken before the magistrate on the ground that a deposition could only be used in case of death or illness preventing ability to travel. *Reg. v. Rendle*, 11 Cox, C. C. 209 (ev.).

And a grand jury was not allowed to use the deposition of a witness taken before a magistrate, although they suspected he had been tampered with, as they should only use the best evidence. *Denby's Case*, 1 Leach, C. C. 514 (ev.).

But an indictment should not be set aside because depositions were used in the grand jury room where the deponents with others also testified before the grand jury. *State v. Schieler* (Idaho) April 20, 1894 (mo. set aside).

In *Beal v. State*, 15 Ind. 378 (instr.), it was said that grand jurors cannot use depositions of witnesses who are in other states, as this is beyond their jurisdiction.

And depositions taken before the magistrate should not be examined as to evidence of guilt after an indictment has been found though the minutes of the grand jury may be examined if they are in court. *People v. Dixon*, 3 Abb. Pr. 305 (mo. bail.).

IV. Documents.

Where the government officer improperly used papers before the grand jury, and as to the use of these papers the testimony was conflicting, incomplete and unsatisfactory, a motion to quash should be sustained. *United States v. Kilpatrick*, 16 Fed. Rep. 765, 4 Crim. L. Mag. 692 (mo. qu.).

And in *United States v. Reed*, 2 Blatchf. 435, 461 (mo. qu.), it was said that the court will inquire as to the manner of authenticating documents to be used before the grand jury.

But written statements of facts received by the 38 L. R. A.

grand jury from witnesses personally appearing before them were held insufficient to invalidate an indictment. *State v. Boyd*, 3 Hill, L. pt. 2, p. 288, 27 Am. Dec. 376 (mo. qu.).

V. Minutes.

The Iowa Code, sections 4273, 4280, provide that an indictment may be found upon the minutes given before the committing magistrate and such indictment will be valid. *State v. Cook* (Iowa) Dec. 12, 1894 (ev.); *State v. Rodman*, 61 Iowa, 456 (obj. ev.).

And such indictment is valid although the stenographer who acted for the magistrate was not sworn. *State v. Wise*, 88 Iowa, 506 (ev.).

In *State v. Guilford*, 49 N. C. 83 (mo. ar.), it was said that the record need not set out the evidence and memoranda on which a bill was presented.

VI. Swearing of witnesses.

The court has no power to inquire of the grand jurymen as to how the oath was administered. *Morrison v. State*, 41 Tex. 516 (pl. abate.); *Turner v. State*, 87 Ga. 107 (mo. new tr.); *Simms v. State*, 60 Ga. 145 (pl. abate.).

And in *Reg. v. Russell*, Car. & M. 246 (obj. ev.), it was said that an improper mode will not vitiate.

Under Gould's Ark. Dig., chap. 52, § 63, providing that the foreman may administer the oath, where the oath as shown by the indictment was "that the defendant was duly sworn to speak the truth concerning all legal questions as might be ascertained by the said G., foreman," this was held sufficient in an indictment for perjury. *State v. Green*, 24 Ark. 561 (mo. ar.).

But where the oath of the witness was to testify concerning such matters as should be inquired of them by the grand jury, omitting "to speak the truth, the whole truth, and nothing but the truth," the indictment should be quashed. *Ashburn v. State*, 15 Ga. 246 (pl. abate.).

Where an indictment or presentment is found upon evidence of a witness not duly sworn or sworn by persons not authorized, it is invalid. *Joyner v. State*, 73 Ala. 448 (mo. qu.); *United States v. Coolidge*, 2 Gall. 384 (mo. qu.); *State v. Barnes*, 53 N. C. 20 (pl. abate.); *State v. Love*, 4 Humph. 255 (pl. abate.); *Middlesex Special Commission*, 6 Car. & P. 90 (charge).

And the same was said to be the rule in *People v. Naughton*, 38 How. Pr. 430 (mo. for use of min.); *Re Lester*, 77 Ga. 143 (contempt); *Com. v. Price*, 4 Kulp, 239, 3 Pa. Co. Ct. 175 (mo. qu.).

And *Rex v. Bittou*, 6 Car. & P. 92 (refusal to plead), shows that an indictment was set aside which was found on testimony of a witness not duly sworn.

Where the witness was too young and lacked intelligence to understand the application of an oath, the court refused to allow the grand jury to hear his testimony. *State v. Doherty*, 2 Overt. (Tenn.) 80 (ev.).

And under Ga. Acts 1857, p. 100, witnesses were

case his name will be found in the list of witnesses which is to be filed of record by the clerk. Pub. Stat. chap. 213, § 9.

8. The motion to dismiss, by which alone the two questions above considered were raised, must also have been overruled, for the technical reason that neither of the facts alleged in it as avoiding the indictment appeared upon the record of the cause, and so could not be availed of by a motion to dismiss. *Com. v. Fredericks*, 119 Mass. 199, 204, and cases cited.

4. As the writing purporting to be a letter written and signed by the defendant was identified as his handwriting, it was competent evidence against him. *Stone v. Sanborn*, 104

Mass. 319, 324, 6 Am. Rep. 238; *Wiggin v. Boston & A. R. Co.* 120 Mass. 201.

5. The testimony of the woman with whom the defendant was accused of having unlawfully intermarried while his former wife was living was competent to prove the unlawful marriage. The testimony of witnesses present at a marriage is competent to prove it (*Com. v. Norcross*, 9 Mass. 492; *Com. v. Littlejohn*, 15 Mass. 163); and this must be held to include the testimony of either of the contracting parties.

6. The attested copy of the record of the marriage of the defendant to Annie Dillon, from the records of the city registrar of Boston,

allowed to be sworn before the grand jury. *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 490 (pl. abate.).

In *State v. Cain*, 8 N. C. 362, the North Carolina Act of 1797, chap. 2, § 3, providing that "no person shall be arrested or charged before any court on a presentment made by a grand jury before the attorney acting for the state shall prepare a bill and the bill be found by the grand jury to be a true bill" is construed to require that the witnesses in support of a bill shall be sworn in open court and sent to the grand jury, and while the grand jury may make presentments on their own knowledge they cannot find a bill or indictment without the evidence of witnesses thus sworn in open court.

And North Carolina Act 1797, providing for swearing of witnesses in open court, was not repealed by Act of 1870, chap. 12, providing for swearing witnesses by the foreman, so an objection that witnesses were sworn in open court is invalid. *State v. Allen*, 88 N. C. 660 (mo. ar.); *State v. White*, 68 N. C. 698 (mo. qu.).

So in South Carolina an indictment must be quashed if the witnesses are not sworn in open court as required by common law in absence of statute. *State v. Kilcrease*, 8 S. C. N. S. 444 (mo. qu.).

And in *State v. Fasset*, 16 Conn. 457 (mo. qu.), it was held that the swearing of witnesses by the magistrate in the grand jury room will not invalidate an indictment.

In *Jetton v. State*, Meigs, 192 (mo. qu.), it was said that if the witness was sworn while court was open, although the mayor and aldermen were not on the bench or before the witness, the swearing was sufficient.

Where the record did not show that the witnesses that were sent to the grand jury were sworn, it was held that the court no doubt knew they were sworn and that it was not the practice to record such fact. *King v. State*, 5 How. (Miss.) 730 (obj.).

And it will be presumed in such a case that they were sworn. *State v. McEntire*, 2 N. C. Law Repos. 287 (mo. ar.).

And under Ohio Crim. Code, section 75, providing for swearing of witness by the clerk, the absence of certificate of such fact will not be a good plea in abatement. *Duke v. State*, 20 Ohio St. 225 (pl. abate.).

And a motion in arrest is not the proper way of objecting that it does not appear that the witnesses were not sworn in court. *State v. Roberts*, 19 N. C. 540 (mo. ar.); *State v. Harwood*, 60 N. C. 228 (obj.); *Gilman v. State*, 1 Humph. 59 (mo. ar.); *State v. Lanier*, 90 N. C. 714 (mo. ar.).

And in *State v. Hines*, 84 N. C. 810 (mo. qu.), it was held that an objection to an indictment that was found upon witnesses not sworn could not be taken advantage of by a motion in arrest.

But in *State v. Cain*, 8 N. C. 362 (mo. qu.), it was admitted by the prosecuting officer that they were not sworn in court, and the indictment was held invalid.

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So a plea in abatement that witnesses were not sworn properly is insufficient, unless it is specific and particular. *Reich v. State*, 53 Ga. 73, 21 Am. Rep. 235 (pl. abate.); *O'Connell v. Queen*, 11 Clark & F. 155, 9 Jur. 25 (pl. abate.).

And an objection made after conviction that the indictment was found on unsworn testimony is too late. *Rex v. Dickinson*, Russ. & R. C. C. 401 (obj.).

And the same has been held to be too late, after a plea of not guilty. *State v. Sheppard*, 97 N. C. 401 (mo. qu.).

A plea that the witness was not sworn before the court was bad where the statute authorized the foreman to administer the oath. *Bird v. State*, 50 Ga. 585 (pl. abate.).

And an objection that the evidence was not on testimony of witnesses indorsed was insufficient where the statute limited objections and did not include this. *Lawrence v. Com.* 86 Va. 573 (pl. abate.).

But where the grand jury had no authority to administer the oath to witnesses who were not indorsed or listed but were heard, an indictment is invalid. *Com. v. Price*, 8 Pa. Co. Ct. Rep. 176 (mo. qu.); *Com. v. Wilson*, 9 Pa. Co. Ct. Rep. 24 (mo. qu.).

But in *Jillard v. Com.*, 26 Pa. 169 (pl. abate.), it was held that such an objection must be made by motion to quash and not by plea in abatement.

If the foreman had not the right to administer an oath to the witness in such a case, the indictment will be invalid. *Ayrs v. State*, 5 Coldw. 26 (mo. ar.).

See further next subhead.

VII. Witnesses generally.

Where it was claimed that a list of witnesses should be furnished the accused, the court said, the solicitor general promised to furnish a list, and that he thought it was right that it should be done and that if an indictment is found upon improper evidence it should be known. *Com. v. Knapp*, 9 Pick. 496, 20 Am. Rep. 491 (inst.).

And in *Warner v. State*, 13 Lea, 52 (contempt), it was said that the attorney-general has no power to direct witnesses to be sent to the grand jury, nor has the court, but under Tenn. Code, § 5087a, the grand jury only has the right and power to send for witnesses.

And under Tennessee Code, § 50820, providing for indorsement of witnesses in cases of presentment, if such presentment is made on testimony of witnesses not enumerated in the indorsement, this invalidates if attacked by plea in abatement. *State v. Lewis*, 87 Tenn. 119 (mo. qu.).

And under Tennessee Act 1841-2, chap. 81, providing for subpoenas for certain witnesses, to go before the grand jury, a plea in abatement that the presentment was made on evidence of persons not enumerated in the act, is a good plea. *Desbazo v. State*, 4 Humph. 275 (pl. abate.).

But whether it was strictly competent for mem-

certified to by the assistant registrar, was admissible in evidence. The records of town clerks relative to marriages are made by statute prima facie evidence in legal proceedings of the facts recorded, and a certificate signed by the clerk is made admissible as evidence of the record. Pub. Stat. chap. 82, § 11. See also Pub. Stat. chap. 145, § 20. Towns and cities of more than 10,000 inhabitants may choose a person other than the clerk to be registrar, and in that case the provisions concerning clerks apply to the registrar. By Stat. 1885, chap. 266, § 5, the city registrar of Boston has power to appoint his own subordinates. General authority to make ordinances concerning registrars and registration is given by Pub. Stat. chap. 82, § 18. By the Revised Ordinances of the city of Boston of 1885 (chap. 20, § 3) there are allowed to the city registrar, for the discharge of the duties of his department,

three clerks for copying and three for recording. By Stat. 1892, chap. 314, § 2, the city registrar is required to appoint from his subordinates two assistant city registrars, and the same section provides that the certificates and attestations of either assistant city registrar shall have the same force and effect as those of the city registrar. The result is that the certificate of the assistant city registrar, admitted in evidence under the defendant's exception, was plainly competent.

7. In proof of the defendant's unlawful marriage, charged in the indictment, the government was allowed, against his objection and exception, to put in the testimony of a witness that he was a clergyman in Boston, and an ordained minister and pastor of a Congregational church, and that he had been such pastor for many years. The defendant contends that the testimony of this witness was not competent

bers of the grand jury to testify before another grand jury in a perjury case, without having been required to do so by judicial order, as provided under California Practice Act, section 218, will not be determined, but the indictment should not be set aside. *People v. Young*, 81 Cal. 568 (mo. set aside).

In *State v. Perry*, 44 N. C. 880 (ev.), a witness was brought before the court to ascertain her competency and on examination she was set aside by the court because she did not appear to understand the obligations of an oath and had not sufficient intelligence, and the court refused to permit her to go before the grand jury.

Where the plea in abatement was that the indictment was not found upon the evidence of a witness duly sworn in open court to testify on said supposed indictment it was held that Tennessee Act 1824, chap. 5, § 2, gives inquisitorial power and where the witnesses were sworn in open court and gave evidence before the grand jury, the indictment was sustained. The objection seems to be that the witnesses testified before the indictment was drawn. *State v. Parrish*, 8 Humph. 80 (pl. abate.).

But in *State v. Robinson*, 2 Lea, 114 (pl. abate.), where it was pleaded that the prosecutor in a larceny case was not sworn to give testimony on the indictment but was summoned to testify as to offenses as to which the grand jury have inquisitorial power, the plea was sustained. The court does not discuss any authorities or any statute but holds the plea good and sustained by the evidence. This seems directly to conflict with *State v. Parrish*, supra.

The defendant cannot compel the exhibition of the minutes of the grand jury or the testimony of witnesses, where he claims that the evidence implicating him is false. *N. Y. Code Crim. Proc.*, 313, providing for a list of witnesses, is the only way in which he can obtain the list of names. *People v. Richmond*, 5 N. Y. Crim. Rep. 97 (ev.).

VIII. Prosecutor.

An indictment for forcible entry and detainer, based upon evidence of a prosecutor who is incompetent to testify, is invalid. *Reg. v. Cunard, Berton* (N. B.), 326 (mo. qu.); *State v. Fellows*, 3 N. C. 340 (mo. qu.).

And some cases hold that private or irresponsible prosecutors have no right to go before the grand jury and secure an indictment. *McCullough v. Com.* 67 Pa. 80 (mo. qu.); *Charge to the Grand Jury by Mr. Justice Field*, 2 Savy. 677.

Where the prosecutrix was a married woman in a prosecution charging the defendant with stealing property, the indictment should have been set aside. *Wilmington v. State*, 5 Sneed, 64 (mo. qu.).

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Under Tennessee Act 1801, chap. 80, § 1, providing that no bill of indictment shall be preferred without a prosecutor, where a married woman was prosecutor in an action of assault and battery, the indictment was quashed because a *feme covert* is irresponsible for costs and damages and after an indictment has been indorsed "true bill" the addition of her husband's name as prosecutor will not be allowed. *Moyers v. State*, 11 Humph. 49 (pl. abate.).

But under the same statute it was held that after trial on the merits, an objection by motion in arrest is too late and will not reach the defect. *Rodes v. State*, 10 Lea, 414 (mo. ar.); *Parham v. State*, Id. 504.

Under Ark. Dig., chap. 82, requiring the name of the injured party in trespass to be indorsed on the indictment, if such party is an infant or married woman the name of the prosecutor may be that of the father or husband. *State v. Harrison*, 19 Ark. 565 (ev.).

But an objection that the prosecutor was the only witness and was a grand juror is insufficient under Arkansas Mansf. Dig., § 2068, providing for objection to a grand juror, who is a prosecutor, as that does not apply to a person who is already indicted. *Baker v. State*, 58 Ark. 518 (mo. set aside).

And in *State v. Stewart*, 45 La. Ann. 1184 (mo. qu.), it was held that a private prosecutor who went before a grand jury without process and instituted prosecution, only did his duty, and the indictment was valid.

In *Molett v. State*, 38 Ala. 408 (dem.; mo. qu.), it was held that it is not necessary that there should be an informer.

IX. Wife as witness.

In cases of bigamy, polygamy, adultery, and incest, under the statutes of the several states, an indictment may be valid where the prosecuting witness was the defendant's wife. *United States v. Cutler*, 5 Utah, 408 (mo. qu.; mo. set aside); *Ex parte Hendrickson*, 6 Utah, 3 (contempt); *State v. Tucker*, 20 Iowa, 508 (mo. set aside).

And the same was held in *State v. Briggs*, 68 Iowa, 416 (mo. to dismiss), although the defendant's wife afterward went before the grand jury and requested them to dismiss the charge.

And the proper mode of making an objection, under Minnesota Penal Code, § 262, allowing prosecution for adultery on complaint of husband or wife, is by motion to set aside. *State v. Brecht*, 41 Minn. 50 (mo. set aside).

And it is too late after a plea of not guilty to question that an indictment against several in a conspiracy to charge a married woman with adultery, was on the testimony of one of the defendants. *State v. Burlington*, 15 Me. 104 (mo. qu.).

to prove his authority to bind parties in marriage. "A minister of the gospel, ordained according to the usage of his denomination, who resides in the commonwealth and continues to perform the functions of his office," may solemnize marriages. Pub. Stat. chap. 145, § 23. Whether the usage of the Congregational denomination requires a record to be made of the ordination of a minister does not appear in this cause, and is not a matter of which we have judicial knowledge. The evidence was at least competent to prove that the witness was *de facto* discharging the office of an ordained minister, and under the peculiar statute regulating the proof of marriages in court the testimony so excepted to was all "circumstantial or presumptive evidence," from which the fact of marriage might be in-

ferred, and so was competent under the statute. Pub. Stat. chap. 145, § 31.

8. The different requests for rulings, founded upon the contention that the defendant was not guilty of polygamy if, at the time he contracted his third marriage, he had a bona fide and reasonable belief that his second wife was dead, were properly denied. We consider that question to have been settled in this jurisdiction by the decision in *Com. v. Mash*, 7 Met. 472, rendered in the year 1844, in which, speaking of a statute substantially like that under which the present defendant was indicted, this court said that "it was not the intention of the law to make the legality of a second marriage whilst the husband or wife is in fact living depend upon ignorance of such party's being alive, or even upon an

And in a murder case involving the defense of adultery of defendant's wife, as cause of provocation, the indictment is invalid if based on her evidence. *People v. Briggs*, 60 How. Pr. 17 (mo. qu.).

Under N. Y. Code Crim. Proc., § 256, providing that the grand jury can receive only legal evidence, an indictment for murder based upon evidence of the wife of the accused which was material, should be set aside. *People v. Moore*, 65 How. Pr. 177 (mo. qu.).

But in *State v. Houston*, 50 Iowa, 512 (obj.), it was held where the indictment in a murder case was based on evidence of the wife, that it was too late to raise objection after conviction.

Where there is no statute authorizing husband or wife to testify in a bigamy case, an indictment found on such testimony is invalid. *State v. Tankersley*, 6 Lea, 582 (mo. qu.).

X. *Hearing witnesses in open court.*

Where the court required witnesses to be examined in open court before the grand jury the indictment was quashed. *State v. Branch*, 68 N. C. 106, 12 Am. Rep. 633 (mo. qu.).

And in *King v. Earl of Shaftesbury*, 8 How. St. Tr. 759, the court required the grand jurors to examine witnesses in open court although the grand jurors denied the authority and claimed the right to examine their witnesses in secret session but returned a finding of "no bill."

XI. *Indictment on evidence partly incompetent.*

Where the evidence before the grand jury consists of part that is incompetent the indictment will not be set aside if there is any competent evidence before them. *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460 (pl. abate.); *State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270 (mo. qu.); *Bloomer v. State*, 3 Sneed, 66 (pl. abate.); *State v. Logan*, 1 Nev. 509 (mo. qu.); *Jones v. State*, 31 Ala. 79 (mo. qu.).

XII. *Physicians.*

Where an indictment is based upon testimony of a physician who obtains his information in an abortion case from examination professionally, and employment by the defendant, the indictment will be quashed. *People v. Sellick*, 4 N. Y. Crim. Rep. 329 (mo. set aside).

XIII. *Evidence generally.*

On motion to instruct the grand jury to receive none but competent evidence, the court said, it is presumed that only proper evidence will be laid before the jury, and it is difficult and inconvenient to instruct them beforehand, but if anything improper is given before them, it may be corrected on trial before the petit jury. Anonymous, 9 Pick. 496 (charge).

The court will not inquire into the character of the testimony which has influenced the grand jury 28 L. R. A.

in finding the indictment with a view to the quashing of the indictment. *State v. Boyd*, 2 Hill, L. pt. 2, p. 238, 27 Am. Dec. 376 (mo. qu.).

And under Minn. Gen. Stat., chap. 107, and Mont. Crim. Practice Act, § 145, providing that the grand jury can receive none but legal evidence, affidavits of the grand jury cannot be used to show the indictment was on illegal evidence. *State v. Beebe*, 17 Minn. 241 (mo. set aside); *Territory v. Pendry*, 9 Mont. 67 (mo. set aside).

So in Connecticut it is held in *State v. Fasset*, 16 Conn. 457 (mo. qu.), that the fact that the grand jury heard incompetent dying declarations could not be proved by the grand jurors or by witnesses who were before the grand jury.

And in *Welch v. State*, 68 Miss. 341 (pl. abate.), it was said that illegal or insufficient evidence will not be inquired into but improper influences to secure an indictment would be.

The grand jury have no right to pass upon the question of competency or admissibility of evidence. *United States v. Lawrence*, 4 Cranch, C. C. 514 (charge).

And Or. Code, § 400, does not allow an inquiry as to the competency of evidence on a motion to set aside. *United States v. Brown*, 1 Sawy. 531 (mo. qu.).

But in *Com. v. Crana*, 3 Pa. L. J. 442, (hab. corp.), it was said that no one should be put on his trial unless the indictment is found upon evidence adduced before the grand jury in a way clearly pointed out by the law.

And in *United States v. Farrington*, 5 Fed. Rep. 343 (mo. qu.), it was held that an indictment will be quashed if found upon incompetent evidence.

See also note to *State v. Peterson* (Minn.) post, 324, as to sufficiency of evidence.

XIV. *Rumor.*

Rumor, hearsay, public clamor, or newspaper articles will not justify an indictment. Charge to Grand Jury, 3 Pittsb. 174 (charge); *Re Charge to Grand Jury No. 3*, 62 Fed. Rep. 840, 4 Inters. Com. Rep. 784 (charge).

In *Reg. v. Bullard*, 12 Cox, C. C. 353, 4 Moak, Eng. Rep. 603 (leave to use dep.), the converse was said to be the rule, but in *Reg. v. Carbray*, 13 Q. L. R. 100, B. 1887, the court refused to follow this case.

XV. *Time.*

Where the judge was temporarily absent from the county when witnesses were examined, the indictment was sustained. *Com. v. Bannon*, 97 Mass. 214 (mo. ar.; mo. qu.).

As to amount and sufficiency of evidence to sustain indictment, see note to *State v. Peterson* (Minn.) post, 324.

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honest belief of such person's death." See Rev. Stat. chap. 130, §§ 2, 3; Gen. Stat. chap. 165, §§ 4, 5; Pub. Stat. chap. 207, §§ 4, 5. This statement has been since acted upon as a part of our system of law regulating marriages and controlling persons contemplating marriage. See *Com. v. Munson*, 127 Mass. 459, 470, 84 Am. Rep. 411. If it ought to be changed, the change should come from the legislature. We therefore decline to treat the defendant's contention as an open question in this common-

wealth. If the reasons which, after much difference of opinion, have led to the final declaration in England that an honest and reasonable belief in the death of the former wife or husband is a good defense to a prosecution for polygamy should be dealt with here, it should be by that department of the government which has the law-making power. See *Queen v. Tolson*, L. R. 23 Q. B. Div. 163, 16 Cox, C. C. 629.

Exceptions overruled.

MINNESOTA SUPREME COURT.

STATE of Minnesota

v.

Gustave PETERSON.

(.....Minn.....)

*1. The district court has the power, under the statute, to discharge the grand

*Headnotes by CANTY, J.

NOTE.—*Sufficiency of evidence before grand jury to sustain indictment.*

I. *Indictment on knowledge of grand jury.*

II. *Evidence on re-indictment.*

III. *No evidence.*

IV. *Prosecutor.*

V. *Amount of evidence necessary to sustain an indictment in general.*

VI. *Witnesses for defense.*

It is generally held that grand jurors may indict on their own knowledge, and that the same grand jury may re-indict without recalling witnesses when the indictment had been quashed, but this is denied in North Carolina. As to whether the indictment will be invalid if found on no evidence there is some conflict of authorities.

Under certain statutes requiring a particular prosecutor in certain kinds of cases, an indictment found on evidence of other persons depends on the construction of such statutes. As to the amount of evidence necessary to sustain the finding by the grand jury, it is generally held that it is not subject to an inquiry, but under New York code, providing for no indictment unless on sufficient evidence, it seems that the action of the grand jury may be reviewed. The defendant is not entitled to have his witnesses examined before the grand jury.

I. *Indictment on knowledge of grand jury.*

Some courts hold that an indictment or presentment may be found on the knowledge of the grand jurors and therefore the court will not inquire into the sufficiency of the evidence before them. *Reg. v. Russell*, 1 Car. & M. 247 (obj. ev.); *State v. Schmidt*, 84 Kan. 399 (mo. qu.; pl. abate.); *State v. Skinner*, Id. 266 (mo. ar.; pl. abate.); *Grand Jury v. Public Press*, 4 Brewst. (Pa.) 313 (charge).

In matters affecting the community, such as nuisances, public officials, elections, public health, morals, safety, the grand jury may originate charges but some one of them must have personal knowledge of the facts. *Charge to Grand Jury*, 3 Pittsb. 174.

"The grand jury may indict for matters from their own observation or from disclosures of each other, but private prosecutors are not allowed to present accusations. *Charge to Grand Jury by Mr Justice Field*, 2 Sawy. 677.

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jury impaneled at a regular general term of the district court, adjourn the term to a future day, and order a new venire of grand jurors to be drawn and summoned for such adjourned term.

2. Such new venire may be drawn from the regular jury list selected by the county commissioners and certified and filed with the clerk of the court.

3. The statute requires such commissioners to make out separate lists of

And an objection that the presentment was based on information of a grand juror obtained from an outside party not sworn, is not good, as the defendant cannot impeach the knowledge of the grand juror who gave the information. *State v. McManus*, 4 Humph. 263 (pl. abate.).

And Mo. Rev. Code 1855, p. 1170, providing for no indictment in certain cases unless preferred on the knowledge of two or more of the grand jury, implies that they may indict on their own information. *State v. Terry*, 30 Mo. 368 (mo. qu.).

And Tenn. Code (Milliken & Vertrees) 5908, provides for an indictment based on the information of a member of the grand jury. *State v. Lee*, 37 Tenn. 114 (pl. abate.).

A motion to quash, because there had not been a presentment or order of court, nor a finding by the grand jury of their own knowledge according to Maryland Act 1722, chap. 5, was refused. *United States v. Tompkins*, 2 Cranoh. C. C. 46 (mo. qu.).

In *State v. Wolcott*, 21 Conn. 272 (mo. ar.), it was said that grand juries have the right to originate charges against offenders without forewarning them of their proceedings against them.

In *Com. v. Woodward*, 157 Mass. 516 (pl. abate.), it was said that grand jurors may indict upon their own knowledge.

That a grand juror may be sworn and testify as a witness before the body of which he is a member is held in *Com. v. Hayden* (Mass.) ante, 518.

And in *Molett v. State*, 33 Ala. 408 (dem.; mo. qu.), it was held that it is not necessary that there should be an informer.

But in *Com. v. Green*, 126 Pa. 531 (mo. qu.), an indictment for keeping a disorderly house was held invalid where the grand jury without any knowledge of their own or calling before them witnesses, had learned for the first time of the character of the house from evidence obtained for an indictment against another party for assault and battery.

And a similar ruling was made in *Com. v. MoComb*, 157 Pa. 611 (mo. qu.).

And in *State v. Cain*, 8 N. C. 332 (mo. qu.), it was held that under North Carolina Act 1797, chap. 2, § 3, requiring witnesses to be sworn in court and sent to the grand jury room, a bill of indictment on testimony of members of the grand jury, not sworn in open court, should be quashed, and that

grand and petit jurors. *Held*, two separate lists following one heading, and certified to by only one certificate, comply with the statute. *Held*, the certificate in this case is sufficient.

4. The number of names on the grand jury list was reduced to forty-nine by the drawing of the grand jury for the regular term. The county commissioners did not meet after such drawing and before the drawing of the grand jurors for the adjourned term. *Held*, a grand jury for such adjourned term might legally be drawn from said forty-nine names.
5. The dismissal of an indictment on the motion of the county attorney after the same has been attacked by demurrer is not equivalent to a decision of the court sustaining the demurrer, so as to prevent the case from being resubmitted to the same or another grand jury, without the order of the court.
6. On the dismissal of an indictment on the motion of the county attorney, a second indictment may be found by the same grand jury for the same offense, on the evidence already received, on which the former indictment was found, and it is not necessary that any new or additional evidence be received. *Held*, the motion to set aside the second indictment was correctly denied.

while the grand jury could make presentations on their own knowledge they must have the testimony of witnesses sworn in open court before they could find a bill of indictment.

And the court will not summon witnesses to support a charge by the grand jury where neither they nor the accusing grand juror have knowledge of the crime or offender. *Re Loyd and Carpenter*, 5 Pa. L. J. 55.

A presentment by Tennessee Act 1823, chap. 25, is required to be made on knowledge of two grand jurors, but this does not have to be made apparent on the presentment. *State v. Darnal*, 1 Humph. 200 (mo. ar.).

II. Evidence on re-indictment.

As in the case of *STATE V. PETERSON* (Minn.) it is generally held that where an indictment is nolleed or quashed and a re-indictment found, it is not necessary for the same grand jury which finds a new indictment to have the same witnesses recalled and re-examined. *State v. Clapper*, 59 Iowa, 279 (mo. set aside); *Molntire v. Com.* (Ky.) April 16, 1887 (mo. set aside); *Creek v. State*, 24 Ind. 151 (pl. abate.); *Whiting v. State*, 48 Ohio St. 221 (pl. abate.); *Terry v. State*, 15 Tex. App. 66 (pl. abate.); *Com. v. Woods*, 10 Gray, 477 (mo. qu.).

That the indictment was not founded solely upon a previous one for the same offense which had been quashed without the witnesses being recalled is not a good plea in abatement as the court will not inquire into the sufficiency of evidence. *Terry v. State*, *supra* (pl. abate.).

And that a grand jury voted "no bill" and then reconsidered without any new evidence, and voted to find a bill, will not invalidate. *United States v. Simmons*, 46 Fed. Rep. 65 (mo. qu.).

But in *State v. Ivey*, 100 N. C. 539 (mo. qu.), it was held where the grand jury brought in a new indictment without having examined any witnesses on the quashing of the former indictment, the latter should be quashed as they cannot indict without evidence and the witnesses might testify differently on the new bill or modify their evidence or testify to additional facts; and as to the second bill there was no evidence at all.

And a former finding by a grand jury which has been quashed or nolleed is not proper evidence on which another grand jury may indict. *Sparren-38 L. R. A.*

(May 6, 1895.)

CERTIFICATION by the District Court for Polk County for the opinion of the Supreme Court of the question as to the correctness of a ruling refusing to set aside an indictment for selling intoxicating liquors to a minor. *Ruling affirmed.*

The case sufficiently appears in the opinion. *Messrs. H. W. Childs, Atty-Gen., George B. Edgerton, Asst. Atty-Gen., and L. E. Gossman* for the State.

Mr. H. Steenerson for defendants.

Canty, J., delivered the opinion of the court:

The defendants were indicted at an adjourned term of the district court for the crime of selling on January 14, 1895, intoxicating liquor to a minor. They moved to set aside the indictment on the grounds hereinafter stated, the motion was denied by the court, and the judge thereof certifies to this court the question whether it was error to deny said motion. The regular general term of the district court of Polk county commenced on the 8d of December, 1894. On December 10th the

berger v. State, 53 Ala. 481, 25 Am. Rep. 648 (pl. abate.).

III. No evidence.

Where the grand jury had no evidence upon which to find an indictment, some courts hold by virtue of statutory provisions that the indictment will be invalid.

So in New York under Code Crim. Proc., § 258. *People v. Brickner*, 8 N. Y. Crim. Rep. 217 (mo. set aside); *People v. Price*, 6 N. Y. Crim. Rep. 141 (mo. qu.); *People v. Restenblatt*, 1 Abb. Pr. 268 (mo. qu.); *People v. Clark*, 8 N. Y. Crim. Rep. 169 (mo. strike out counts).

And the same is held in North Carolina in *State v. Ivey*, 100 N. C. 539 (mo. qu.), without referring to any statute.

So in *State v. Roberts*, 19 N. C. 540 (mo. ar.), it was said that if an indictment was found without evidence, a motion to quash would be sustained.

And in *State v. Cannon*, 90 N. C. 711 (mo. ar.), it was said that a motion to quash, or a plea in abatement would reach the defect, but not a motion in arrest.

And in *State v. Lanier*, 90 N. C. 714 (mo. ar.), it was held that a judgment cannot be arrested if the indictment is found without evidence, but it was said that a bill may be quashed or a plea in abatement will reach the objection.

And in *State v. Harrison*, 104 N. C. 728 (mo. ar.; mo. am. rec.), it was held that a motion to amend the record so as to show that no witnesses were examined by the grand jury should have been allowed as a motion in arrest would not reach the defect.

Likewise in *State v. Hines*, 84 N. C. 810 (mo. qu.), it is held that before the North Carolina Act of 1879, if an indictment was found without evidence, the bill might be quashed, or this could be pleaded in abatement but not in arrest, and the law on this point has not been changed by North Carolina Act 1879, chap. 12, requiring the foreman to mark the witnesses on the bill.

And Mo. Rev. Code, § 1802, providing that the names of material witnesses must be indorsed on the indictment, implies that the indictment cannot be found without evidence or witnesses being examined. *State v. Grady*, 84 Mo. 220, 12 Mo. App. 361 (mo. qu.).

grand jury appeared before the court and reported that they had finished their business. Thereupon the judge stated to them that they had failed to do their duty; "that he knew there was sufficient evidence before them to find indictments in cases where they had failed to do so;" and that he felt it his duty to order a special venire for twenty three grand jurors to issue immediately; and therefore discharged them. The court then ordered a special venire for twenty-three grand jurors, returnable December 17, to issue, but later in the day modified the order so as to make the venire returnable January 15, 1895. The venire was issued and placed in the hands of the sheriff, but was afterwards recalled and the order revoked. On December 22, 1894, the following order was made: "State of Minnesota, Polk County—District Court. It appearing to me that there is a necessity for an adjourned term of this court to be held at as early a day in January, 1895, as practicable, for the trial of civil and criminal cases; and it further appearing that a grand jury is necessary at said adjourned term to inquire into the crimes, if any, committed in said county,—therefore it is ordered that the December, 1894, term of this court be,

and the same is, adjourned to, and will be held at, the court-house in the city of Crookston, in the said county, on Tuesday, the 15th day of January, 1895, at ten o'clock A. M. of that day, at which time the petit jury, and each and every member thereof, unless duly excused, will appear and be in attendance on said term. And it is further ordered that Nils Nuus, clerk of this court, be and hereby is instructed forthwith to draw a grand jury for said adjourned term in the manner prescribed by law for drawing jurors, and on or before the first day of January, 1895, to issue his venire to the sheriff of said county, directing and commanding him to duly summon such jury to be and appear before this court, as grand jurors at such adjourned term, at the time and place before named. Dated this 22d day of December, 1894. By the Court, Frank Ives, Judge." Pursuant to this order, on the same day, the clerk, in the presence of the sheriff and a justice of the peace drew from the jury box the names of twenty-three grand jurors, in the manner prescribed by section 6, chapter 107, Gen. Stat. 1878 (Gen. Stat. 1894, § 7175), and on the same day the clerk issued to the sheriff a venire commanding him to summon the per-

And a motion to quash because the indictment was not found on any evidence, was held to be properly overruled where no evidence was offered on such a motion. In this case no statute is referred to and it is not decided whether or not the indictment would be bad if the grand jury had been shown to have had no evidence. *Shields v. State*, 22 Ga. 472 (mo. qu.).

And in *Creek v. State*, 24 Ind. 151 (pl. abate.), it was held that a plea that no evidence was heard by the grand jury was insufficient.

So in Texas a plea that the indictment was found without evidence is insufficient as there is no authority to inquire whether the evidence was sufficient before the grand jury. *Morrison v. State*, 41 Tex. 516 (pl. abate.).

That an indictment was found upon no evidence cannot be taken advantage of in New Jersey, on a motion to quash, or in any other way. *State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270 (mo. qu.).

Although Minn. Gen. Stat., chap. 107, provides that a grand jury can receive none but legal evidence, an affidavit of a grand juror will not be received to show that there was no legal evidence before the grand jury. *State v. Beebe*, 17 Minn. 241 (mo. set aside).

And under Tenn. Code, § 5097, subsec. 9, providing that the district attorney may file a bill of indictment upon an order of court, where no one will prosecute, a plea in abatement that no witnesses were examined, is insufficient. *Lawless v. State*, 4 Lea, 173 (pl. abate.).

And where persons not present at a gambling place were the only witnesses furnished by the grand jury in a gambling case, the court refused to inquire into the intention of the grand jury, except as expressed in the indictment. *Cotton v. State*, 43 Tex. 169 (variance).

And in *People v. McIntyre*, 1 Park. Crim. Rep. 371 (mo. for severance), it was said that it will not be assumed that an indictment was found without evidence.

It will not be presumed that it was found without evidence where the bill was pleaded to. *State v. McIntire*, 2 N. C. Law Repos. 287 (mo. ar.).

An objection that a grand juror was not present at the finding and did not hear any witnesses, or that some of the members of the grand jury were changed and others appointed, and that no evi-

dence was heard, after the change, is insufficient. *Turk v. State*, 7 Ohio, pt. 2, p. 240 (mo. qu.; pl. abate.); *State v. Fowler*, 52 Iowa, 108 (mo. set aside); *Stewart v. State*, 24 Ind. 142 (pl. abate.); *Com. v. Clune*, 182 Mass. 206 (pl. abate.).

And on a motion to quash an information in the nature of an impeachment based upon the report of the grand jury, the accused cannot show that it was found without legal evidence. *State v. Savage*, 39 Ala. 1 (mo. qu.).

IV. Prosecutor.

Under Ark. Dig., chap. 52, § 87, prohibiting an indictment unless the prosecutor's name is indorsed, if not based upon knowledge of the grand jury, or testimony of some witness other than the party injured, it must be so stated at the end of the indictment, and where the indorsement showed that it was found on the testimony of the injured party, but added, "but was summoned on presentation and by order of the grand jury," it was invalid. *State v. Denton*, 14 Ark. 343 (mo. qu.).

And under Ala. Code 1876, 4410, prohibiting an indictment for injury to stock except upon complaint of owner or agent, the indictment should not be quashed although no prosecutor was indorsed, but should an indictment be presented where neither owner nor agent made complaint, it should be quashed. *Ashworth v. State*, 63 Ala. 120 (mo. qu.).

And under Ala. Code, § 3861, providing that no indictment for taking stock without owner's consent shall be found except on complaint of one of the persons in control, and § 4354, requiring indorsement of prosecutor's name, or if none "no prosecutor," if a prosecutor appears an indictment will not be invalid because indorsed "no prosecutor" as the person may complain without being a prosecutor. *Blackman v. State*, 38 Ala. 77 (mo. qu.).

V. Amount of evidence necessary to sustain an indictment in general.

The general rule in the absence of statutory modification is that the court cannot examine into the nature, amount, or quantity of evidence upon which the grand jury raise their accusation. *State v. Lewis*, 38 La. Ann. 680 (mo. qu.); *Bryant v. State*, 79 Ala. 282 (mo. qu.); *State v. Chandler*, 45 La. Ann. 52 (mo. qu.); *State v. Boyd*, 2 Hill, L. pt. 2, p. 238, 37 Am. Dec. 376 (mo. qu.).

But under N. Y. Code Crim. Proc., § 258, the evi-

sons so drawn to appear before the court at said adjourned term. Said jurors were summoned and appeared at said adjourned term, were sworn and charged as a grand jury, and returned the indictment here in question.

1. It is urged by defendants that the court had no power to order this grand jury for this adjourned term. We are of the opinion that the court had such power. Section 15, chapter 64, Gen. Stat. 1878 (Gen. Stat. 1894, § 4850), provides for the holding of adjourned terms, and provides that the judge "may direct grand and petit jurors to be drawn and summoned for any adjourned or special term in the manner prescribed by law."

2. It is further urged that, if the court had power to order the summoning of such special grand jury, it should have been summoned by the sheriff from the body of the county in the manner prescribed by section 17 of said chapter 64, Gen. Stat. 1878 (Gen. Stat. 1894, § 4852). We are not of that opinion. Section 17, chapter 64, Gen. Stat. 1878 (Gen. Stat. 1894, § 4852), applies where, "at any term of the district court, there is a deficiency of jurors," or "an entire absence of jurors of the regular panel, whether from an omission to draw or to summon such jurors or because of a challenge to the panel or from any other cause." In these cases the court may order a special venire to issue to the sheriff of the county, commanding;

him to "summon from the county at large . . . competent persons to serve as jurors." Under this section jurors are not "drawn" at all, but simply "summoned" by the sheriff from the county at large. But under the provisions of section 15, chapter 64, Gen. Stat. 1878 (Gen. Stat. 1894, § 4850), the court may direct grand jurors "to be drawn" and summoned for an adjourned term, which was done in this case.

3. It is further urged that no legal list of grand jurors had ever been prepared or certified to as required by section 107, chapter 8, Gen. Stat. 1878 (Gen. Stat. 1894, § 679), which requires the county commissioners to "make out separate lists" of grand and petit jurors, "which lists shall be certified and signed by the chairman of the board, attested by the clerk and shall be forthwith delivered to the clerk of the district court." At the head of the list in question it is stated that: "The names were selected by the board of county commissioners of Polk county, at the adjourned annual meeting held on the 29th day of January, 1894, to serve as grand and petit jurors, respectively, for the ensuing year. Grand Jurors: [Then follows a list of the names of grand jurors, and the place and election district in which each resides.] Petit Jurors: [Then follows a list of the names of petit jurors, and the place and election district in which each resides.] Certified as correct: C. U. Webster,

dence should be such as would, if unexplained or uncontradicted, warrant a conviction. *People v. Baker*, 10 How. Pr. 597, S. C. *sub nom.* *People v. Hyler*, 2 Park. Crim. Rep. 570.

See also *supra*, III., heading, "No evidence."

An indictment will not be held invalid on the ground of insufficiency of evidence if there was any evidence on which the grand jury could fairly act. *People v. Strong*, 1 Abb. Pr. 244 (mo. qu.); *Washington v. State*, 63 Ala. 189 (mo. qu.).

Where an indictment charged five different offenses, the defendant could not show that only one offense was proved before the grand jury, as an indictment cannot be impeached by showing that it was not upon sufficient evidence. *People v. Hulbut*, 4 Denio, 133, 47 Am. Dec. 244 (ev.).

So where the prosecution could be instituted upon motion of a solicitor, an objection that a bill was not based upon an affidavit charging defendant with an offense was held insufficient ground for habeas corpus. *State v. Bowman* (S. C.) Feb. 16, 1895 (hab. corp.).

And in *Reg. v. Copeland*, 5 Cox, C. C. 290 (adv.), and *State v. Freeman*, 18 N. H. 438 (mo. ar.), it was said that the grand jury should indict if they believe sufficient uncontradicted evidence to authorize a conviction.

An indictment for fornication and adultery may be found without any evidence of criminal intent. *State v. Cody*, 111 N. C. 725 (obj.).

And in *State v. Morris*, 36 Iowa, 272 (mo. qu.; mo. set aside), it was held that the fact that the minutes do not show sufficient to justify an indictment is not a ground for quashing or setting aside, under Iowa Revision, section 4691, as it does not authorize setting aside on that ground.

But under N. Y. Code Crim. Proc. § 258, providing that an indictment should not be found unless the evidence uncontradicted would warrant a conviction, a motion to set aside an indictment in a bigamy case was allowed, where there was not legal evidence of a prior marriage. *People v. Edwards*, 35 N. Y. Supp. 450 (mo. set aside).
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VI. Witnesses for defense.

The defendant is not entitled to have his witnesses sent to the grand jury and examined upon an investigation of an indictment against him. *United States v. Palmer*, 2 Cranch, C. C. 11 (ev.); *Reg. v. Hodges*, 8 Car. & P. 195 (advice); *United States v. Terry*, 39 Fed. Rep. 355 (pl. abate.); *Respublica v. Shafter*, 1 U. S. 1 Dall. 236, 1 L. ed. 116 (instruct. to gr. jury); *United States v. Blodgett*, 85 Ga. 336 (charge); *People v. Goldenson*, 76 Cal. 828 (mo. set aside).

And in *United States v. White*, 2 Wash. C. C. 29 (recog.), it was said that defendant's witnesses are not examined in an application to bind over in a criminal charge and are never sent to the grand jury except with the consent of the prosecuting attorney.

But in *Lung's Case*, 1 Conn. 423, in a charge to the grand jury, it was said that the accused might appear and cross-examine the witnesses before the grand jury, but not to call witnesses on his part.

In *State v. Wolcott*, 21 Conn. 272 (mo. ar.), it was held that a motion in arrest of judgment that the accused had no opportunity to cross-examine the witnesses before the grand jury will not be allowed. The court said in this case that in *Lung's Case*, *supra*, the court adopted a rule in the form of a charge by which counsel or witnesses on the part of the accused are not allowed before the grand jury.

In this note cases in regard to contempt of court by witnesses refusing to testify before a grand jury; examination as to evidence of guilt or innocence in application for bail, or in resisting extradition proceedings,—have not been included.

Neither does the note include cases in regard to contempt of court by witnesses refusing to testify before a grand jury; or those concerning examination as to guilt or innocence in application for bail, or in resisting extradition proceedings, or those as to indorsement of witnesses' names by grand juries.

For competency of evidence before grand jury, see note to *Com. v. Hayden* (Mass.) *ante*, 318. I. T.

County Auditor, by M. Cornelius, Deputy. [Seal of County Auditor.] A. C. Reinhart, Chairman of County Board." It is urged that "separate lists" of grand and petit jurors were not made out as required by the statute. Although the list of grand jurors and the list of petit jurors are both included under one head, and covered by only one certificate, they are certainly separate lists. The statute prescribes no particular form of certificate, and, though somewhat informal, we are of the opinion that the certificate is sufficient. See *Kipp v. Dawson* (Minn.) 60 N. W. Rep. 845, and *State v. Brill* (Minn.) 59 N. W. Rep. 989.

4. There is nothing in the point that there were but forty-nine names on the grand jury list when this special grand jury was drawn, the number on said list having been reduced to forty-nine by the drawing of the grand jury for the regular December term, and the county commissioners not having met after that drawing and before the drawing of such special grand jury for the adjourned term.

5. A former indictment for the same offense was found against the defendants at said adjourned term by the same grand jury. The defendants demurred to that indictment, and on the day set for the argument of the demurrer, but before the argument, the indictment was dismissed on the motion of the county attorney, and the case was resubmitted to the grand jury, who found the indictment here in question. Sections 7-9 of chapter 111, Gen.

Stat. 1878 (Gen. Stat. 1894, §§ 7297-7299), provide that if such a demurrer is sustained the defendant shall be discharged, unless the court directs the case to be resubmitted to the same or another grand jury. It is urged that such dismissal was equivalent to sustaining the demurrer, and that it does not appear that the court ordered the case resubmitted. It is sufficient answer to this to say that it does not appear that the court did not so order, and error will not be presumed. But we are of the opinion that this provision of the statute cannot be extended in this manner. The demurrer was not sustained, and such a dismissal is not equivalent to an order sustaining the demurrer.

6. It is claimed that the indictment here in question was returned on the same evidence on which the former indictment was found; that no other evidence was given before the grand jury,—and it is urged that the grand jury cannot act a second time on the same evidence, and return a second indictment after the first is dismissed. The point is not well taken. The grand jury can, under such circumstances, return a second indictment on the same evidence. 1 Bishop, Crim. Proc. § 870.

This disposes of all the questions raised. We are of the opinion that *the court below did not err* in denying the motion to set aside the indictment, and the cause is remanded for further proceedings.

NEW HAMPSHIRE SUPREME COURT.

James B. EDGERLY *et al*, Exrs., etc., of
Hiram Barker, Deceased,

Clara BARKER.

(.....N. H.)

1. In construing wills the principle of lineal representation is accepted as an implied basis of distribution except so far as a purpose to set it aside is clearly expressed.
2. The legal construction of a will is according to the common understanding of the language unless a different meaning is proved.
3. A will giving to the children of testator's son and daughter his whole estate when the youngest arrives at a certain age, entitles the descendants of any children who are then deceased to take their parents' share.
4. A gift to testator's grandchildren when the youngest arrives at the age of forty years, when the law prohibits the suspension of alienation longer than the infancy of such children, may be sustained by

NOTE.—The application of the *cy près* doctrine to a gift which is not charitable so as to save it substantially when the time of distribution fixed by will is unlawfully remote, is somewhat unusual, but the opinion in the above case presents much authority for the essential principle involved.

For the effect on *prior takers* of the failure of a gift because it violates the rule against perpetuities, see *note* to *Saxton v. Webber* (Wis.) 20 L. R. A. 508.

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modifying the provision so as to make the gift take effect on reaching twenty-one instead of forty.

(July 31, 1891.)

BILL of interpleader by the executors of Hiram Barker, deceased, against persons named as trustees in his will and his heirs-at-law to determine the validity of a clause in the will which established the trust. *Judgment in favor of trustees.*

The clause in controversy was as follows:

"Eighth. I give, bequeath, and devise all the rest, residue, and remainder of my estate, real, personal, or mixed, of every name, nature, and description, and wherever found or situate, to James B. Edgerly and John F. Cloutman, both of said Farmington, Nathaniel Stevens, of Alton, in the county of Belknap, in said state, Henry R. Parker and Reuben G. Hayes, both of Dover, in said county of Strafford, and their successors and their heirs, in trust for the following purposes, to wit: First. To carry on, manage, and improve all my real estate to the best advantage, and take care of my personal estate, and invest the proceeds of all my said estate, with power to sell at private or public sale any of my real estate whenever, in the best judgment of said trustees, it is most expedient and for the interest of my estate so to do, and make the money received from such sale or sales a part of said investment. Secondly. To pay out of and from the net

income of my said estate to my daughter, Clara Barker, during her life yearly, the sum of two thousand dollars, in such sums and at such times as she shall request; and, if said sum is not sufficient for her ample and comfortable support and suitable manner of living, such further and additional sums of money shall be paid her by said trustees and their successors as shall, in their best judgment, be just, sufficient, and proper for such purposes. Thirdly. To pay out of and from said net income of my estate to my son, Hiram H. Barker, during his life, yearly, the sum of one thousand dollars, in such manner and at such times as he shall request, for the proper and reasonable support of himself and his wife and children, if, in the best opinion of said trustees, he shall, from his habits and mode of life, prove himself to be safe and competent to have the use and expenditure of said money for said purposes; and if said sum of one thousand dollars shall not, in the best judgment of said trustees or their successors, prove sufficient for said purposes, then said specified sum shall be increased to such an amount as shall in their best opinion be sufficient for said objects; and said trustees, in case my said son shall prove incapable or unfit from any cause to manage and pay out said money for said purposes, then my said trustees shall manage and expend the same money, and more, if need be, all at their best judgment, and all for said purposes; that, also, out of said income of my said estate, means shall be furnished and provided for the education, at home or abroad, at proper institutions of learning, of each and all of said children; and any other child or children of my said son, if any, hereafter born, shall have and receive all the rights and benefits from my estate that such child or children would have if living at my decease. And I hope that said children, each and all, will avail themselves of this opportunity to acquire a good education. And, if my said son shall become and remain temperate, sober, and correct in his habits for the entire space of five years together, he shall have five thousand dollars, and be added to the number of the trustees, and be of equal power with any other one of them in the control and management of my estate; and he shall be of said trustees, after becoming such as aforesaid, so long as he shall remain temperate, sober, and correct in his habits, and no longer, and ten thousand dollars more shall, at the expiration of ten years from and after the expiration of said five years, be paid him if he shall remain during all said last-named time perfectly temperate, and of good and regular habits, and fifteen thousand dollars more shall be paid to him at the expiration of ten years more after the end of said last mentioned ten years if he shall remain during all said last-named ten years perfectly temperate and of good and regular habits. Fourthly. To pay out of and from said funds, after the death of my said son, if his wife shall survive him, to her, yearly, money for her sole, proper, and sufficient support and maintenance, not, however, exceeding five hundred dollars, unless more is needed by her, and then such an amount as said trust-

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ees shall regard as proper and necessary, all so long as she remains his widow, and no longer. Fifthly. To pay out of and from said estate to each of said children when said child shall reach the age of twenty-one years, and to each of the children of my said daughter if she shall marry and have a child or children, the sum of from three thousand dollars to five thousand dollars, if such child shall then be temperate and of good capacity to manage said money, all in and according to the opinion of my said trustees; and from time to time thereafter, as their wants and necessities shall require, to pay out of and from said estate such further sum or sums of money as may be necessary, all under the conditions aforesaid respecting temperance and capacity; and, when the youngest of said children shall arrive at the age of forty years, then all my estate shall be theirs, to have and to hold the same, to them and their heirs, those of them of good and regular habits, and of capacity to do business and manage property, to take care of and manage as trustees the portion or portions thereof belonging to those, if any, who are not then possessed of such habits and capacity; but, before said property shall vest in and be theirs, proper, suitable, and sufficient bonds or other security must be given by them for the payment of said sum or sums to my said daughter, if living, so long as she shall live, to my said son's widow, if she shall then be living, so long as she lives and remains his widow, and also for the good and sufficient support of my said son so long as he shall live. And, lastly, I hereby constitute and appoint all the said trustees to be also the only executors of this, my last will and testament; and I direct that said executors and trustees and those hereafter appointed under this will shall each be exempt from giving bond, or from giving a surety or sureties on his or their bond; and in case any of said executors or trustees, or both, shall at any time decline to act as such, or die, then application shall be made by him or them who are willing to act or are acting as such to the supreme court in and for said county of Strafford to fill the vacancies so caused."

Mr. J. G. Hall for executors.

Messrs. W. L. Foster and Jeremiah Smith for trustees.

Messrs. G. E. Cochrane, Worcester & Gafney, and Frink & Batchelder for Hiram H. Barker.

Doe, Ch. J., delivered the opinion of the court:

The construction of the will, including the question whether the testator intended the remainder, which he devised to his grandchildren, should vest in them before they became entitled to a distribution of it, is determined as a question of fact by competent evidence, and not by rules of law. *Rice v. Boston Port & Seaman's Aid Soc.* 56 N. H. 191, 197, 198, 203; *Brown v. Bartlett*, 58 N. H. 511; *Kimball v. Lancaster*, 60 N. H. 264; *Goodale v. Mooney*, Id. 528, 534, 535, 49 Am. Rep. 384; *Sanborn v. Sanborn*, 62 N. H. 631, 643; *Kennard v. Kennard*, 68 N. H. 308, 310;

Bodwell v. Nutter, Id. 446; *Kimball v. New Hampshire Bible Soc.* 56 N. H. 139, 150; *Doten v. Doten*, 66 N. H. 381, 383.

"Good and regular habits" are a condition on which he directs that more than one right shall depend. His solicitude on this subject is significant. It is traceable, in the will, to a probable cause, and is the motive of several of his arrangements. The proviso that, when the time arrives for the distribution of the remainder among the grand-children, "those of them of good and regular habits, and of capacity to do business and manage property," shall "take care of and manage as trustees the portion or portions thereof belonging to those, if any, who are not then possessed of such habits and capacity," is evidence on the question whether he intended the remainder should vest in the grandchildren before the time of distribution. If their interest is vested, they can sell it when they severally come of age. If they can sell it, they can consume the proceeds. He did not intend they should have power to squander it before "those of them of good and regular habits" and competent were authorized to save the portions of the others. When he fixed the day on which "all my estate shall be theirs to have and to hold the same, to them and their heirs," with the proviso for the protection of those "who are not then possessed of" good habits and business capacity, and another proviso that, "before said property shall vest in and be theirs, . . . security must be given by them," he meant that, before it became "theirs," it should not be theirs in a sense that would enable the intemperate, incapable, or improvident (if such there should be), or any others, to sell or incur an incumbrance in it.

The trustees contend that, if the remainder does not vest in the grandchildren before the time of distribution, the children of a grand-child who is then dead will take nothing; that their disinheritance was not intended by the testator; and that, consequently, the remainder vests before that time; and this position is sustained by many authorities. Of various words and phrases, there is, in reported cases, a construction that would disinherit the descendants of deceased donees, contrary to the donor's intent; and the consequence of this error is often avoided by holding that an estate vested in deceased donees, contrary to his intent. When the second error merely corrects the first, the result is the same as if the will were read as he understood it. If a will cannot be conformed to the law unless devised property vests sooner than the testator intended, the inquiry may be whether his intent as to the time of vesting is qualified by his intent that the devisees shall have the property, and that the devise shall be carried into effect *cy près*. The construction that gives to A. an estate which the testator gave to A's children is far from the intent on that subject; but, if it is as near as possible, it may accord with the intent on the subject of approximation. Barker's intention not to disinherit the children of grandchildren who die before the time of distribution would not be properly carried

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out by unnecessarily vesting the property in the grandchildren before that time, contrary to his intent. Under such a variation of the will, the orphans might not receive what he meant they should have. His design might be frustrated by the construction adopted to give it effect. If his intent not to cut them off could be executed in no better way than vesting the property in their parents before the intended time, there would be a question which the case does not present. In proprietary rights, children are regarded by the people of this state as the natural representatives of their deceased parents; and the general meaning of testators and the general understanding of wills are that the principle of lineal representation is accepted and acted upon as an implied basis of distribution, except so far as a purpose to set it aside is clearly expressed. The popular construction is strengthened by the common knowledge of the law of inheritance. The Act of 1718 provided that the judge of probate should order and make distribution of the real and personal estate of an intestate in manner following: A portion to the widow, and the residue to the "children, and such as shall legally represent them, if any of them be dead; . . . and in case there be no children, nor any legal representative of them, then" a larger portion to the widow, and the residue equally to the next of kin in equal degree "and those who legally represent them, no representatives to be admitted among collaterals after brothers' and sisters' children; and, if there be no" widow and no child, to the next of kin. "and their legal representative, as aforesaid." Laws 1726, pp. 102, 103. "We often mistake for nature what we find established by long and inveterate custom." 2 Bl. Com. 11. When this will was made, the rule of representation, enacted as a natural order of succession, had been in force 164 years. Its constant operation had confirmed the instinctive idea of right, and exerted the influence of immemorial and familiar usage in defining the language of the people, raising an implication in many forms of testamentary expression that materially affects their sense, and indicating a testamentary intent to be assumed if not rebutted by convincing proof.

The prevailing view that lineal representation is a natural right, and its known operation as a legal right when not superseded by an exercise of testamentary power, is evidence that the will means that the remainder shall go, in equal shares, to the devisees living at the time of distribution, and to the children of such of them as are then dead. *Pinkham v. Blair*, 57 N. H. 226, 242-244. The testator's language is: "When the youngest of said children [of the testator's son and daughter] shall arrive at the age of forty years, then all my estate shall be theirs, to have and to hold the same, to them and their heirs." This would not be commonly understood to be an expression of an intent to disinherit the descendants of a deceased devisee. The generally accepted meaning would be that such descendants are to stand in the place of the parent, and take as devisees. The competent evidence does not show

that the meaning is to be found in any other than the ordinary and popular sense in which the terms of every written instrument are to be understood when a peculiar sense is not proved. 1 Greenl. Ev. § 278. The ordinary and popular sense being the legal sense, lineal representation is a part of the devise of the remainder to the testator's grandchildren. Correct construction is not insured by correct views of the law. A testator's right to use words in the sense in which they are commonly understood may be infringed when that sense is not known to his judicial interpreters, or is disparaged by their educational bias. The professional and official sense sometimes introduced by construction is in effect a scholastic dialect, not used by the mass of the people. "The bulk of mankind act and deal with great simplicity; and on this is founded the rule that '*benigna faciendæ sunt interpretationes cartarum propter simplicitatem laicorum.*' Words are to be taken in their popular and ordinary meaning, unless some good reason be assigned to show that they should be understood in a different sense. . . . *Si nulla sit conjectura quæ ducat alio, verba intelligenda sunt ex proprietate, non grammatica sed populari ex usu.*" 2 Kent, Com. 555. The construction is "favorable," "for the maxims of law are that '*verba intentioni debent inservire;*' and '*benigne interpretamur chartas propter simplicitatem laicorum.*' And therefore the construction must also be reasonable and agreeable to common understanding." 2 Bl. Com. 379; Co. Litt. 88a; Broom, Legal Maxims, 418; Hill v. Grange, 1 Plowd. 164, 170; Williams, J., in Doe v. Perratt, 6 Mann. & G. 814, 836; Chitty, Cont. 79, 81; Perkins v. Mathes, 49 N. H. 107, 110. "The peculiar indulgence extended to testators, who are regarded as *inopes consilii*, has exempted the language of wills from all technical restraint, and withdrawn them in some degree from professional influence." 2 Jarman, Wills, 787; 2 Bl. Com. 381; Bacon, Abr. "*Legacies and Devises.*" C; Root v. Stuyvesant, 18 Wend. 307. "Words of limitation shall operate as words of purchase. Implications shall supply verbal omissions. The letter shall give way. Every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest." Chapman v. Brown, 8 Burr. 1626, 1634, 1635. In this state a peculiar want of advice or learning in drafting wills is not presumed. The common understanding of all written instruments is their legal construction, if a different meaning is not proved. One of the instances in which the authorities that defeat intention by adhering to technical rules and technical definitions are disregarded is a devise, with a remainder over if the devisee dies without issue. Hall v. Chaffee, 14 N. H. 215, 218-222, 326-240; Bell v. Seamon, 15 N. H. 881, 890, 891, 41 Am. Dec. 706; Eaton v. Straw, 18 N. H. 320, 825, 827, 328-330; Downing v. Wherrin, 19 N. H. 9, 84-86, 49 Am. Dec. 139; Ladd v. Harney, 21 N. H. 514, 526; Pinkham v. Blair, 57 N. H. 226, 237, 239; Kimball v. Penhallows, 60 N. H. 448, 451.

The limitation over is not based on an in-
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definite failure of issue, and is not prohibited by the rule against perpetuities. "The context may show clearly that the testator meant to put two different senses upon the same word." Best, J., in *Murthwaits v. Jenkinson*, 2 Barn. & C. 857, 887; 2 Jarman, Wills, 842. The word "children" has several ordinary and popular significations. One includes all descendants; another is limited to descendants of the first degree. In this case the objects at which the testator was aiming are evidence that he used the word in both senses. As a description of persons, the youngest of whom (at the age of forty) he selected for the purpose of fixing the time of distribution, it was used in its limited sense. The youngest of all future generations was not the individual named for that purpose; and, as he used the word "children" in the limited sense before he said his estate should be "theirs", a literal reading would disinherit the children of deceased children. But the general and substantially universal understanding that, as a description of legatees and devisees, "children" includes the issue of those who die after the will is made, is sufficient evidence that the devise to children expresses an intent to include such issue. "Upon the reason of the thing, the infant is the object of the testator's bounty; and the testator does not mean to deprive him of it, in any event. Now, suppose that this object of the testator's bounty marries, and dies before his age of twenty-one, leaving children; could the testator intend in such an event to disinherit him? Certainly he could not." *Goodtitle v. Whitby*, 1 Burr. 228, 234. "The disinheritance of issue of any child who may marry and die before the expiration of the trust period" is "a consequence which no one can doubt the testator never intended." *Goebel v. Wolf*, 118 N. Y. 405, 415. "We cannot presume such to have been the intention of the testator." *Dale v. White*, 38 Conn. 294, 297. "In ninety-nine cases out of a hundred it is the intention of the testator that his bounty should be transmitted to the children or family of the beneficiary; otherwise, indeed, full effect is not given to it." *Chess' App.* 87 Pa. 362, 365, 80 Am. Rep. 361. Their disinheritance "would not be presumed to be intended by the testatrix unless such intention is clearly manifested." *Teale v. Hathaway*, 129 Mass. 164, 166; *Collier's Will*, 40 Mo. 287, 825. "The testator could not have intended such a result." *Doe v. Consideine*, 73 U. S. 6 Wall. 458, 478, 18 L. ed. 869, 876; *Cropley v. Cooper*, 86 U. S. 19 Wall. 167, 175, 23 L. ed. 109, 113; Buller, J., in *Doe v. Perryn*, 3 T. R. 484, 495; *Perry v. Rhodes*, 6 N. C. 140, 142. Barker's intention that, at the time of distribution (determined by legal construction), the children of deceased grandchildren should take as devisees, is not modified by conflicting intent or by law.

By annuities and otherwise, the testator, a widower, made what he considered suitable provision for C. and H., his only children. He clearly expressed his purpose that the remainder of his estate should not vest in them, but should vest in their children "when the youngest of said children shall arrive at

the age of forty years." If he had said "when the youngest of said children shall arrive at the age of twenty-one years," the validity of the devise to them would not have been questioned. H. contends that the remainder may not vest within a period prescribed by law; that the devise is void for remoteness; and that the remainder vested in C. and H. at the testator's death, as intestate property. It is not now necessary to determine the legal possibility of knowing, during the lives of C. and H. (Gray, *Perpetuities*, § 215), who will be the youngest of their children. Without considering that question, it is assumed that during the lives of C. and H. the remainder will not vest in their issue. A dominant idea of the residuary clause and of the whole will is that the testator's grandchildren shall have the bulk of his estate. Not less dominant or less manifest is his determination that C. and H. shall not have it. His intent would not have been plainer if he had inserted a declaration that the grandchildren's remainder should not be transferred from them to C. and H. by judicial construction. The question is whether his appointment of the time of vesting in the grandchildren is wholly or partially void for remoteness because he said "forty" instead of "twenty-one," and whether his inability to postpone the vesting as long as he wished is a reason why the property should not go to those to whom he gave it. Could he suspend the grandchildren's ownership beyond the time when the youngest of them would arrive at the age of twenty-one years? If he could not does their title fail? He willed that the remainder should be theirs. When it should be theirs was another point for him to decide. Upon consideration of such matters of law and fact as were within his knowledge, he chose the time when the youngest would be forty years old. He did not know that, on a judicial view of public policy, they should have it nineteen years sooner. Is this a ground on which it can be held that they shall not have it at all? There is no evidence, direct or inferential, and no reason to believe, that the testator regarded his grandchildren's title as inseparably connected with his appointment of the time of vesting, or as resting upon the validity of that appointment. In his mind, the main point evidently was the extent to which he disinherited C. and H., and put their children in their places. The time when the property, after supporting the first generation of his heirs, should pass to the second, must have been, in his estimation, a matter of less consequence. His understanding is a question of probability. *Rice v. Boston Port & Seaman's Aid Soc.* 56 N. H. 191, 197, 198, 203. It is not probable that he understood the change he made in the natural and legal order of succession would depend upon the property's being withheld from the grandchildren nineteen years after the youngest came of age. The will, made in 1882, bears marks of deliberation. It cannot be assumed that the testator ever forgot the circumstances of his family, or his reasons for making a will. His deliberation would not be likely to cease in 1882. In 1886 he added two

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codicils, increasing the provision for C. and H., but making no change that affects the present inquiry. The will he had made, and his reasons for making it, were still in his mind. He died in 1887. At that time his only daughter, C., was about forty-five years old, and unmarried. His only son H., was thirty-five years old, had been married fifteen years, and had five children, and his wife was thirty-two years old. There might be a failure of issue, and the remainder might go to collateral heirs. The testator acted upon the presumption that there would not be an early failure of issue, and that the remainder would go to his descendants. He had reason to expect, and the provision for the education of grandchildren shows he did expect, his only issue, after the death of C. and H., would be the issue of H. The care with which he studied the interests of both generations is evinced by the elaborate details of the will and codicils, and the natural anxiety of a person in his situation. Whatever doubts may be entertained of the wisdom of his conclusions, they were presumably reached and held upon all the painstaking he was capable of in weighing the evidence of his duty. After years of observation and reflection, his unchanged judgment was that the welfare of his issue required an absolute provision for the comfort of C. and H. during their lives, a conditional appropriation of \$30,000 for H., other special appropriations (including one for education), and a devise of the remainder to the grandchildren. In this manner and to this extent, he was convinced it was his duty to modify the operation of the statutory rule of distribution. His exercise of testamentary power to this end was his primary and leading purpose. He looked upon the postponement of the grandchildren's title nineteen years after the youngest came of age as comparatively unimportant. Taking this view of the condition and prospects of his children and grandchildren, as that view is disclosed in the will, and considering his manifest reasons for disposing of his property as he did, there is no doubt on the question of what is called primary and secondary, or general and particular, intent.

The justice and necessity of withholding the control of his estate from C. and H., and settling nearly the whole of it in trust for their benefit and the benefit of their children, is a question on which there is no appeal from his decision. He may have had reason to fear that, without such a settlement, the support of C. and H. and their children would soon become a public charge. *Root v. Stuyvesant*, 18 Wend. 276, 309, 310. The legislature had authorized him to guard his issue and the public against that misfortune, and had not fixed a time beyond which an estate could not be vested by an executory devise. "A great proportion of the rules and maxims which constitute the immense code of the common law . . . was the application of the dictates of natural justice and of cultivated reason to particular cases." 1 Kent, Com. 471. "The common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and en-

lightened public policy. . . . It has its foundations in the principles of equity, natural justice, and that general convenience which is public policy." *Norway Plains Co. v. Boston & M. Railroad*, 1 Gray, 263, 267, 268, 61 Am. Dec. 423. "It is the great merit of the common law that it is founded upon a comparatively few broad, general principles of justice, fitness, and expediency." *Com. v. Temple*, 14 Gray, 69, 74; *Jones v. Randall*, Cowp. 37, 39. In the absence of statutory regulation, the inability of a testator or grantor to suspend the vesting of a legal or equitable title for an unreasonable time is a portion of a mass of common law that consists of what is judicially recognized as convenient, expedient, and required by the common welfare. A requirement that titles shall vest in a reasonable time is readily accepted as a rule dictated by public interests, clear enough and strong enough to determine public policy, and to be classed with moral right as evidence of law. The rule against perpetuities and unreasonable remoteness "was created to effect a general end of public policy, and there is no reason in history or policy why all future interests should not fall within it." Gray, *Perpetuities*, § 298; *Wood v. Griffin*, 46 N. H. 230, 235. "The necessity of imposing some restraint on the power of postponing the acquisition of the absolute interest in or dominion over property will be obvious if we consider . . . what would be the state of a community in which a considerable proportion of the land and capital was locked up. . . . Such a state of things would be utterly inconsistent with national prosperity; and those restrictions which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, or originated in more exceptional motives, would be baneful to all. Perhaps these restrictions most frequently spring from the desire to exert a posthumous control over that which can be no longer enjoyed." 1 Jarman, *Wills*, 250, 251. "On the same reason with bonds and contracts in restraint of trade stand perpetuities, attempts to create which are never permitted by the law to succeed, on account of the tendency of such limitations to paralyze trade by shackling property and preventing its free circulation for the purposes of commerce. . . . This doctrine of 'perpetuities,' as it is called, is of comparatively modern introduction. Its objects were, indeed, at a very ancient period of English law, in some degree accomplished by a maxim . . . that property has certain inseparable incidents, among which is the right of alienating it." *Mitchel v. Reynolds*, 1 Smith, Lead. Cas. Hare & W's notes, 183d. "If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void." Littleton, *Tenures*, § 360. "And the like law is of a devise in fee upon condition that the devisee shall not alien. The condition is void. . . . And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest or property therein upon condition that the

donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic, and bargaining and contracting between man and man." Co. Litt. 223a; Gray, *Restraints on Alienation*, § 279. "These executory devises . . . have some of the inconveniences of estates tail, as they lock the property up during the period that the contingency may happen, without any power of alienation. . . . This operation of executory devises, or, in other words, of contingent estates created by will, tended to fetter real estates by a species of perpetuity, and prevent them from circulating from owner to owner, as the ends of commerce or the exigencies and wants of families might require. The courts of justice have therefore wisely and steadily determined that they would not permit these executory devises to tie up property beyond a moderate and reasonable period." *Anderson v. Jackson*, 16 Johns. 332, 398, 399, 2 Am. Dec. 330.

"The history of executory devises presents an interesting view of the stable policy of the English common law, which abhorred perpetuities, and the determined spirit of the courts of justice to uphold that policy, and keep property free from the fetters of entailments, under whatever modification or form they might assume. Perpetuities, as applied to real estates, were conducive to the power and grandeur of ancient families, and gratifying to the pride of the aristocracy; but they were extremely disrelished by the nation at large, as being inconsistent with the free and unfettered enjoyment of property. 'The reluctant spirit of English liberty,' said Lord Northington, 'would not submit to the statute of entails; and Westminster Hall, siding with liberty, found means to evade it.' Common recoveries were introduced to bar estates tail; and then, on the other hand, provisos and conditions not to alien . . . where introduced to recall perpetuities. The courts of law would not allow any such restraints . . . to be valid.

. . . . Executory limitations were next resorted to, that men might attain the same object. . . . This species of limitation . . . was slowly and cautiously admitted, prior to the leading case of *Pells v. Brown*" (1620) Cro. Jac. 590, which "established the legality of an executory devise of the fee upon a contingency not exceeding one life, and that it could not be barred by a recovery. . . . The limits of an executory devise were gradually enlarged. . . . In 1736 . . . the addition of twenty-one years to a life or lives in being was held to be admissible. . . . A devise of lands in fee to such unborn son of a *feme covert* as should first attain the age of twenty-one was held to be good; for the utmost length of time that could happen before the estate would vest was the life of the mother, and the subsequent infancy of the son. . . . When an executory devise is duly created, it is a species of entailed estate." 4 Kent, Com. 264, 265, 267, 270. "All these perpetuities [of entailment] were against the reason and policy of the common

law; for at common law all inheritances were fee simple. . . . The true policy and rule of the common law in this point was in effect overthrown by the statute *de bonis conditionalibus* made anno 18 Edw. I., which established a general perpetuity by act of parliament, for all who had or would make it, by force whereof all the possessions of England in effect were entailed accordingly, which was the occasion and cause of the said and divers other mischiefs." *Mildmay's Case*, 6 Coke, 40. "It was adjudged by Bereasford that the issues in tail should not alien no more than they to whom the land was given, and that was the intent of the makers of this act." 2 Inst. 336. "The nobility, in order to perpetuate their possessions in their own families, procured the statute . . . to be made." By allowing estates to be entailed, the law "made it impossible to diminish the property of the great families, and at the same time left them all means of increase and acquisition. . . . The impossibility of obtaining a legislative repeal of the statute *de donis* induced the judges to adopt various modes of evading its effects, and of enabling tenants in tail to charge or alien their estates." 1 Cruise, Dig. 77, 78, 101, 102. "The inconvenience of these fettered inheritances is as strongly described, and the policy of them as plainly condemned, in the writings of Lord Bacon and Lord Coke as by subsequent authors, and the true policy of the common law is deemed to have been overthrown by the statute *de donis*, establishing those perpetuities. Attempts were frequently made in parliament to get rid of them, but the bills introduced for that purpose . . . were uniformly rejected by the feudal aristocracy, because estates tail were not liable to forfeiture for treason or felony, nor chargeable with the debts of the ancestor, nor bound by alienation. They were very conducive to the security and power of the great landed proprietors and their families, but very injurious to the industry and commerce of the nation. It was not until *Taltarum's Case* [Hardr. 209], 12 Edw. IV., that relief was obtained against this great national grievance, and it was given by a bold and unexampled stretch of the power of judicial legislation. The judge upon consultation, resolved that an estate tail might be cut off and barred by a common recovery. . . . The desire to preserve and perpetuate family influence and property is very prevalent with mankind. . . . If the doctrine of entail be calculated to stimulate exertion and economy, by the hope of placing the fruits of talent and industry in the possession of a long line of lineal descendants, undisturbed by their folly or extravagance, it has a tendency, on the other hand, to destroy the excitement to action in the issue in tail, and to leave an accumulated mass of property in the hands of the idle and the vicious. Dr. Smith insisted, from actual observation, that entailments were unfavorable to agricultural improvements. . . . Some of the most distinguished of the Scotch statesmen and lawyers have united in condemning the policy of perpetual entails, as removing a very powerful incentive to preserving industry

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and honest ambition. They are condemned as equally inexpedient and oppressive. . . . Entailments are recommended in monarchical governments as a protection to the power and influence of the landed aristocracy; but such a policy has no application to republican establishments, where wealth does not form a permanent distinction, and under which every individual of every family has his equal rights, and is equally invited by the genius of the institutions to depend upon his own merit and exertions. Every family, stripped of artificial supports, is obliged, in this country, to repose upon the virtue of its descendants for the perpetuity of its fame." 4 Kent, Com. 18, 19, 20; *Anderson v. Jackson*, *supra*.

The act of parliament allowing estates tail to exist in England had no effect in the colonies as a statute, and did not become common law in this province by implied adoption. "Our ancestors brought with them only such parts of the laws of England as were adapted to their new condition, and, we may add as quite important, such only as were conformable to their principles. . . . Not only in regard to the common law, but as to the statutes in force at the time of their settlement, some parts were adopted, some entirely rejected, and some adopted with important modifications." 1 Bl. Com. 108, *Sharswood's note*; 1 Kent, Com. 173; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 6, 7, 15, 17, 19, 18 L. R. A. 679; *State v. Saunders*, 66 N. H. 89, 72, 73, 18 L. R. A. 646; *Re Ricker*, 66 N. H. 207, 226, 24 L. R. A. 740. The ancient policy of the common law that inheritances should be vested, alienable, and unfettered was the policy of the New Hampshire colonists. They were not members of the ruling class who introduced the grievance of perpetual entails. The statute *de donis*, not being conformable to their principles or adapted to their institutions and wants, was a part of a great body of law from which they liberated themselves by migration. The Act of 1837 (Rev. Stat. chap. 129, § 1; Id. chap. 340), authorizing tenants in tail to convey by deed, was declaratory of the common law (*Welles v. Olcott*, Kirby (Conn.) 118; *Chappel v. Brewster*, Id. 175; *Hamilton v. Hempsted*, 3 Day, 332), and was designed to remove the doubt which naturally existed in the absence of explicit legislation (*Jewell v. Warner*, 35 N. H. 176, 177, 180), and which had been a reason for resorting to the collusive fiction of a common recovery (2 Bl. Com. 357-361) in some conveyances of New Hampshire land. A rule against perpetuities, applicable to entails and the creation of estates at future times unreasonably remote, is a doctrine of the common law that "grows out of the situation and circumstances of the people" (*Brown v. Langdon*, Smith (N. H.) 178, 182); in other words, out of that general convenience which is public policy. The question of policy necessarily relates to the community whose interests are concerned. In 1699 the court "held that an executory estate to rise within the compass of a reasonable time is good; that twenty, nay, thirty, years has been thought a reasonable time. So is the compass of a life or lives;

for, let the lives be never so many, there must be a survivor, and so it is but the length of that life (for Twiden used to say the candles were all lighted at once); but they were not for going one step further, because these limitations make estates unalienable, every executory devise being a perpetuity as far as it goes,—that is to say, an estate unalienable, though all mankind join in the conveyance." *Scatterwood v. Edge*, 1 Salk. 229. "At first it was held that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years. At length it was extended a little further, viz., to a child *en ventre sa mere* at the time of the father's death; . . . and the rule has, in many instances, been extended to twenty-one years after the death of a person in being." *Goodtitle v. Wood* (1740) Willles Rep. 211, 213. "The number of contingencies are not material if they are all to happen within a life in being, or a reasonable time afterwards." *Gulliver v. Wickett*, 1 Wils. 105, 107. "The only question is whether they are to happen within a reasonable time or not." Buller, J., in *Thellusson v. Woodford*, 4 Ves. Jr. 227, 238. "The contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years, for courts of justice will not indulge even wills so as to create a perpetuity, which the law abhors, because by perpetuities (or the settlement of an interest which shall go in the succession prescribed without any power of alienation) estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established." 2 Bl. Com. 173, 174. "Such contingency must happen within a short space of time, such as a life in being or some few years after; otherwise it would be in a testator's power to limit an estate unalienable for generations to come,—a power which the law very wisely denies to every man, as the exertion of it would tend to render property in great measure useless to the general purposes and calls of a commercial society." Fearn, *Remainders*, 314, 315. "The object of the rule against perpetuities was to prevent property's being tied up for a longer time than was deemed reasonable, so that it could not be alienated absolutely by the owners." 14 Am. L. Rev. 237. "The object of the rule against perpetuities cannot be simply to prevent the tying up a particular parcel of land, or other specific thing, as would seem from the language of many of the books; . . . for it is applied to a legacy of money, and also when the trustees . . . have power to change the investment. In such cases no specific property is rendered inalienable. . . . A perpetuity of this sort is necessarily created when a fund is devoted to a charity absolutely. Even if specific property is not rendered inalienable, the proceeds of the fund can only be applied in one way forever." 4 Kent, Com. 283, note by Holmes. "It has been . . . said that, if future interests can be alienated or released, they cannot be too remote, and that

the rule against perpetuities is aimed only at such limitations as tie up property and take it absolutely out of commerce. . . . The rule applies to cases where there is no tying up of property. For instance, suppose real and personal property are given to trustees and their heirs, with full power of changing investments, but upon trusts which may arise more than twenty-one years after lives in being; such trusts are void, yet no property is tied up. But, further, conditional limitations may be bad for remoteness, though they are releasable or alienable. . . . The true object of the rule against perpetuities is to prevent the creation of interests on remote contingencies. Its effect in removing restrictions on the immediate conveyance of property is only an incident. . . . It is not the alienability of an interest dependent on a remote contingency, but its utterly uncertain value, which furnished the sufficient justification, if it was not the original ground, of the rule against perpetuities. If there is a gift over of an estate on a remote contingency, the market value of the interest of the present owner will be greatly reduced, while the executory gift will sell for very little; or, in other words, the value of the present interest plus the value of the executory gift will fall far short of what would be the value of the property if there were no executory interest." Gray, *Perpetuities*, §§ 140, 141, 159, 236, 241, 268, 269.

The alienable character of property is not usually understood in a sense large enough to bring a case of this kind (a trust with full power of changing investments) within the operation of the rule against remoteness. The reasons of the rule are not fully stated in the authorities. Its application may require a wide view of public policy, including the legal nature and design of property, the reasonable extent of an owner's posthumous control, and the economic and moral effects of realty and personality being largely held in trusts of long duration for mere accumulation, or for purposes of entailment. Divers evils could be materially increased and unduly perpetuated if the law allowed long-continued accumulations of estates in trust for future private use, or appropriations to maintain grantees or legatees, and their heirs, forever or for many generations, without effort or care on their part, and without ability to waste or lose the capital devoted to their support. "The most universal and effectual way of abandoning property is by the death of the occupant, when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease, of course; for, naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him, which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society." 2 Bl. Com. 10. What- ever may have been the origin of proprietary

rights, the power of grantors and testators to control the tenure, possession, use, and alienation of property after it ceases to be theirs is one of the subjects on which the interests of society are sufficiently clear and strong to be evidence of common law. By that law an owner's imposition of unreasonable restrictions upon the legal and equitable titles of his successors is not one of the rights of which property consists; and the common-law elements of ownership are not extinguished by a statute conferring or regulating the power of alienation by deed or will. An inability to postpone the vesting of an estate for an unreasonable time is one of many instances of a proprietor's loss of control when he parts with his title. The rule against remoteness is not a detached doctrine, but a broader principle, applied to the creation of remote interests. "The policy of the law, where a man dies leaving an infant son, restrains alienation until such infant attains twenty-one; and, as such infant may not be born until nine or ten months or perhaps a further period after the death of its father, the power of alienation is, of course, suspended during that period; and, as the law imposes such suspension of the power of alienation on the infant, so it will permit such suspense by the owner for a like period, for, whether it arises from the act of the law or of the party, the effect will be the same in relation to the interest of the public in property, which is what is consulted in the doctrine of perpetuities." *Fearne, Remainders*, 321, *Powell's note*; 2 *Fearne, Remainders*, 4th ed. p. 118. "Estates may be unalienable for lives in being and twenty-one years, merely because a life may be an infant or *en ventre sa mere*." *Arden, M. R.*, in *Thellusson v. Woodford* (1799) 4 Ves. Jr. 227, 337. "The established length of time during which the vesting may be suspended is during a life or lives in being, the period of gestation, and the infancy of such posthumous child." *Macdonald, O. B.*, delivering the opinion of the judges in *Thellusson v. Woodford*, 11 Ves. Jr. 112, 143; *Id.* (1805) 1 Bos. & P. (N. R.) 357, 393. "That rather implies that he thought the rule was confined to cases of minority." *Bayley, B.*, delivering the opinion of the judges in *Cadell v. Palmer*, 10 Bing. 140, 145; *Id.* (1833) 1 Clark & F. 372. "The twenty-one years are introduced to provide for the minority of a child born, and a few months are allowed to let in a posthumous child." *Hawley v. Northampton*, 8 Mass. 3, 38, 5 Am. Dec. 66; *Gray, Perpetuities*, §§ 171, 176. "Upon the introduction of executory devises, . . . care was taken that the property which was the subject of them should not be tied up beyond a reasonable time. . . . The cases of *Lloyd v. Carew*, Show. P. C. 137, in the year 1696, and *Marks v. Marks*, 10 Mod. 419, in the year 1719, established the point that for certain purposes such time as, with reference to those purposes, might be deemed reasonable beyond a life or lives in being, might be allowed. The purpose in each of those cases was to give a third person an option, after the death of a particular tenant, to purchase the estate; and twelve months in the first case, and three months in

the other, were held a reasonable time for that purpose. These cases . . . do not necessarily warrant an inference that a term of twenty-one years, for which no special or reasonable purpose is assigned, would also be allowed. . . . *Taylor v. Biddall* (1677) 2 Mod. 289, is the first instance we have met with in the books in which so great an excess as twenty-one years after a life or lives in being was allowed. . . . That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was followed by, and was the foundation of, the decision in *Stephens v. Stephens* (1736) Cas. t. Talb. 232. . . . This, also, was a case of infancy. It was on account of that infancy that the vesting of the estate was postponed. . . . These decisions, therefore, do not distinctly or necessarily establish the position that a term in gross for twenty-one years, without any reference to infancy, after a life or lives in case, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy. . . . The limit is a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person whatever. This . . . will not tie up the alienation an unreasonable length of time." *Cadell v. Palmer*, 10 Bing. 140, 142-144, 151; *Id.* (1833) 1 Clark & F. 372. In the same case it was held that, although a period of twenty-one years can be allowed without an infant, a period of nine months cannot be allowed without gestation.

The devise to trustees for the support of the testator's children during their lives, remainder to his grandchildren (born and unborn) when the youngest is forty years old, is an unreasonable suspension of the grandchildren's future estate. The vesting of their remainder cannot be postponed beyond the time when the youngest is twenty-one. *Marston v. Carter*, 12 N. H. 159, 162; *Dennett v. Dennett*, 40 N. H. 493, 503, 43 N. H. 499, 501; *Wood v. Griffin*, 46 N. H. 230, 234. The number of lives in being that may be designated as a part of the period of postponement, and the power of including the lives of persons to whom no interest is given, and adding a term of twenty-one years in gross without reference to the infancy of a beneficiary (*Gray, Perpetuities*, §§ 171-190, 216-219, 223, 224; *Lewis, Perpetuities*, 167), are open questions in this jurisdiction. A devise to trustees for accumulation during the lives of all the testator's descendants living at his death, and twenty-one years more, without reference to a case of infancy, and then to his most wealthy heir bearing his name, would require an examination of the reasons of the law, and of the reasons given for the judgments rendered in such cases as *Thellusson v. Woodford*, 1 Bos. & P. (N. R.) 357, 4 Ves. Jr. 227, 11 Ves. Jr. 112, and *Cadell v. Palmer*, before cited. There are many English rules the adoption of which is not necessary here to prevent a disturbance of titles; and *Britton v. Turner*, 6 N. H. 481, 486, 26 Am. Dec. 713, and *Hall v. Chaffee*, 14 N. H. 215, 226-240, are precedents for a course that may be taken on any subject when foreign au-

thorities are in conflict with elementary principle. The opinion of the majority of the court in *Hall v. Chaffee* sustains a testator's intention against an English rule of construction in the application of the law of perpetuities. In *Duke of Norfolk's Case*, 8 Ch. Cas. 1, 36, 49, Lord Nottingham was pressed with its case: "Suppose a contingency which must take effect, if at all, within one hundred years, but may not take effect any sooner. What then? Where will you stop?" "Where?" he answered. "Why, everywhere, where there is not any inconvenience. . . . You may limit, it seems, upon a contingency to happen in a life. What if it be limited, if such a one die without issue within twenty-one years or a hundred years, or while Westminster Hall stand? Where will you stop, if you do not stop here? I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear." Gray, *Perpetuities*, § 169. Entails, perpetuities, restraints on use (*Postor v. Foster*, 62 N. H. 55) or alienation, and contracts in restraint of trade (*Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. Limited* [1894] App. Cas. 553, 553, 554) present questions of visible inconvenience, generally called questions of public policy, in the decision of which it may be necessary to consider what is reasonable and expedient.

The feudal doctrine of forfeiture for and by a conveyance of a larger interest than the grantor has is no part of our common law. *Fletcher v. Chamberlin*, 61 N. H. 438, 438, 484. A lease for forty years, made under a power to lease for twenty-one years, is good for twenty-one. *Alexander v. Alexander*, 2 Ves. Sr. 644. Under a statute restricting to a term not exceeding twenty-one years the time for which a tenant for life can be empowered to lease, a testamentary gift to a tenant for life of a power to lease for sixty-three years is not void. If he makes a lease for more than twenty-one years, it is void for the excess, and no more. Nelson, *Ch. J.*, and Bronson and Cowen, *J.*, in *Root v. Stuyvesant*, 18 Wend. 257, 278, 275-277, 290, 291, 302, 306, 307, 318. "If I had come to a different conclusion," says Nelson, *Ch. J.*, "and been obliged to hold the power to lease void, still I could not concur with the court below in breaking up the other independent portions of the will. . . . The chancellor

. . . argues that the general and important intent of the testator was to give a beneficial estate to his children in preference to remoter descendants, and that the loss of the power so far defeats this intent that the will cannot consistently be upheld." But it must not be forgotten that it is at least equally clear that the testator did not intend his children should take the fee; that he secured to their children or descendants. For aught we can know, he had good reasons for thus withholding it. . . . We cannot comprehend the operations of the mind of the testator, and hit with certainty the motive that led to this provision. The nearest approximation to be made is by considering the language he has used; and . . . I am . . . unable to say that the intent to give the power to lease was paramount to that which oper-

ated to give the estate for life, or that, if he had known the power to be void he would have given the fee. On the contrary, the peculiar and special feature of the will appears to be the provision which secures beyond contingency the estate to the descendants of his children. That is the object and end of the whole will. The life estates, the power of appointment, and the remainders over in default are all in furtherance of this design and agreeably to the rules of law. Thus, the life estates are an inseparable part of the scheme of this family settlement, and must be maintained to carry it into effect. If I must take the place of the testator, and decide for him whether he would give up the power to lease, or the residue of the will,

. . . I must say he would have yielded the former; that the disposition of the residue does not necessarily hang upon it." "I do not think we are required by any rule of construction," says Cowen, *J.*, in the same case, "to declare that a power which, when executed in a proper way, within legal limits, would be perfectly valid, is void because an abortive attempt may be made under it to create an estate so remote as improperly to suspend alienation. . . . We are to read this will just as if the testator had incorporated in it all the provisions of the revised statutes any way applicable, and then declared that, so far as those statutes allow, he desired his will might prevail, and that it should be void in those respects only wherein they declared it should be invalid. . . .

In *Alexander v. Alexander*, 2 Ves. Sr. 644, the master of the rolls said: "Suppose a power to lease for twenty-one years, and he leases for forty; that shall be good for the twenty-one, because it is a complete execution of the power, and it appears how much he has exceeded it. If the court can see the boundaries, it will be good for the execution of the power, and void as to the excess." In *Thellusson v. Woodford*, 4 Ves. Jr. 825, Buller, *J.*, followed Lord Talbot when he declared that in the case of wills "the method of the courts has been not to set aside the intent because it cannot take effect so fully as the testator desired, but to let it work as far as it can."

These sound views have grown into a maxim applicable to almost every legal transaction, '*Valeat quantum valere potest.*' To deeds, wills, and the execution of powers may be added judgments, awards, and all contracts, releases, and discharges. . . . '*Utile non debet per inutile vitari.*' . . . Suppose the parents [of the testator's grandchildren] to prove insolvent, dissipated, or extravagant, it would be a disgrace to the law should we break up the titles of these innocent objects of the testator's bounty, and put them to the hazard of final loss by an idle slip of the pen in the creation of a leasing power." "Courts lean in favor of the preservation of all such valid parts of a will as can be separated from those that are invalid, without defeating the general intent of the testator. . . . A single trust, created for two purposes,—one lawful and the other unlawful,—is good for the lawful purpose, although void for the unlawful one." *Harrison v. Harrison*, 36 N. Y. 543.

547, 548. "It is difficult to discover any principle which forbids the sustaining of the general intent of the testator by cutting off a void trust which is separable from other valid trusts, in a case where the trust which is defeated is independent of the other dispositions of the will, and subordinate to them, and is not an essential part of the general scheme." *Manice v. Manice*, 48 N. Y. 803, 884. This is "merely a statement in another form of the general proposition that valid and void trusts, when independent of each other, may be separated, and the one rejected and the other sustained." *Van Schuyver v. Mulford*, 59 N. Y. 426, 432. "When several trusts are created, and they are independent of each other, each trust complete in itself, and the legal can be separated from the illegal, and upheld, without doing injustice, or defeating what the testator might in the emergency be presumed to wish, the illegal trust may be cut off, and the legal permitted to stand, and thus the intention of the testator be effectuated so far as the law will permit." *Kennedy v. Hoy*, 105 N. Y. 134, 137, 188; *Underwood v. Curtis*, 127 N. Y. 528, 541, 542. "Courts should endeavor, by every reasonable intendment and by a liberal construction, to sustain a testamentary disposition of property, when, in so doing, they can give actual and just effect to the testator's purpose, and validate at least the main, if not the true, part of a testamentary scheme, which contemplates distinct and severable acts." *Henderson v. Henderson*, 118 N. Y. 1, 16. "The endeavor is to find a way of upholding the will, not of breaking it down." *Greene v. Greene*, 125 N. Y. 506, 512. "It is now considered to be the settled rule of law in New York that the will of a testator is to be carried into effect so far as that intention is consistent with the rules of law; that although some of the objects for which a trust is created, or some future interests limited upon a trust estate, are illegal and void, yet, if any of the purposes of the trust are valid, the legal title vests in the trustees during the continuance of such valid objects of the trust, provided the legal be not so mixed up with the illegal objects of the trust that one cannot be sustained without giving effect to the other." 4 Kent, Com. 281, note a.

Withholding the remainder from Barker's grandchildren beyond a reasonable time was not the sole or the main purpose for which he devised nearly all his estate to trustees; and his inability to postpone the grandchildren's title unreasonably does not invalidate the trustees' title, nor prevent their doing the lawful fiduciary work which he ordered them to do. The general devise in trust vests the legal estate in them for such legal purposes as require their services. It is a good devise for the valid uses (including the interests, absolute and conditional, of C. and H.) for which the trustees are directed to hold the property during the lives of C. and H. *Greene v. Greene*, 125 N. Y. 506, 510. During their lives the trust will not infringe any rule of law. During the intended continuance of the trust the testator meant the remainder should vest in no one but the

trustees. The law does not give his children what he gave his grandchildren, nor give his grandchildren what he gave his children. At some time the grandchildren will have their remainder. If his appointment of the time when it is to pass to them from the trustees were a mere nullity, the consequence would be, not that substantially the whole will would be unnecessarily broken, but that the remainder would pass at the termination of the life interests of C. and H. Beyond that time, the validity of the trust depends upon the question whether on this point the will is a mere nullity, or whether the testator's intent that the remainder shall pass at a period more distant than the law allows is carried into effect as nearly as it can be; that is, at the most remote legal time. In *Humberston v. Humberston* (1716) 1 P. Wms. 832, a testator "devised his estate . . . to the Drapers Company and their successors in trust, to convey the premises to his godson Matthew Humberston for life, and afterwards, upon the death of the said Matthew, to his first son for life, and so to the first son of that first son for life, etc., and, if no issue male of the first son, then to the second son of the said Matthew Humberston for life, and so to his first son, etc., and, in failure of such issue of Matthew, then to another Matthew Humberston for life, and to his first son for life, etc., with remainders over to very many of the Humberstons (I think about fifty) for their lives successively, and their respective sons, when born, for their lives, without giving an estate in tail to any of them, or making any disposition of the fee.

By Lord Chancellor [Cowper]: Though an attempt to make a perpetuity for successive lives be vain, yet, so far as is consistent with the rules of law, it ought to be complied with, and therefore let all the sons of these several Humberstons that are already born take estates for their lives; but, where the limitation is to the first son unborn, there the limitation to such unborn son shall be in tail male." By "sons . . . already born," "it must be assumed that the court intended sons born at the time of the testator's death. . . . The distinctive character of the practice of courts of equity, in carrying out executory trusts, is the giving effect to them as far as possible according to the intentions of their author." Lewis, Perpetuities, 450, 451. In *Humberston v. Humberston*, "the trust was executory; and in those cases the courts adopt the doctrine of *cy pres*. That mode of construction is inapplicable where . . . the devisees take by direct devise to themselves." *Mortimer v. West*, 2 Sim. 274, 282. "The case of *Humberston v. Humberston* . . . has usually been considered as a leading authority for the doctrine" of *cy pres*. "The trust, however, being executory, the court was authorized to mold the limitations so as to bring them within the established limits, independently of the doctrine in question." 1 Jarman, Wills, 4th ed. 298, note i. When the construction is *cy pres*, nothing is gained by giving it some other name. "In *Parfitt v. Hember*, L. R. 4 Eq. 448, where it was considered that the testator had intended to

create a series of life estates in perpetuity, *Lord Romilly, M. R.*, by *cy près*, gave the unborn issue an estate tail, declaring that the doctrine was not confined to executory trusts; and this declaration was approved in *Hampton v. Holman*, L. R. 5 Ch. Div. 188, 190, 191." *Gray, Perpetuities*, § 652. As *cy près* is a construction that gives effect to approximations intended by the testator, it cannot depend upon a devise being direct or indirect.

"The most striking illustration . . . of the anxiety of the courts to prevent the total disappointment of the testator's intention by the operation of the rule against perpetuities is afforded by the doctrine of *cy près* or approximation, as it is called. This doctrine applies where lands are limited to an unborn person for life, with remainder to his first and other sons successively in tail, in which case, as such limitations are clearly incapable of taking effect in the manner intended, . . . the doctrine in question gives to the parent the estate tail that was designed for the issue, which estate tail (unless barred by the parent or his issue, being tenant in tail for the time being) will comprise, in its devolution by descent, all the persons intended to have been made tenants in tail by purchase. The intention that the testator's bounty shall flow to the issue is considered as the main and paramount design, to which the mere mode of their taking is subordinate, and the latter is therefore sacrificed." 1 *Jarman, Wills*, 260, 261. "Where a testator has two objects,—one primary or general, and the other secondary or particular,—which are incompatible, the particular intention must be sacrificed, in order that, as far as possible, effect may be given to the general one." *Lewis, Perpetuities*, 426. In *Robinson v. Robinson* (1756) 1 Burr. 38, 50-52, it was held "that, upon the true construction of the said will, . . . the said Lancelot Hicks must, by necessary implication, to effectuate the manifest general intent of the said testator, be construed to take an estate in tail male, . . . notwithstanding the express estate devised to the said Lancelot Hicks, 'for his life and no longer.'" In *Dodson v. Grew* (1787) 2 Wils. 823, the will was: "I give, devise, and bequeath unto my nephew George Grew all my lands . . . for and during the term of his natural life, and, from and after his decease, to the use of the issue male of his body lawfully to be begotten, and the heirs male of the body of such issue male; and, for want of such issue male, then I give all and every the aforesaid premises unto my nephew George Dodson, his heirs and assigns, forever." George Dodson was the plaintiff. George Grew entered, and suffered a common recovery, and died without issue male. It was held that he took an estate tail, and consequently the plaintiff was barred by the recovery. "The statute of wills," says *Wilmot, Ch. J.*, "gives a man power to devise his lands, but he cannot by his will create a perpetuity, nor restrain tenant in tail from suffering a recovery. . . . The intention of the testator clearly was to give George Grew an estate for life only, 28 L. R. A.

but his intention also clearly was that all the sons of George Grew should take in succession. Both these intentions cannot take place. . . . The court must put themselves in the place of the testator, and determine as he would have done if he had been told that both of his intentions . . . could not take place, and had been asked which of them he desired should take effect. . . . If we balance the two intentions, the weightiest is that all the sons of George Grew should take in succession; and therefore . . . George Grew must be adjudged to have been tenant in tail, for the testator's great intention most clearly was that the lands should never go over to the plaintiff but upon a failure of issue of George Grew." "The great intention," says *Clive, J.*, "is to give in succession to all the sons of George Grew, which cannot be without construing it an estate tail in him." "Where there appear a particular intent and a general intent, the general must take place." *Bathurst, J.*, in the same case.

The doctrine of *cy près* goes on the principle "that where there is a general and a particular intent, and the particular one cannot take effect, the words shall be so construed as to give effect to the general intent." *Robinson v. Hardcastle* (1788) 2 T. R. 241, 254. "It has been the settled doctrine of Westminster Hall for the last thirty or forty years that there may be a general and a particular intent in a will, and that the latter must give way when the former cannot otherwise be carried into effect. . . . Nothing could be more positive than the words of the will in" *Robinson v. Robinson* "to show a particular intent that the first taker should take an estate for his life, and no longer. But there was a general intent apparent, which could not be effected but by giving him an estate tail, and on that the decision was founded." *Doe v. Cooper* (1801) 1 East, 229, 234. "A particular intent expressed in a will must give way to a general intent. . . . It is not to be inferred that, because the heirs of the body cannot take in the particular mode prescribed by the testator, he intended that they should not take at all." *Doe v. Harvey* (1825) 4 Barn. & C. 610, 620. "There is certainly no express gift to" the sons of P. M. "as tenants in tail; but it is contended that, in order to effectuate the testator's general or leading intention, they must be held so to take, according to what has been called the doctrine of approximation or *cy près*. . . . The doctrine of *cy près*, in reference to questions of perpetuity, arises where a testator gives real estate to an unborn person for life, with remainder to the first and other sons of such person in tail male, or with remainder to the first and other sons of such person in tail general, with remainder to the daughters as tenants in common in tail, with cross-remainders amongst them. In such a case, the course of succession designated by the testator is one allowed by law, but the direction that the first taker should take for life only, with remainder to his children as purchasers, is illegal, as tending to a perpetuity. In such cases the law, in order to prevent the testa-

tor's intention from being entirely defeated, has treated his expressed intention as divisible into two parts: First, the intention that the first taker and his issue male or issue general, as the case may be, shall all take in succession, according to the legal course of descent; and, secondly, the intention that the first taker shall take an estate for life only, and that his children shall take as purchasers. And, the two intentions being thus ascertained, the courts have treated them as independent of each other, and have said that the inability to carry into effect the second or subordinate intention shall not defeat the primary or general intention; and such a devise has therefore been held to give an estate in tail male or in tail, as the case may be, to the first taker. By these means, the estate

will go in the precise course marked out by the testator, though it will be (contrary to what he intended) liable to be divested from that course by the act of the first taker.

The doctrine has been long recognized, and we should be unsettling landmarks if we were to call it in question. The doctrine is nowhere more clearly stated than in a note of the late Mr. Butler, at the end of Fearn's chapter on the rule in *Shelley's Case* [1 Coke, 88]. Fearn, *Remainders*, 204.

"The courts have considered that the testator's primary object was that the issue of the devise should take the land, and that the mode in which the issue should take it was the testator's secondary object, or, as it has been usually expressed, that the former was his general, the latter his particular, intention. Then, in conformity to their uniform practice of effecting the testator's intention as far as possible, they have thought themselves required to adopt that construction of the devise which, by including the devisee, satisfied the testator's general intention that the issue should take, but which, at the same time, by raising in the issue estates different from those which the testator appeared to have intended them, sacrificed to that extent his particular intention."

Monypenny v. Dering (1847) 16 Mees. & W. 418, 428, 429. "That an estate for life in the plaintiff, according to the particular intent of the testator, contravenes no rule of law, is indisputable.

This construction, however, would defeat the testator's general intent, which was to create an interminable succession of estates in the premises.

To effectuate, therefore, the general intent of the testator, it is necessary to vest in the plaintiff a fee tail." *Allyn v. Mather* (1832) 9 Conn. 114, 127. If the intention cannot be carried into full effect, it is to be carried as nearly into effect as the law will permit. What the real intention of the present testator was with respect to the property in question appears to be clear. He wished his son to enjoy it during his life, and his grandson during his life, and so on forever. But this intention contravenes a legal principle, and cannot be carried into full effect.

As, then, the intention of the testator cannot be completely effectuated, it becomes necessary to consider what estate allowed by law will be nearest to that which he intended; and it is clear that an estate tail will better

correspond with his views than an estate in fee simple. . . . An estate in tail male is clearly nearer to the intention of the testator than an estate in tail general. The testator designed that the property should go from eldest son to eldest son indefinitely, each eldest son having only a life estate. An estate in tail male, excluding females, would be more in conformity to such design than an estate in tail general, admitting females." Daggett, J., in the same case, pages 129-131.

In *Jackson v. Brown* (1835) 18 Wend. 437, a testator devised land to his son, S., for life, remainder to the first son of S. for life, remainder to the first and every other son of the eldest son of S. successively in tail male. "It is an established principle," says the court, "in the decision of questions arising under wills, that the intention of the testator shall be effectuated in so far as such intention is consistent with the rules of law. It is a principle of law that perpetuities shall not be permitted to exist,—real estates shall not be so conveyed or devised as to be inalienable beyond a certain period,—because such perpetuities tend to the inconvenience and prejudice of commerce and society.

The doctrine of approximation, or, as it is called, the *cy près* doctrine, . . . has been adopted in cases where the testator clearly intended to give estates which were contrary to the rules of law; and, in construing such devises, the court's primary object was to give effect to the general intent of the testator, which was that the issue of the devisee should take the land, and that the mode in which the issue should take was his secondary object or his particular intent. In order, therefore, to effect the testator's intent as far as possible (*cy près*), the courts adopt that construction of the devise which, by including the issue of the devisee, satisfied the testator's general intent that the issue should take, but which in part defeated his particular intent by giving to his issue estates different from those intended by the testator.

By raising the estate tail in S., we should defeat the general intent of the testator, to wit, that of continuing the estate in his descendants as long as the rules of law will permit. If the will gave S. an estate tail, our statute converted it into an estate in fee simple; but, if S. took only an estate for life, then the perpetuity is carried one degree further in the family of the testator. If the law will permit that to be done, then it is the duty of the court to do it, as more nearly effecting the intention of the testator.

The testator intended that the lessor [the oldest son of S.] should take as purchaser, and not as heir. This intention is consistent with the rules of law, and should be carried into effect. It was also the testator's intention that the lessor should take an estate for life only. That intention is contrary to the rules of law, as tending to a perpetuity. That intention the court cannot effectuate. But, to effectuate the general intent as far as possible, the lessor must take an estate of inheritance,—a fee simple." "When the particular intent cannot be executed, the general intent must direct the construction." *Hawley v. Northampton* (1811) 8 Mass. 8, 37, 5 Am.

Dec. 66. "The general intention is to control any particular intention. . . . *Ut res magis valeat quam pereat.*" *Malcolm v. Malcolm* (1849) 3 Cush. 472, 477-479. "Where the general intent of the testator is clear, and it is impracticable to give effect to all the language of the instrument expressive of some particular or special intent, the latter must yield to the former. . . . This rule is now clearly established, both in the English and American courts." Redf. Wills, 482, 483. "The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late, as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. . . . In its origin, it was merely descriptive of the operation of the rule in *Shelley's Case*; and it has since been laid down in others, where technical words of limitation have been used, and other words showing the intention of the testator that the objects of his bounty should take in a different way from that which the law allows have been rejected; but in the latter cases the more correct mode of stating the rule of construction is that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense. . . . This doctrine of general and particular intent ought to be carried no further than this; and, thus explained, it should be applied to this and all other wills. Another undoubted rule of construction is that every part of that which the testator meant by the words he has used should be carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject. . . . This construction makes the least sacrifice of the testator's declared intention. It preserves estates to all his grandchildren. . . . It is true that these grandchildren cannot take estates for life, as the testator intended, for the rule in *Shelley's Case* prevents it, nor the children of those children estates for life, . . . for the rule of law against perpetuities prevents that; but this is unavoidable, and no construction can carry into effect all the testator wished. . . . *Murthwaite v. Jenkinson*, 2 Barn. & C. 357, . . . is an example of the proper construction of the word 'issue,' which was considered as a word of limitation, embracing all the descendants, and in which the inconsistent intent that all those descendants should take for life formed no reason why they should not take at all. . . . Thinking therefore that this mode of construing the will gives effect to the greater part of it, and, as far as the rules of law will permit, the whole, whilst that contended for on the part of the plaintiff strikes out altogether the devise to the grandchildren, our opinion is that the former ought to be preferred." *Doe v. Gallini* (1833) 5 Barn. & Ad. 621, 640-645; 2 Jarman, Wills, 484-489.

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As a description of the operation of the rule in *Shelley's Case*, the doctrine of general intent is immaterial. A devise or bequest to A. for life, and to his heirs, shows an intent, not that A's life estate shall be enlarged by the gift to his heirs, but that A. shall have a life estate, and his heirs the remainder. The principle of our common law that finds the intent in competent evidence, and not in rules of construction, upholds the intent, notwithstanding the rule in *Shelley's Case*. *Sanborn v. Sanborn*, 62 N. H. 681. If the operation of that rule had not been prohibited by statute, it would not defeat the intention that a remainder should go to the heirs of a tenant for life. So far as the doctrine of general intent is a rule of approximation that makes the least sacrifice of a testator's declared intention concerning realty or personality (or a mixed fund of realty and personality), rejecting no more of his will than the law makes it necessary to reject, and preferring "the greater part" and the "weightiest" intent when the greater and the less cannot both be carried into effect, it is as applicable in this and other cases as in those in which it has been applied.

By this curative process, a line of partition is drawn through a gift to a polygamous church. The donor's intent is executed so far as it is legal, and the whole gift is supported and applied to lawful uses. *Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U. S. 1, 50, 55, 56, 84 L. ed. 478, 493, 495. By the same process, a devisee's life estate is made an estate tail, and the time appointed by the testator for the vesting of title is changed, and brought within the period prescribed by law. *Gray, Perpetuities*, §§ 643-670. "A charity being a trust in the support and execution of which the whole public is concerned, and which is therefore allowed by the law to be perpetual, deserves and often requires the exercise of a larger discretion by the court of chancery than a mere private trust; for without a large discretionary power, in carrying out the general intent of the donor, to vary the details of administration, and even the mode of application, many charities would fail." *Jackson v. Phillips*, 14 Allen, 589, 590. Discretionary power is exercised by weighing evidence on a question of fact. *Bundy v. Hyde*, 50 N. H. 120; *Darling v. Westmoreland*, 52 N. H. 408, 18 Am. Rep. 55; *Boody v. Watson*, 64 N. H. 186; *Eckstein v. Downing*, 64 N. H. 259; — v. — 66 N. H. 158. As a devise to members of the testator's family is more specific than an ordinary public charity, it may carry less latitude of approximation; but authorities before cited show that the margin is not narrow in all cases of private use. Barker did not intend that his gift to his grandchildren should fail by being excepted from the method of construction that would save a bequest to the Mormon Church. The approximation intended by testators is not limited to charitable uses and cases in which the time of vesting is changed by converting life estates into estates tail. Prohibiting a change of the time without such an altera-

tion of a devised estate would be arbitrary legislation. The time is changed by an intended approximation because the testator's disposition of his property is not invalidated beyond the bounds of necessity. The construction is *cy pres* because it is an ascertainment of his intent. *Perry, Tr.* §§ 723-729; *Adams Female Academy v. Adams*, 65 N. H. 225, 226, 6 L. R. A. 785; *Arnold v. Congreve*, 1 Russ. & M. 209, 215. If the whole of Barker's property had been New Hampshire land, and his will had been in the form of a devise of the whole in tail to his grandchildren living at his death, he would not have been intestate. His general and primary intent would have been that they should have the property; and, as they could not take an estate tail, they would have a fee simple. *Jackson v. Brown*, 18 Wend. 437; 66 N. H. 469. It has been said that "the doctrine of *cy pres* goes to the utmost verge of the law, . . . to the outside of the rules of construction" (1 East, 451), and that "it is not proper to go one step further." 7 Ves. Jr. 390, and authorities cited in Gray, *Perpetuities*, §§ 645, 651. In changing the character of devised estates for the purpose of changing the time of vesting, the authorities have gone further than there is occasion to go in this case. "Such a construction is to be adopted as will make the devise effectual; and, if it cannot be so to the full extent, then so far as it lawfully can." *Dennett v. Dennett*, 40 N. H. 498, 500. "The method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired, but to let it work as far as it can. . . . The very being of executory devises shows a strong inclination, both in the courts of law and equity, to support the testator's intent as far as possible." *Talbot, Id. Ch.*, in *Hopkins v. Hopkins* (1784) *Forrester* (Cas. 4. Talb.) 44, 50. "The common law doth divide according to common reason, and, having made that void that is against law, lets the rest stand." *Norton v. Simmes*, Hob. 12, c. 14; 4 Kent, Com. 281, note a. "It is . . . difficult at times to determine whether in the case of an executory devise to a class, when some cannot take because too remote, the whole devise is void as against perpetuity, or only that part which offends. The determination of the question depends upon the ability to separate the good from the bad, and at the same time preserve the intention of the testator." *Tiedeman, Real Prop.* § 544. This test is as applicable to other questions of approximation as to the divisibility of a class of devises.

A division of a defective will is the execution of the testator's intent, inferred as a fact from competent evidence. When a contrary design does not appear, he intends that separable parts shall be separated if one is illegal or otherwise incapable of execution. He could not desire that the whole should be unnecessarily and unreasonably set aside; that an effort should be made to save as little as possible, or that the dividing line should be drawn at random. A total or disproportionate destruction of the will is not one of the objects he had in view in making it.

The nature of the case is evidence of his intent that there shall be no useless mutilation, but that, when enough of his plan is annulled to conform it to the law, it shall be left as nearly whole as consistency and reason will permit. The same evidence shows his meaning to be that if all his arrangements, general and particular, primary and secondary, cannot be carried into effect, "the inability to carry into effect the secondary or subordinate intention shall not defeat the primary or general intention." If any of his orders cannot be executed in the designated time or manner, or to the designated extent, he means that the execution shall be approximate (as nearly as possible according to instructions) in time, manner, and extent. A bequest of \$100, to be paid at the end of six years, does not mean that the legatee shall have nothing in case there is less than \$100 for him, or in case the executor has no means of payment before the end of twelve years, or in case he has means of payment at the end of five years, and the law requires all legacies to be then paid notwithstanding the testator's appointment of a more remote time. With other evidence, a mere devise of a farm accompanied by a suspension of the title in trust for a time, does not indicate a purpose that the devisee is not to have the farm if the specified time is a day, a year, or twenty years longer than the legal period, and if no wrong would be done by an approximation. Within the legal limit, the testator's power of suspending the title is not affected by the disability under which he labors beyond that limit. The devise is effective *cy pres*, in pursuance of his implied intent to divide according to common reason,—throw out what is against law, and let the rest stand. This legal intent, correctly inferred as a fact, is a part of the will, not less operative or less important than it would be if set forth in express terms in the writing. A refusal to execute it would be an alteration of the will, and a violation of common-law principle and statutory right.

The legality of Barker's small bequests is not disputed. The will is not wholly void, but is admitted to be good in part, and to be divisible. The question is not whether it shall be divided, but where the line of division shall be drawn. In the devise of the remainder to the grandchildren, the last nineteen of the forty years are too remote. In the rest of the time and the rest of the will there is no illegality. The invalidity arising from remoteness would be unnecessarily and unreasonably extended by throwing out twenty-one years that are not too remote. The intestacy asserted by H. would be a more inordinate expansion of the limited defect. "When a man sits down to dispose of his property by will, it is fair to presume that he does not intend to die intestate, nor to become intestate after death." *Weatherhead v. Stoddard*, 58 Vt. 623, 629; *Kennard v. Kennard*, 63 N. H. 811; *Hoitt v. Hoitt*, Id. 499, 56 Am. Rep. 530. "Where the will admits of two constructions, that is to be preferred which will render it valid. . . . Of two modes of construction, that is to be preferred which will prevent a total intestacy."

tacy. . . . Where a testator's intention cannot operate to its full extent, it shall take effect as far as possible." 2 Jarman, Wills, 842, 843. These so-called "rules" are a correct statement of Barker's intention. The third applies the first to the partial invalidity, and the second to the question of his alleged partial intestacy. Whether they are regarded as a statement of the fact of intention, or as rules of law adopted by him as a part of his will (*Root v. Stuyvesant*, 18 Wend. 302-304), the result is the same. They would not have been strengthened by his recital of them. His declaration, inserted in the will, that "if my intention, herein written, cannot operate to its full extent, it shall take effect as far as possible," would have been superfluous. Such a provision, accepted by him as law, or found to be an expression of his implied intent, renders the will valid *cy præs*. The partial invalidity, neither increased nor diminished, introduces neither total nor partial intestacy. The construction that rejects the approximation intended by the testator, and makes him intestate as to a part of his property, is sustained by authorities in other jurisdictions, but is at variance with the effect given to intent by the law of this state. When the youngest of the grandchildren is twenty-one years of age, the remainder devised to them will be theirs.

A testator may prefer, in certain contingencies, to be wholly or partially intestate. In this will Barker could have said: "If my intention, herein expressed, cannot operate to its full extent, it shall not take effect as far as possible. No part of my will shall be sustained by an inferred intent that it shall work as far as it can, or by the equivalent rule of construction. If the whole cannot take effect, the whole shall be void." It is not claimed that such a provision can be implied. He could have said: "If the vesting of the remainder in my grandchildren cannot be postponed beyond the time when the youngest is twenty-one, the devise thereof to them is revoked, and as to said remainder there shall be no will." His belief that the protection due from him to them was a will that would save the remainder for them, and his exhaustive effort to do his duty (explained and emphasized by a fact plainly disclosed), cannot be reconciled with an intent that the devise of the remainder shall be revoked, and that his confessed duty shall not be done if the devisees' title cannot be suspended beyond the minority of the youngest. The revocation of that devise, leaving the remainder to descend as intestate

property, would thwart the purpose of his conditional appropriation of \$30,000 (by making H. the absolute owner of a large amount of property), deprive the grandchildren of the protection which the testator considered indispensable, and defeat the main objects of the will. It would be little less erratic than a causeless revocation of the whole instrument. An intended intestacy as to the remainder can be inferred from nothing but mental disorder, of which there is no evidence.

It is said that in some cases "the court must put themselves in the place of the testator, and determine as he would have done if he had been told that both of his intentions in the will, by the rules of law, could not take place, and had been asked which of them he desired should take effect and stand, as both could not" (*Dodson v. Grew*, 2 Wils. 322, 323, 86 N. H. 487), and that the court inquire "what the testator would probably have done himself" (*Atty-Gen. v. Ironmongers' Co.* 1 Craig & P. 208, 224), and what he probably "would have preferred." 2 Beav. 318, 325. It is not said that this is the question in all cases when a testamentary provision cannot be executed. Upon incompetent evidence (circumstantial or direct) that, if Barker had been aware of some matter of law or fact of which he was ignorant, he would have made a different will, legal construction cannot do what he would have done. But this will is competent and sufficient evidence that if he had been informed (when he gave instructions for drafting it) that his intent that his grandchildren should have the remainder could not stand with his intent that they should not have it till the youngest was forty years old, and had been asked which of these intents should prevail, he would have given an answer that is comprehended in his intent on the subject of approximation. The law determines not what will he would have made if he had known that the last nineteen of the forty years were too remote, but what will he did make in ignorance of this flaw in his appointment of time. His intent that the grandchildren shall not have the remainder till the youngest arrives at the age of forty years is modified by his intent that they shall have it, and that the will shall take effect as far as possible. The forty years are reduced to twenty-one by his general proximating purpose, which is a part of the will.

Decree for the trustees.

Clark and Chase, JJ., did not sit. The others concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Re HOUSE BILL NO. 1230.

(.....Mass.....)

A statute requiring manufacturers to pay wages of their employes weekly, although applying to individuals as well as to corporations, is within the power of the legislature under the Massachusetts constitution which

extends such power to "all manner of wholesome and reasonable orders, laws, statutes, and ordinances" and does not in terms make any provisions as to freedom or liberty of contract.

(May 6, 1896.)

RESOLUTION by the house of representatives requesting the supreme judicial

NOTE.—Validity and effect of statutes regulating time of payment of wages.

The constitutionality of statutes regulating and restricting agreements between master and servant has become a question of great practical importance and is one on which there is much lack of uniformity in the decisions. In this place will be considered only the validity and effect of statutes regulating the time of payment of wages, but in a note to *Avent-Beattyville Coal Co. v. Com. (Ky.) ante, 273*, is considered the subject of statutes prohibiting the payment of wages in anything else than lawful money. The same questions as to interference with the liberty of contract and as to discrimination or class legislation arise in both classes of cases and also in legislation as to hours of labor and other matters of contract with employes.

The conflict of decisions in respect to the constitutionality of statutes regulating the time of payment of wages is involved chiefly if not altogether in the matter of discrimination or class legislation.

The validity of a statute requiring the wages of employes engaged in mining or manufacturing to be paid at least once every two weeks by all persons, firms, corporations, etc., engaged in such business, is sustained in *Hancock v. Yaden*, 6 L. R. A. 576, 121 Ind. 366.

The decision of *Braceville Coal Co. v. People*, 22 L. R. A. 340, 147 Ill. 66, is against the constitutionality of a statute requiring weekly payment of wages "by every manufacturing, mining, quarrying, lumbering, mercantile, street, electric and elevated railway, steamboat, telegraph, telephone, and municipal corporation, and every incorporated express company and water company," and while the court made general observations as to the liberty to enter into contracts the basis of the decision is clearly shown to be based on the distinction between persons affected by the law and others. The court says laws depriving particular persons or classes of persons of rights enjoyed by the community at large, to be valid must be based upon some existing distinction or reason not applicable to others not included within its provisions. The decision therefore by no means goes to the extent of denying the power of the legislature to require prompt payment of wages if the statute does not improperly discriminate between persons affected by it and others, and is not necessarily in conflict on this point with the Rhode Island decision below referred to, although the tendency of the Illinois decision seems to be toward the denial of the power of the legislature to restrict contracts on matters of this kind. See Illinois cases in note to *Avent-Beattyville Coal Co. v. Com. ante, 273*, also *Ritchie v. People*, post, —, 155 Ill. 98.

In *State v. Brown & S. Mfg. Co.*, 17 L. R. A. 856, 18 R. I. —, the court sustains a statute providing for weekly payments of the employes of all corporations other than religious, literary, or charitable, and holds that such statute is to be regarded as an amendment of the charters of such corporations.

But the two cases are exactly opposed in respect to another question. That is as to the right of the employes of corporations to make contracts with them as affecting the power of the legislature to

prohibit the corporations from entering into such contracts. The Rhode Island case holds that employes of corporations have no right to demand that greater power shall be granted to the corporations than the legislature sees fit to give them in order that they may make with the corporations other contracts than those which the legislature sees fit to permit corporations to make, while the Illinois case declares that a restriction of the right of corporations to contract with employes as to payment of wages by compelling weekly payments denies the constitutional right of the employes. On this last point the decision in the Rhode Island case is supported by the Arkansas case of *Leep v. St. Louis, I. M. & S. R. Co.*, 23 L. R. A. 264, 58 Ark. 407, which denies that the right of employes to contract can prevent statutory restrictions upon corporations in respect to contracts with them, and quotes with approval the language of the Rhode Island court on that subject.

In the Arkansas case just named the court sustained a statute requiring all wages that had been earned to be paid to an employe on the date of his discharge irrespective of the terms of his contract on that question, so far as the statute applies to contracts between corporations and their employes, but held it unconstitutional as to contracts between individuals and their employes.

A decision of the Pennsylvania common pleas in *Bauer v. Reynolds*, 3 Pa. Dist. Rep. 532, 14 Pa. Co. Ct. Rep. 497, holds that a statute requiring monthly payments of wages by mining or manufacturing companies is unconstitutional so far at least as it amounts to making a contract between parties against their will, and cannot give any right to the payment of wages before the time agreed upon by the parties by reason of a provision that a contract for payment otherwise than according to the statute shall be void.

It will thus be seen that decisions as to the constitutional power of the legislature to compel prompt payment of wages are very few in number. But the decision in *Re HOUSE BILL NO. 1230* is in principle supported by the other decisions except so far as it may be inconsistent on the question of discrimination between classes of employes with the Illinois decision in *Braceville Coal Co. v. People*, 22 L. R. A. 340, 147 Ill. 66.

In *Com. v. Marsh*, 3 Pa. Dist. Rep. 489, 14 Pa. Co. Ct. Rep. 369, the Pennsylvania Act of May 20, 1891, requiring semi-monthly payments of wages, is said to apply only to mining or manufacturing business and not to contractors for the construction of a railroad.

That it does not apply to the business of lumbering is decided in *Bauer v. Reynolds*, *supra*, which also decides that it does not require an employer to anticipate a payment which is not due by the terms of a special contract.

On the general subject of the constitutionality of statutes restricting contracts and business, see note, to *State v. Loomis (Mo.)* 21 L. R. A. 790, and on the general subject of statutory restrictions on contracts between master and servant, see also note to *Com. v. Perry (Mass.)* 14 L. R. A. 325.

B. A. R.

court to give their opinion upon the following question:

Is it within the constitutional power of the legislature to extend the application of the present law, relative to the weekly payment of wages by corporations, to private individuals and partnerships, as provided in the bill entitled "An act relative to the weekly payment of wages," now pending before the general court?

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

We, the justices of the supreme judicial court, received, on the 20th ultimo, your resolution, a copy of which is annexed, and in reply we respectfully submit the following opinion:

Your question implies that in your opinion the present law relating to the weekly payment of wages by certain corporations to their employés is constitutional, and your inquiry is whether it is within the constitutional power of the legislature to extend the law to private individuals and to partnerships.

We are not informed of the nature of the doubts which your request implies. It is well known that in some of the states of this country legislation similar to that proposed has been held unconstitutional by the courts, sometimes on the ground that it is partial in its character, but more frequently on the ground that it interferes with what is called the liberty of contract, which, it is said, either as a privilege or as property, is secured to the inhabitants of a state by its constitution, or by the Constitution of the United States. In some of these decisions a distinction has been suggested or made between the rights of natural persons and the rights of corporations, and such legislation has been deemed valid with respect to corporations whose charters were subject to alteration, amendment, or repeal by the legislature, or which, being foreign corporations, were permitted to do business in the state under such conditions as the legislature might impose, while the legislation has been deemed void with respect to natural persons. Some recent decisions on this subject are the following: *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264; *State v. Peel Splint Coal Co.* 86 W. Va. 802, 17 L. R. A. 885; *Hancock v. Yaden*, 121 Ind. 866, 6 L. R. A. 576; *State v. Brown & S. Mfg. Co.* 18 R. I. —, 17 L. R. A. 856; *Shaffer v. Union Min. Co. of Allegany County*, 55 Md. 74; *Tilt v. People* (Ill.; Feb., 1895) 40 N. E. Rep. 462.

The legislative power granted to the general court by the constitution of Massachusetts is perhaps more comprehensive than that found in the constitutions of some of the other states. The constitution of Massachusetts (part 2, chap. 1, § 1, art. 4) provides as follows: "And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain and establish, all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without, so

as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defense of the government thereof," etc. This provision was taken substantially from the province charter. There is not in the constitution of Massachusetts anything which in terms relates to the freedom or liberty of contract, as there is concerning the liberty of the press. The constitution declares that "all men are born free and equal, and have certain natural, essential and unalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness;" and it is also declared that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Declaration of Rights, arts. 1, 12. This last declaration was taken from Magna Charta, and in substance it has been incorporated in the 14th Amendment of the Constitution of the United States, in form as follows: "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In legal nomenclature, at the time of the adoption of the constitution of Massachusetts, the right to make a contract for personal services, if it can be regarded either as property or as a liberty or privilege, would perhaps have been regarded as the latter. So far as we are aware, the capacity to make such a contract was not, in the discussions concerning the constitution, ever spoken of as property, although that capacity may be necessary to the acquisition of property. The statutes existing in England at the time of the adoption of the constitution, regulating the employment of servants or laborers, were of ancient origin. The modern English statutes concerning the regulation of employment in factories undoubtedly rest on somewhat different political and economical principles from those formerly entertained. In Massachusetts, after the province became an independent state, and before the adoption of the constitution, the general court passed laws regulating minutely the prices of commodities, and in certain respects the prices of labor. Stats. 1776-77, chap. 14, 46; 5 Provincial Laws (State ed.) 583, 642. It never has been much considered by the courts of Massachusetts how far the provisions of the declaration of rights in the constitution have limited the power of the general court with respect to such legislation, but it generally has been thought that this power under the constitution is subject to some substantial limitations.

There never has been at any time in Massachusetts an absolute right in its inhabitants to make all such contracts as they pleased. Some contracts have always been held void at common law, and some contracts valid at common law have been declared void by statute. Married women at common law were under a general disability to make contracts during coverture; and, although they have been recently empowered by the statutes to make contracts as if they were unmarried, still, at the present time, husband and wife cannot make contracts with each other, and, if the statutes were repealed, the powers of married women to make contracts would be governed by the common law. Marriage, brokerage, and post-obit bonds and covenants in restraint of trade sometimes have been held void. Minors at common law are under a disability to make contracts except for necessities, and this is said to be for their protection. Our statute of frauds prevents the enforcement in the courts of many kinds of contracts, unless they are shown by a writing, and prohibits the making of certain contracts, and this statute was passed for the protection of persons against fraud and perjury. Seamen sometimes have been regarded as a class of persons who could not be trusted to make their own contracts without supervision, and statutes have been passed making regulations concerning their wages and shipping contracts. U. S. Rev. Stat. title 53. Wages to a certain amount due for personal labor and services have been exempt from attachment, probably on the ground that it was thought that workmen generally need their wages for their support. Usury laws furnish perhaps the best known illustration of the regulation by statute of the price to be paid for the use of a commodity, but the validity of these laws usually has been regarded as an exception to the general rule. Mass. Rev. Stat., title 12, entitled "Of the Regulation of Trade in Certain Cases," shows various forms of interference by the legislature with what may be called the freedom of trade or of contracts concerning the sale of commodities. The regulation of the subject of fire insurance, and the prohibition of the sale of oleomargarine made in imitation of yellow butter, and the requirement that an agreement to make a will must be in writing, are some of the most recent instances in Massachusetts of the prohibition or regulation of contracts by statute. The constitutionality of much of this legislation never has been questioned, and, when questioned, it generally has been sustained.

The Supreme Court of the United States has recently considered the constitutionality of the Act of Congress of June 27, 1890, making it a misdemeanor for an attorney to receive more than \$10 for prosecuting a claim for a pension, and has decided the statute to be constitutional. In *Frisbie v. United States*, 157 U. S. 160, 39 L. ed. 657, that court says: "While it may be conceded that, generally speaking, among the inalienable rights of the citizen, is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals

from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence; and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property." See *Wolcott v. Frisell*, 184 Mass. 1, 45 Am. Rep. 272. In *Com. v. Hamilton Mfg. Co.*, 120 Mass. 383, the court of which we are now the justices decided that Statute 1874, chapter 231, was constitutional. The provision which it was contended was unconstitutional was that "no minor under the age of eighteen years, and no woman over that age, shall be employed in laboring by any person, firm, or corporation, in any manufacturing establishment in this commonwealth, more than ten hours in any one day," except in certain cases; and that "in no case shall the hours of labor exceed sixty per week." The decision of the case did not turn upon the fact that the defendant was a corporation of this commonwealth, organized under Statute 1824, chapter 44. The court says: "There can be no doubt that such legislation may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources for power. This principle has been so frequently recognized in this commonwealth that reference to the decisions is unnecessary." In *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, Stat. 1891, chap. 123, § 1, was declared unconstitutional by a majority of the court. The principal ground of the decision is that the statute was an attempt "to compel payment under a contract of the price for good work when only inferior work is done;" and it is said that "the right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law;" and that, if the statute be held to permit the hiring of weavers "only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the constitution guarantees to every one," etc.

The decisions of various courts of this country upon the authority of the legislature of a state to prescribe rates for transportation by railroad companies, and, in some instances, for the use of elevators, have proceeded on the ground that these were public employments; and it is implied in all or nearly all of these decisions that the legislature could not constitutionally prescribe the rates of compensation to be paid for services or for the use of property in exclusively

private employments. It is manifest, however, from the examples we have given, that the regulation of contracts by statute, not amounting to a determination of rates or prices, has not been confined to public employments, or to business which may be said to be affected with a distinct public interest. The legislation on this subject relates to a great variety of contracts, and has been passed, some of it to promote the public health or the public morals or the public convenience, some of it for the protection of individuals against fraud, and some of it for the protection of classes of individuals against unfair or unconscionable dealing. The considerations which may influence the legislature to determine what legislation of this character is required by good public policy, or, in the words of the constitution, what laws are "for the good and welfare of this commonwealth and for the government and ordering thereof, and of the subjects of the same," are not for us to weigh, except so far as may be necessary to determine whether the legislation proposed is repugnant or contrary to the constitution. The legislation on similar subjects in Great Britain and in other foreign countries which have no written constitutions limiting the powers of the legislature is not in all respects pertinent to the present inquiry; but, considering the history of legislation in England concerning servants or laborers from the earliest times, and the statutes which in modern times have been passed in several foreign countries and in many of the states of this country regulating the employment of laborers in factories, we cannot say, as matter of law, that the legislation proposed is so plainly not wholesome

or reasonable that the general court may not judge it to be for the good and welfare of the commonwealth. We know of no reason derived from the constitution of the commonwealth or of the United States why there must be a distinction made in respect to such legislation between corporations and persons engaged in manufacturing, when both do the same kind of business. The existing statutes on the subject, relating to manufacturing corporations, we do not regard as having been passed necessarily in amendment of their charters. They relate to all the corporations described, whether there is any power reserved in the legislature to amend their charters or not, and they do not purport to have been passed for the purpose of restricting the corporate powers of the corporations. Without attempting to define the limits of the power of the general court in Massachusetts to control the right of its inhabitants to make contracts generally, we cannot say that a statute requiring manufacturers to pay the wages of their employés weekly is not one which the general court has the constitutional power to pass, if it deems it expedient to do so. We have not examined in detail the provisions of the bill referred to in the inquiry, or considered whether the bill may not need amendment to make its meaning clear; but the question submitted, we think, should be answered in the affirmative.

WALBRIDGE A. FIELD.

CHARLES ALLEN.

OLIVER WENDELL HOLMES.

MARCUS P. KNOWLTON.

JAMES M. MORTON.

JOHN LATHROP.

JAMES M. BARKER.

NEW YORK COURT OF APPEALS.

Matilda A. SLOANE, Exrx., etc., of George Sloane, Deceased, *Resp't.*,

v.

William R. H. MARTIN, *Appt.*

(145 N. Y. 584.)

Actual service of process upon infants is not necessary to the jurisdiction of a federal court in an action in the nature of a suit *in rem* for a judicial sale of real estate in which they have or claim to have an interest where an appearance is entered for them and a guardian *ad litem* appointed who defends in their behalf.

(April 9, 1893.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment entered in the office of the clerk of New York County upon the report of a referee in favor of plaintiff in an action brought to compel

specific performance of a contract to purchase certain real estate. *Affirmed.*

The material portions of the opinion of the referee, William Allen Butler, are as follows:

"The plaintiff brings this action to compel the specific performance by the defendant of a contract for the sale of certain lands and premises situated at, and adjoining, the northeast corner of Broadway and Thirty-second street, in the city of New York, extending on Broadway fifty-three feet nine inches, and on Thirty-second street one hundred and twenty-two feet ten inches. The contract which bears date October 23, 1891, provided for the sale and conveyance by the plaintiff of the premises, as described therein, to the defendant, in consideration of the sum of \$650,000, to be paid in the manner specified by the contract, upon receipt whereof the plaintiff was to execute and deliver to the defendant an executrix's deed, conveying the fee simple of the premises, free from all incumbrances except certain enumerated existing leases. At the proper time the plaintiff tendered to the defendant a conveyance of the premises, as described in the contract, duly executed by herself, in her capacity of executrix under the

NOTE.—In connection with the above case, see *Boche v. Waters* (Md.) 7 L. R. A. 533; also *Louisville, N. O. & T. R. Co. v. Jordan* (Miss.) 16 L. R. A. 261.

38 L. R. A.

will of her husband, George Sloane, deceased, which contained a power of sale authorizing such conveyance, and also duly executed by all the heirs-at-law and devisees of her testator. No objection was made by the defendant to the form of the conveyances, but as to a part of the premises, being that portion thereof situated on the northeasterly corner of Broadway and Thirty-second street, which was conveyed by William V. Brady and wife and Henry A. Hurlbut and wife to Ezra R. Goodridge by deed dated January 30, 1867, the defendant objected to the conveyances tendered by the plaintiff, and refused to accept them, on the ground that they did not convey a good and marketable title, alleging that the title to that portion of the premises was not in the plaintiff, and was never acquired by her testator, but that the owners thereof are the children of the said Ezra R. Goodridge, who died on or about August 20, 1867, and who at the time of his death was the sole owner thereof, in fee simple. As to the residue of the premises, the defendant made no objection to the title tendered by the plaintiff. The plaintiff claims, upon the pleadings and proofs in this action, that the deeds tendered by her to the defendant were in full performance of her contract of sale, and that, as to the portion of the premises to which the defendant's objection applies, the title in fee simple was acquired by J. Pierpont Morgan under a sale made by Simon de Visser, a receiver thereof appointed by the circuit court of the United States for the southern district of New York in a suit in which James Drake and others were plaintiffs, and Francis Goodridge, survivor of Ezra R. Goodridge, and others, were defendants, pursuant to the decree of the court made therein June 19, 1868, and that by subsequent conveyance by Morgan, the purchaser at the receiver's sale, to the plaintiff's testator, the latter acquired a good title in fee to the same premises. The defendant's contention upon the evidence at the trial is that in respect to the two infant children of Ezra R. Goodridge, who were made parties defendant to the above suit, a reasonable doubt exists as to the question whether service was made upon them, respectively, of the process of the court, and also as to the further question whether the circuit court of the United States sitting in equity, could, at the time of the commencement of the suit, acquire jurisdiction over the infant defendants in any other manner than by the service upon them of the process of the court. The question, therefore, to be determined, under the issue joined in this action, is whether the title tendered by the plaintiff is good and marketable, or whether such a reasonable doubt in respect to its validity has been established by the evidence as to entitle the defendant to be relieved from his purchase.

"It appeared at the trial that Ezra R. Goodridge, before and at the time of his death, August 20, 1867, was a member of the firm of Ezra R. Goodridge & Co., doing business in the city of New York, composed of himself, his brother Francis Goodridge, and Franklin F. Randolph. Ezra R. Goodridge died intestate, a resident of Westchester county, N. Y., leaving, him surviving, his widow, Mary C. Le Roy Goodridge and two infant children,

Mary Read Goodridge and Ezra Read Goodridge his only heirs-at-law, who were at the time of his death of the ages of two and three years, respectively. Letters of administration on his estate were issued to his widow. He was the apparent owner, at his death, of several parcels of real estate in the city of New York of which the premises in question formed a part. After his death the firm of Drake, Kleinwort & Cohen, of London, England, creditors of Ezra R. Goodridge & Co., commenced actions in the supreme court of the state of New York against Francis Goodridge, the sole survivor of the firm (Franklin F. Randolph having died September 18, 1867), to recover the amount of an indebtedness of the firm of Ezra R. Goodridge & Co. to them. In such actions, warrants of attachment against the property of Ezra R. Goodridge & Co. were issued to the sheriff of the city and county of New York, and levied upon real property, including the premises in question; and after the recovery of judgments in the actions, to the amount, in the aggregate, of \$303,278.17 and the returns of executions thereon by the sheriff wholly unsatisfied, except as to \$6,222.99 collected by the sheriff, Drake, Kleinwort & Cohen, on January 13, 1868, filed their bill in equity in the circuit court of the United States for the southern district of New York against Francis Goodridge, as survivor of Ezra R. Goodridge & Co.; the infant children of Ezra R. Goodridge, deceased; his widow, individually and as administratrix; and the legal representatives of Franklin F. Randolph, deceased, his widow, and the children of a deceased brother; and other parties who claimed to have liens on the attached premises—setting forth the recovery of judgments and the return of executions unsatisfied as above, and alleging that the real property of which Ezra R. Goodridge died seised was in fact the property of the firm of which he was a member at the time of his death, and had been purchased with partnership funds. The bill prayed that the plaintiffs be adjudged to be creditors of the firm of Ezra R. Goodridge & Co., and as such to have a prior lien, by virtue of their attachments, judgments, and executions in the state court, upon the premises in question and the other property described in the bill, and to be entitled to the application of the said property to the payment of their judgments by means of a receiver to be appointed by the court. The allegation was also made in the bill of complaint that as the apparent title to the property was in Ezra R. Goodridge, individually, the sheriff was unable to sell the same, under the executions issued to him upon the judgments free from cloud upon the title. Upon the filing of the bill, January 13, 1868, a subpoena was issued on the same day, as appears by the equity docket kept by the clerk of the United States circuit court for the southern district of New York, in which the suit is entered by its title, and in which is also entered the issuing of the subpoena. There is no entry in the docket of the return of the subpoena by the United States marshal, the proper officer by whom the subpoena should be served, and the return made, nor any entry of service of the subpoena on any defendant, nor do the papers in the case on file in the clerk's office con-

tain the subpoena, or any return of service thereof. A blank line appears in the docket, below the entry of the issuing of the subpoena, left blank in order that the return of the subpoena might be entered whenever the same should be returned. The record and the entries in the docket show that on February 10, 1868, there was filed and entered the appearance of the defendants Mary R. Goodridge and Ezra Read Goodridge, the infant children of Ezra R. Goodridge, by F. A. Lane, their solicitor. The record further shows that on February 11, 1869, the same infant defendants by their mother, as natural guardian, filed a petition which recited the filing of the bill against them; that they had appeared thereto, and are preparing to answer the same; that they are infants under the age of fourteen years, to wit, of the ages of two and three years, respectively; and that they are advised that Richard E. Stillwell, of the city of New York, is a proper person to be appointed their guardian to defend the suit, and praying that he may be assigned their guardian, by whom they may answer and defend. The petition was verified by the affidavits of the mother and the solicitor of the infants, and upon these papers, and the consent of Richard E. Stillwell, to serve as guardian, he was appointed, by an order of the court made and filed February 11, 1869, the guardian *ad litem* of the Goodridge infants. Similar proceedings were taken in respect to two infant defendants who were children of Franklin F. Randolph, deceased, and the same person was appointed guardian *ad litem* for them. The guardian *ad litem* thus appointed put in the usual general answer for the infant defendants. Other parties defendant, including the mother of the infants, and the surviving partner of the firm of Ezra R. Goodridge & Co., and the legal representatives and widow of Franklin F. Randolph, deceased, answered the bill, and contested the suit on the merits; and the remaining parties having answered, or the bill having been taken as confessed against them, the cause was tried before Judge Blatchford. On June 19, 1868, a decree was entered, adjudging the premises in question to be partnership property, properly applicable to the payment of the judgments recovered in the state court, appointing Simon de Visser, receiver, and directing the execution of a deed by Mary C. Le Roy Goodridge, the widow of Ezra R. Goodridge, and the guardian *ad litem* of the infant Goodridge children, to such receiver, and the sale of the premises by him at public auction. The deed was executed as required by the decree, and the receiver sold the premises at public auction, December 1, 1868, to Messrs. Mayer & Simon Sternberger, who paid the usual deposit. Subsequently, in January, 1869, the purchaser at the receiver's sale refused, under advice of counsel, to complete their purchase, and thereupon the receiver applied to the court for an order to compel them to complete it. The purchasers resisted the application, and specified twelve distinct grounds of objection to the title, one of which was that the Goodridge infant defendants had not been served with process, and therefore the court had never acquired jurisdiction of their persons. A stipulation was entered into between the attorneys for the receiver and the

attorneys for the purchasers to the effect that, for the purposes of the motion, certain facts, which are stated in eight paragraphs of the stipulation, and are separately numbered, were admitted—one of such facts being that none of the infant defendants were served with a subpoena or other process in the suit. After argument Judge Blatchford decided the motion in favor of the receiver, and ordered the purchasers to complete their purchase. No order was entered on such decision. The purchasers notified the receiver that they would appeal from the decision to the Supreme Court of the United States. No appeal, however, was taken. The proceedings by the receiver to compel the purchasers to complete their purchase were withdrawn. The purchasers were paid back the amount deposited by them, with certain allowances for counsel fees and expenses, and thereafter, on October 30, 1871, the decree was so amended that the receiver was authorized to sell the premises at private sale. The receiver executed the decree, as amended by a sale of the premises in question, by deed dated May 23, 1872, to J. Pierpont Morgan, who afterwards conveyed them to Ezra R. Goodridge.

"On the facts thus established, it is manifest that if it were incumbent upon the plaintiff to prove by direct and positive evidence that the subpoena in the Drake suit was served on the infant defendants, the children of Ezra R. Goodridge, deceased, and to establish such service as a jurisdictional fact, necessary to the validity of the decree of sale, this action must fail for want of such proof. But it is not essential to the plaintiff's action that she should give such proof. Having put in evidence the judgment record in the Drake suit, which is the judgment of a court of general jurisdiction, acting within the scope of its powers, she is entitled to rest on the presumption of the regularity of the proceedings, including whatever is necessary to the jurisdiction; the rule being that, whenever such a judgment is questioned collaterally its regularity must be presumed until the presumption is overcome by competent proof. *Yates v. Lansing*, 9 Johns. 407, 6 Am. Dec. 259, 290; *Foot v. Stevens*, 17 Wend. 488; *Hart v. Seixas*, 21 Wend. 40; *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589, 86 N. Y. 609; *Brown v. Nichols*, 42 N. Y. 26.

"The regularity and validity of the proceedings of the United States circuit court in the Drake suit must therefore be taken as established by the record, unless the legal presumption in their favor is overcome by competent proof. Such proof may either consist of recitals in the record itself, inconsistent with the presumption, or of extrinsic evidence contradicting the recitals of the record as to jurisdictional facts, or, if the record is silent, establishing affirmatively that jurisdiction was not required.

"In respect to the fact of service of the subpoena on the infant defendants, there is no recital whatever in the judgment record nor in any of the papers in the cause on the files of the court, at any stage of the proceedings leading up to the final decree. The record is silent in this regard. The defendant claims that, although there is nothing in the record stating the non-service of the subpoena on the Good-

ridge infants, it cannot, within the lines of the adjudged cases, or the rules laid down by the text-books, be called a silent record, for the reason that the blank left in the clerk's equity docket for entry of the return of the subpoena remains unfilled, and, assuming that jurisdiction over the infants could be acquired only by the service of the subpoena, the absence of an entry showing a return negatives the presumption of jurisdiction thus acquired; and it is further claimed that the record fails even to show any delivery of the subpoena to the United States marshal for service, and as the evidence of the clerk of the United States circuit court shows the custom to have been, when the subpoena was issued, to hand it to plaintiff's solicitor for delivery to the marshal, there is nothing to show that the marshal ever had the subpoena, and, even if the presumption is indulged that the marshal did have it, such presumption does not include its return by him, because the presumption of a proper performance of all the acts essential to jurisdiction must include an entry by the clerk, in his docket, of the marshal's return, and no such entry exists. And still further, the defendant claims that all the proceedings taken on behalf of the infant defendants for the appointment of a guardian *ad litem* are manifestly on the theory that the infants could voluntarily appear without service of process, as neither their petition, the affidavits annexed, nor the order of appointment, contain any mention of the fact of service of process on the infants.

"Inasmuch as the intendment of the law in favor of a judgment, when questioned collaterally, is that the action of the court in exercising jurisdiction was based on the existence of the necessary jurisdictional facts, and the cognizance thereof by the court, it is inadmissible to disturb the presumption of validity by the mere absence from the record of entries or recitals.

"Notwithstanding diligent investigation, it appears that no trace can be found of the subpoena, after its first issue. The United States marshal who was in office in 1868 is dead, and none of his papers are in the possession of his successor; so that nothing appears in evidence to prove or to disprove the actual fact of service. As no one but the marshal or a deputy could make service of the subpoena, the appointment of a guardian *ad litem* must be presumed to have been made on the return by him of the process.

"The defendant offered in proof, from the files of the clerk's office, the papers relating to certain proceedings after the decree, to compel the purchasers at the receiver's sale to complete their purchase. These proceedings have been adverted to in a former part of this opinion, as including a stipulation between the solicitors of the plaintiffs and the solicitors of the purchasers to the effect, among other things, that, for the purposes of the motion to compel the purchasers to take the title, it was admitted that the infant defendants had not been served with the subpoena. . . . Nothing which is averred in the papers is competent evidence of any fact in issue in this action. This is especially so as to the facts stated in the stipulation to be admitted, because by the terms of the stipulation the admission it con-

tained was solely for the purpose of the motion in respect to which it was made, as I understand, but claims that the fact of the proceeding, and of its not being met by proof then existing, if it ever existed, of the service of the subpoena, raises a conflict with the presumption of the service, and a reasonable doubt as to that fact. As the papers are no part of the judgment record, they must be regarded as extrinsic evidence, and so far as they show a proceeding in which an allegation was made by the purchasers, charging, among other things, that the infants never were served, such allegation would be of no avail to the defendant here, in the absence of corroborative proof, and such proof is not furnished. The admission in the stipulation can have no effect to create any presumption, because it is wholly incompetent as evidence, and to assume that it was made because of the want of ability on the part of the receiver to prove the fact to which it relates would be an attempt to draw legal inferences from incompetent evidence. An approved test, where the validity of a title depends upon a presumption of fact, is whether the case is such that if it were before a jury it would be the duty of the judge to give a clear direction in favor of the fact, and not leave the evidence generally to the consideration of the jury. *Fry, Spec. Perf. p. 486; Emery v. Grocock, 6 Madd. 54; Fleming v. Burnham, 100 N. Y. 1, 12.* Assuming that the Goodridge infants were in a court of law, in an action of ejectment, to recover the premises in question, on the ground of the invalidity, as to them, of the decree of sale in the Drake suit, by which their title was divested, because, in fact, they were not served with the subpoena in that suit, would the court be authorized to direct a nonsuit against them on the ground of the conclusiveness of the presumption in favor of the fact? I think this question must be answered.

"On this branch of the case, my conclusion, therefore, is that, assuming service of the subpoena in the Drake suit on the Goodridge infants to be a jurisdictional fact, the fact is presumptively established by the judgment record in that suit; that such presumption has not been overcome by anything appearing in the record, or by any competent extrinsic proof; and that there is no reasonable doubt as to the regularity or validity of the proceedings in the Drake suit to bind the infant defendants. But if a reasonable doubt as to the title could be predicated in reference to the presumption of validity established by the judgment record in that suit, the inquiry remains whether the court could acquire and exercise jurisdiction over these infant defendants in any other way than by the service of process upon them. If jurisdiction could be and was acquired in the absence of the process, it is of no consequence whether the process was or was not served upon them. They are bound by the decree and by the sale made pursuant to its direction. What the court did was to appoint a guardian *ad litem* for these infant defendants after appearance entered in the suit in their names, by a solicitor of the court, and on the petition of their mother, who was their natural guardian. The precise question, on this branch of the case, is whether

any reasonable doubt exists as to the jurisdiction of the court over the infants, as thus exercised, without the service of process on the infants themselves. If the court could acquire jurisdiction in the suit over these infants only by service upon them of the subpoena, then, in the absence of such service, the appointment of the guardian *ad litem*, and all other acts of the court in the suit, were so far as these infants are concerned, wholly nugatory; the decree of sale was, as to them, utterly void, and no title passed by the deed given by the receiver under it. *Rogers v. Dill*, 6 Hill. 415. Unquestionably if there existed in 1868 any statute of the United States, or any rule of the United States Supreme Court, making service of process on infant defendants in equity suits a prerequisite of jurisdiction, either as to its acquisition or its exercise, the court would be bound thereby, and could only acquire and exercise jurisdiction in the manner prescribed by such statute or rule. It has been uniformly held that, where the law has prescribed a particular mode by which a court shall acquire jurisdiction, it can acquire it in no other way, and, if it undertakes to proceed in disregard of the statutory requirements, its judgment is a nullity, and will be so treated whenever it comes in question, either directly or collaterally. *Risley v. Phenix Bank*, 83 N. Y. 318, 33 Am. Rep. 421, and cases cited, page 337; *Crouter v. Crouter*, 138 N. Y. 55. For example, in the state of New York the Code of Procedure in force in 1881 prescribed that civil actions should be commenced by the service of a summons, and that in case of a defendant being an infant under fourteen years of age personal service should be made on such infant in a specified manner. In *Ingersoll v. Mangam*, 84 N. Y. 622, the validity of a judgment was drawn in question, where the court, in a foreclosure suit, had proceeded to judgment and sale without service of the summons having been made on the infant defendant in the manner prescribed by the statute, his mother having procured the appointment of a guardian *ad litem* for him, who appeared in the action, and answered for the infant. The purchaser at the foreclosure sale declined to take the title, on the ground of reasonable doubt whether the court had acquired jurisdiction, and he was discharged from his purchase by the supreme court. *Ingersoll v. Mangam*, 24 Hun, 202. The court of appeals affirmed the order, on the ground that foreclosure suits were governed by the requirements of the code as to the commencement of civil actions, and said (Id. 84 N. Y. 627): 'The legislature has seen fit to prescribe that the summons shall be served on infant defendants. This was the mode defined by statute for acquiring jurisdiction over their persons and property. It is no answer to the objection that the statute has not been complied with in respect to the mode of service, that the infant is of such tender years that he would have derived no benefit from the service, if made, or that it would have been competent for the legislature to have provided that service upon the parent or guardian should stand as service upon the infant. The statute has prescribed how jurisdiction shall be acquired, and courts cannot dispense with its observances.'

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'If, therefore, in the case at bar, there existed in 1868 any statutory prerequisite of jurisdiction in the United States circuit court, such as existed in reference to the state court in *Ingersoll v. Mangam*, that case would be a controlling authority in favor of the defendant's contention, and he should be discharged from his purchase. But the court of appeals, in its opinion, took care to guard against any assertion of the rule excluding jurisdiction where there was no statutory requirement, and expressly instanced equitable actions in partition as being exempt from the operation of the provisions of the code of procedure. They say that in such actions, the code not being in force, but the provisions of the revised statutes relating to proceedings by petition for partition, which, by a section of the same code, were made applicable to actions of partition, jurisdiction over the person and property of infants was acquired by the appointment of a guardian in the first instance, upon notice to such infants or to their general guardian. Service of notice upon the infants was not dispensable to the exercise of the jurisdiction; citing *Oroghan v. Livingston*, 17 N. Y. 218; *Gotendorf v. Goldschmidt*, 83 N. Y. 110. In the last-named case it was expressly held, in an equity suit for partition, that personal service of summons upon an infant defendant was not essential, and that the appointment of a guardian *ad litem* without such service was sufficient to give jurisdiction, and to authorize the court to proceed to judgment against the infant defendant. There can be no possible difficulty in applying the plain rule laid down by the authorities to which reference has been made. Where personal service of process on an infant defendant is, by law, a jurisdictional fact, as in foreclosure suits in New York, the absence of that fact deprives the court of jurisdiction, because it cannot lawfully acquire jurisdiction in any other way. Where there is no law requiring personal service of process on an infant defendant, the service of process is not a jurisdictional fact, and the jurisdiction may be exercised without reference to that fact, as in partition suits in the state of New York; the jurisdiction in that latter class of suits being upheld where, on the application of the natural guardian of the infant defendant, the court appointed a guardian *ad litem*, and proceeded to judgment, without any service of process on the infant. The inquiry, therefore, must be as to the mode of acquiring jurisdiction by circuit courts of the United States, in 1863, over the person and property of an infant defendant in an equity suit. The grant of judicial power contained in the Constitution of the United States extends to all cases in equity between citizens of any state and foreign citizens or subjects. U. S. Const. art. 3, § 1. The Act of Congress of May 8, 1793 (chap. 86, § 2), provides that the mode of procedure in the courts of equity shall be according to the principles, rules, and usages which govern courts of equity, as distinguished from courts of common law, subject to regulation by statute or by rules of the court made in pursuance thereof, and also subject to regulation by the rules of the supreme court. This is the whole extent of statutory regulation as to the jurisdiction of

the circuit courts of the United States in equity. Under the authority given by congress the supreme court, at February term, 1822, promulgated rules of practice for the courts of equity of the United States, to take effect July 1, 1822; Equity Rules, 7 Wheat. p. V. In *Story v. Livingston*, 38 U. S. 18 Pet. 359, 10 L. ed. 200, it is said that these rules are obligatory on all of the United States courts, and, where they do not apply the practice of the circuit and district courts shall be regulated by the practice of the high court of chancery in England (page 368, 10 L. ed. 204), and *Judge Story* had previously said, in *Pratt v. Northam*, 5 Mason, 95: 'It has often been decided by the supreme court that the equity jurisdiction of the United States is not limited or restrained by the local remedies in the different states; that it is the same in all the states, and is the same which is exercised in the land of our ancestors, from whose jurisprudence our own is derived.'

"In January, 1842, the supreme court revised the equity rules, and promulgated them anew, to take effect August 1, 1842 (Equity Rules, 1 How. 69.), and these rules regulated the procedure of the circuit courts of the United States, in equity, in 1868. Rule 90 is as follows: '90. In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience, of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.'

"When the above rule took effect the general orders of the high court of chancery in force were those which had been issued up to April 11, 1842, and they contained no directions as to any special mode of service of subpoena on infant defendants, or anything in the nature of a condition precedent as to the acquisition of jurisdiction over infant defendants, as contradistinguished from adult defendants. The United States Equity Rules of 1842 provide that 'the process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill' (Rule 7), and shall not issue from the clerk's office in any suit in equity until the bill is filed in the office (Rule 11), and shall then issue thereon, as of course, and be returnable into the clerk's office the next rule day, or the next but one, after twenty days from the issuing thereof. At the bottom of the subpoena shall be placed a memorandum that the defendant is to enter his appearance in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Rule 12. It is then provided, by Rule 18, that 'the service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or, in the case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some free, white person who is a member or resident in the

family.' No different mode of service is prescribed as to infant defendants from that prescribed as to adult defendants. Rule 15 provides that 'the service of all process, mesne and final, shall be by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise.' Rule 17 provides that the appearance day of the defendant shall be the rule day to which the subpoena is returnable, provided he has been served with process twenty days before that day, and that the appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk. Rule 23 provides that the prayer for the process of subpoena in the bill shall contain the names of all the defendants in the bill, 'and, if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process.' Rule 87 is as follows: 'Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves.'

"It thus appears that, while it was competent for congress, by statute, or for the supreme court, by rule, to prescribe the manner in which infant defendants in equity suits in a federal court shall be subjected to the jurisdiction of the court, this subject had not, up to 1868, been regulated either by statute or by rule. In most of the states, as in our own state, as already shown, there are positive statutory regulations on this subject, binding on the state courts, so that conformity to them is essential to the jurisdiction over infants; but these state regulations in no way affect the United States courts, and we are remitted to the practice of the English high court of chancery for the rule of procedure, so far as the equity rules are silent. As already seen the equity rules provide one and the same course for the service of the subpoena on all the defendants, and treat all as alike capable of appearing, either personally or by solicitor, and prescribe for all of them the same appearance day. As to infants, after return of process, the court is to proceed as justice may require, and may appoint a guardian *ad litem* to defend the suit. Recurring to the judgment record in the Drake suit, it shows that after the filing of the bill, and the issuing of the subpoena, an appearance was entered by a solicitor for the infant defendants, followed by a petition on their behalf, by their mother, for the appointment of a guardian *ad litem*, stating according to the form given in Dantell's Chancery Pleadings and Practice, already cited, which is identical with that given in Smith's Chancery Practice (p. 576), that a bill had been filed, and that the petitioners have entered their appearance, and are preparing to answer the same; that the petitioners are infants; and that the person named is a proper person to be appointed guardian *ad litem* to defend the suit. This was in accordance with the course of practice in the English high court of chancery. The jurisdiction of that court over the persons and estates of infants, whether originally derived from the crown, as *parens patrie* and thence

transferred to the court or assumed as customary law, without formal delegation is firmly established as a judicial function of the court, and is exercised by the chancery judges as a matter of discretion, except so far as the power is curtailed or regulated by statute. 8 Pom. Eq. Jur. § 1804; 2 Story, Eq. Jur. §§ 1327, 1384. And when an infant is made party defendant in a suit, although he may not be under a general guardian appointed by the court, he is treated as a ward of the court, and as being under its special cognizance and protection. 2 Story, Eq. Jur. § 1357. In Chambers' Law of Infants (Introduction, p. 25), it is said that an infant made a ward of the court by bill is in every sense under its protection and control. The mere filing of a bill, to which the infant is a party, makes an infant a ward of the court, and, when the infant is once a ward, any matter may then be determined on petition or motion. In McPherson on Infants (p. 896), it is said: 'Where a suit is instituted against an infant, his infancy is not noticed in the bill, unless it be a material fact in the cause, and he is served with the subpoena, and must appear in the usual way.' It is further said: 'A solicitor ought not to take upon himself to appear for an infant defendant without some authority from the infant's friends.'

After an appearance has been entered for the infant, the court appoints a guardian to conduct his defense, . . . called "guardian *ad litem*." And the practice as to the appointment of guardians *ad litem* is then given in detail. It is said in Smith's Chancery Practice (vol. 1, p. 122) that 'the appearance of the defendant is necessary except where otherwise provided for by act of parliament, to give the court jurisdiction over the subject-matter in dispute.' The directions given in the work as to the service of the subpoena are the same in respect to infant as to adult defendants, and it is nowhere intimated that personal service on them is a prerequisite to the appointment of a guardian *ad litem* when they voluntarily appear and application is made on their behalf for such appointment. In case of non-appearance, proceedings might be taken by the plaintiff against the infant defendants to compel appearance, and to bring the infant before the court by a messenger or by a commission, in order to have a guardian appointed. Pages 113, 114, 145. The cases are numerous which show that the court exercised its jurisdiction over infant defendants, and appointed a guardian *ad litem*, after appearance in their behalf by a solicitor upon their application, or upon that of the plaintiff when the infant failed to apply, and when there had been no service of subpoena upon them. A voluntary appearance by any defendant, adult or infant, was all that was necessary to call for and justify the action of the court in assuming jurisdiction. Lord Redesdale says, in his treatise on Pleadings and Practice in Equity: 'It is a rule in equity practice that no decree can be passed against a defendant without his real or constructive appearance. By his appearance he submits to the jurisdiction of the court.' Mitford, Pl. & Pr. 482.

"In practice, this rule included infant defendants.

"In *Cookson v. Lee*, 15 Sim. 302, the infant

defendant had appeared by a solicitor, and, the time to answer the bill having expired, the plaintiff moved for the appointment of a guardian *ad litem*. The question was raised whether there ought not to be proof of service of the subpoena, and of notice of the motion. The vice-chancellor said that, as the infant had appeared, the service of the notice of motion on the solicitor who had entered the appearance was sufficient and that an affidavit of the service of the subpoena was not necessary, and therefore he should make the order.

"*Lloyd v. Rosemore*, 9 Ir. Eq. Rep. 498, seems precisely in point. An application was made to the vice-chancellor, on behalf of an infant, for the appointment of a guardian *ad litem*. The infant had not been served, but an appearance had been entered for him by a solicitor; and the question was whether, without service on the infant, the guardian could be appointed. The case stood over for a week, and the vice-chancellor then rendered his decision as follows: 'It is alleged that there is a difficulty in this case, because the infant defendant had not been served, but I am of the opinion that a guardian may be appointed notwithstanding this fact. Any defendant, whether an infant or of full age, may appear gratis. If an appearance has been entered for an infant an affidavit of service of the subpoena is not necessary to entitle the plaintiff to appoint a guardian. *Cookson v. Lee*, *supra*. And in *Wood v. Logsdon*, 9 Hare, Appendix, XXVI., proof of the appearance of the infant to a claim was held sufficient to enable the court to dispense with an affidavit of the service of the writ of summons. So, also, in *Bentley v. Robinson*, 9 Hare, Appendix LXXVI. Application should in such case be made to the solicitor who had entered the appearance to appoint a guardian. Appearances are entered for infants in the same way as in case of defendants; and if a solicitor without any instruction causes an appearance to be entered for an infant defendant, the appearance will be set aside (1 Dan. Ch. Pr. 5th ed. p. 533, citing *Richards v. Dudley* (Trinity Term, 1837, not reported), and *Leese v. Knight*, 8 Jur. N. S. 1006, 10 Week. Rep. 711), which shows that if such instructions had been given the appearance would have been regular. I am of opinion that a solicitor must be taken, in the absence of proof to the contrary, to have authority from his client to enter an appearance, and that that may be although the party is an infant, and that when once the appearance has been entered the court will act upon it without service.'

"It was the constant practice of the court of chancery to prescribe the mode of bringing the infant defendants within the jurisdiction of the court, by directing what should be sufficient service of the subpoena, both as to resident and nonresident infant defendants, and whether the issuing of a commission should be required, or dispensed with, in order to save expenses, or for any other reason. Manifestly, the court would have no power to direct a mode of substituted service, of its own motion, and without the authority of a statute or general order, if it did not possess such power as an incident of its jurisdiction over infants. A plain distinction exists between jurisdiction and the exercise of jurisdiction. *Bangs v.*

Duckinfield, 18 N. Y. 592. Where a court has jurisdiction of the subject-matter and of the parties, in case they are properly brought before it, as in the case at bar, which was that of a judgment creditor's suit against persons within its territorial jurisdiction, in aid of Hens asserted as to the property within the same jurisdiction, no question can arise, except as to the acts of the court in the exercise of a jurisdiction which belongs to it. Where a court has no jurisdiction to proceed at all, its acts must be void. Thus, in England, the court of chancery has uniformly held that it had no jurisdiction to direct the sale of infants' lands on petition: *Lord Hardwicke* saying, in *Taylor v. Philips*, 2 Ves. Sr. 23, 'there is no instance of this court binding the inheritance of an infant by a discretionary act of the court;' and in *Russel v. Russel*, 1 Molloy, 525, the vice-chancellor said that since that decision of *Lord Hardwicke*, the 'chancellor has never attempted to deal with the legal inheritance of infants without the aid of an act of parliament.' And the same rule was applied in our court of chancery. *Rogers v. Dill*, 6 Hill, 415. But where the court had inherent jurisdiction over the subject and over the parties, the mode of the exercise of such jurisdiction, in the absence of statutory regulations, was discretionary; and accordingly we find that in determining the course of practice as to infant defendants, and the exercise of jurisdiction in regard to them, whether resident or nonresident, the court was governed by its own precedents, and acted on its own discretion.

'Instances of the control of the court over the manner of serving the subpoena, and of bringing infant defendants into court, where the infants were nonresidents or concealed or could not be found within the jurisdiction, and the mode of substituted service was directed by the court according to its discretion, are found in *Thompson v. Jones*, 8 Ves. Jr. 141; *Jongema v. Pfeil*, 9 Ves. Jr. 357; *Lingren v. Lingren*, 7 Beav. 66; *Smith v. Palmer*, 3 Beav. 10; *Lane v. Hardwicke*, 5 Beav. 222; *Wood v. Logsdon*, 9 Hare, Appendix, XXVI. Instances of the exercise of a like power as to infants within the jurisdiction, in addition to the cases already cited, are the following: In *Stillwell v. Blair*, 18 Sim. 399, there were twenty infant defendants in the suit; two of them residing within twenty miles of London, appearing in court for the purpose of having a guardian *ad litem* assigned for them. Their solicitors stated that the rest of the infants, who were within the jurisdiction, resided in different counties, more than fifty miles from London, and, to save the expense of commissions, applied to the court to appoint the same guardian as assigned to the two for the others, and the order was made. In *Re Greaves*, 2 Week. Rep. 355, application was made to the lord chancellor for the appointment of a guardian *ad litem* for an infant respondent on an application for property under a railway act. There had been no service of process on the infant. The court appointed the guardian, saying that the jurisdiction arose from the 'necessity of taking care of such persons.' In *Fletcher v. Rogers*, 1 Week. Rep. 74, a guardian *ad litem* was appointed, without a commission, to save expense. No English case has been cited by

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the learned counsel for the defendant, invalidating or questioning a decree of the high court of chancery rendered against an infant defendant, in the exercise of jurisdiction, after appearance by a solicitor, and the appointment of a guardian *ad litem* by the court on the application of the natural guardian of the infant, without service of process, nor can I find that any judicial doubt has ever existed in the English courts on the subject. As the practice of the English high court of chancery governed the procedure of the United States circuit courts in 1868, the jurisdiction exercised in the Drake suit by the appointment by Judge Blatchford of the guardian *ad litem* for the infant Goodridge defendants, after appearance by a solicitor in their behalf, was in accordance with that practice, and was a valid exercise of jurisdiction. The appearance of the infants after the filing of the bill and the issuing of the subpoena, was the equivalent of personal service upon them of the subpoena, and dispensed with the necessity of such service; and they could not be heard to allege, after such appearance, and the appointment of a guardian *ad litem* for them by the court on the application of their mother, that the subsequent proceedings were void for want of jurisdiction because they were not personally served with the subpoena.

'It is correctly stated in the brief of the learned counsel for the defendant that in some instances the appointment of a guardian *ad litem* without previous service of process upon infant defendants, and without a commission, was allowed by the court of chancery in England where the circumstances were such that a commission would involve undue expense, in cases of resident infants, as well as where the infants were concealed, and upon the presentation of a proper case; such action by the court being a sort of substituted service, analogous to our service in pursuance of statutory provisions by special order on defendants outside the state, or service by publication. This conceded course of practice, which, as already seen, extended also to cases of nonresident infants, seems to me conclusive on the question that service of process on infant defendants was not a prerequisite to the jurisdiction of the court in any case where the appointment of a guardian *ad litem* was concerned. Our courts have no power, in the absence of a statute conferring it, to authorize any method of substituted service, while the English court of chancery had the power, wholly irrespective of statute, and exercised it according to its discretion, in reference to infants outside the realm, as well as those resident within the jurisdiction. If the court could, by virtue of its inherent powers, appoint a guardian *ad litem* where no process had been served, and prescribe a mode of service where the infant was nonresident, or could not be found within its territorial jurisdiction, the same power could undoubtedly be exercised, in the absence of statutory prohibition, as to resident infants, voluntarily appearing, and asking the aid of the court. It is not at all necessary to hold that the circuit courts of the United States, in the exercise of their powers conformably to the practice of the high court of chancery in England, as provided by Rule 90 (United States

Equity Rules), are invested with the plenary power of the court, as *parens patriæ*. As clearly pointed out by Mr. Justice Field in *New York L. Ins. Co. v. Bangs*, 103 U. S. 438, 26 L. ed. 581, the states of the United States and not the federal government, except as to the District of Columbia, stand, in reference to the person and property of infants, in the situation of *parens patriæ*, and therefore, in a case where the infant sought to be charged had no property within the district to which the territorial jurisdiction of the circuit court of the United States was confined, and was not within the jurisdiction, there is no authority in the circuit court to appoint a guardian *ad litem*, by virtue of any supposed general power of courts of equity over the person and property of infants. Accordingly, says Mr. Justice Field: 'The authority of the federal courts can only be invoked within the limits of a state, for such an appointment, where property of the infant is involved in legal proceedings before them, and needs the care and supervision of an officer of that kind; and those courts will always see that a proper guardian *ad litem* has charge of the infant's interest, where his property is involved in proceedings before them.'

'He goes on to say that in the case under consideration the infant possessed no property in Michigan, where the suit in equity was commenced against him, nor did the suit concern any property, real or personal, but was brought to cancel a personal contract made with the infant's father, and, under such circumstances, any decree respecting it 'would necessarily have been *coram non jure*, unless the parties interested were before the court upon the service of a subpoena, or their voluntary appearance. The infant, being absent from the state, could not be personally served.'

'It is thus clear that the federal courts have original jurisdiction, in respect to infants, commensurate with that of the English court of chancery, when the particular facts of the case show that property of the infant is within the district, and that the residence of the infant is within the same limits, so as to give the court jurisdiction over both subject-matter and person, and the jurisdiction thus acquired must be co-extensive, for all purposes, with that of courts of equity of the state. Otherwise, infant citizens of the United States, resident within the territorial jurisdiction of the United States circuit court, when impleaded as defendants in an action properly cognizable in that court, and affecting property situated within its jurisdiction, would not have like protection as that accorded by the laws of their own state in similar actions brought in the state court. It would seem strange if the unqualified delegation by the states to the federal courts of jurisdiction, in equity in suits by subjects of a foreign country against citizens of a state, did not give the federal courts plenary powers for the protection of infant defendants, when such jurisdiction is invoked against them. Messrs. Drake, Kleinwort & Cohen had the right to sue their debtors in New York, either in the state or the federal court. They brought their common-law action in the former, and their equity suits in the latter. It is inadmissible to assume that the federal court had not power to protect the infant defendants

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in the equity suit, equal to that which the state court would have had, in case the complainants had proceeded in the state court. The difference related only to the procedure, which in the federal court was regulated, not by state law, but by federal law.

'Our own reports are not wanting in cases holding that, in the absence of any statutory inhibition, the voluntary appearance of an infant defendant in an equity suit, by a solicitor, is equivalent to personal service of process upon him. In *Varian v. Stevens*, 2 Duer, 685, the appointment of a general guardian of infant defendants in a partition suit, as their guardian *ad litem*, was objected to because the guardian had been appointed after an appearance entered for the infants, but without personal service upon them; the objection was overruled, and the purchaser compelled to complete his purchase, on the ground that, although the code required personal service, it also provided that voluntary appearance of the defendant should be 'equivalent to personal service of the summons upon him,' and that an appearance on their behalf (i. e., the infant defendants), 'dispensed with the personal service.' And in *Rogers v. McLean*, 84 N. Y. 536, the court of appeals held that it was the settled law, as decided in *Oroghan v. Livingston*, 17 N. Y. 218, after full consideration, that the court of chancery had original jurisdiction of the action, which was for a partition of lands, without the aid of any statute; the plaintiff was not bound, in his bill, to notice the fact that the defendants—any of them—were infants, but he might frame his bill and issue a subpoena as if they were all adults; and it is then said: 'After they were brought in upon process, it was necessary, both at law and in equity, that guardians should be appointed for the infant defendants, but that no law could be found holding that a judgment or decree, when they appeared by attorney, would be void.' The papers produced by the defendant from the files of the court in reference to the proceeding, after the decree in the Drake suit, in which the purchasers at the receiver's public sale claimed to be discharged on the ground, among others, of the non service of the subpoena on the Goodridge infants, show that this objection was overruled by the court. As already seen, a stipulation has been made by the parties to it to the effect that it should be assumed, for the purposes of the proceeding, that the infants were not served with process. While this stipulation is not evidence in this action as to any fact, and does not, by its terms, relate to any fact at issue here, it is proof that the legal question of the validity of the sale, on the assumption that the infant defendants were not served with process, was passed upon by the court, and that its decision upheld the sale. No opinion was filed, and the decision was not reviewed on appeal, as the purchasers were discharged by the voluntary act of the receiver; and a private sale was made, under the decree, as amended to that end. The effect of the proof on this branch of the case is only to show that the attention of the court was called to the question whether it had exercised its jurisdiction improperly or irregularly, and that its decision was in favor of the jurisdiction it had assumed.

"If this decision of *Judge Blatchford* were in conflict with any adjudged case in the federal courts on the jurisdictional question involved here, I should not regard it as binding, but I do not find any conflicting adjudication. The authorities cited by the learned counsel for the defendant do not seem to me to be applicable. Where the federal courts have had to deal with the jurisdictional questions arising under state statutes, they are necessarily confined to determining the effect of the local law, and the application of those laws prescribing the prerequisites or limits of jurisdiction in no way touch the point of the original equity jurisdiction of the federal courts. Thus, in *Earle v. McVeigh*, 91 U. S. 508, 23 L. ed. 898, the question was as to the prerequisites of jurisdiction, under the statute of Virginia, as to service of process against nonresidents. In *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, and in *Settemier v. Sullivan*, 97 U. S. 444, 24 L. ed. 1110, the question of jurisdiction arose on the provisions of the statutes of Oregon as to service of process—in the former case, as to service on husband and wife by publication, and in the latter case as to nonresidents, and the effect to be given the state statutes, respectively, in the federal courts. In *Cheely v. Clayton*, 110 U. S. 701, 28 L. ed. 298, the case turned on a like question of sufficient service under the statutes of Colorado. *New York L. Ins. Co. v. Bangs*, already referred to, is wholly aside from the point involved here. It held only that the United States circuit court could not, under any general equity power, acquire jurisdiction in the state of Minnesota over a nonresident infant in a purely personal action, where the infant had no property in the state, and had never been served with process. The case most strongly pressed on behalf of the defendant as a controlling authority is *Woodbridge v. McKenna*, 8 Fed. Rep. 650, where the question involved arose on a motion to remand to the state court of Tennessee a suit in equity attempted to be removed into the United States circuit court by the father of the infant defendant absent from the state in which the suit was commenced, and before the infant defendant had been properly bound to defend in the state court. In discussing one of the many questions arising in the cause, the learned district judge uses the following language: 'In original cases in the courts of the United States, sitting in equity, there can be no defense otherwise than by guardian *ad litem*, and one cannot be appointed, nor the infant bound, until serving of process upon him.' Equity Rule 87; *Bank of United States v. Ritchie*, 33 U. S. 8 Pet. 128, 8 L. ed. 890; *O'Hara v. McConnell*, 98 U. S. 150, 23 L. ed. 840; *New York L. Ins. Co. v. Bangs*, 108 U. S. 435, 26 L. ed. 580; *Carrington v. Brents*, 1 McLean, 174.

"The point intended to be emphasized by this dictum evidently was that there was no power in the court to treat any other kind of service as a substitute for personal service, for the learned district judge goes on to say that while, under the English chancery practice applicable under Rules 87 and 90 of the Supreme Court, a guardian *ad litem* is appointed to defend for an infant, 'never is the service of process upon the guardian alone, or upon the

parent, or other substituted process of that character sufficient to bind the infant, where he is personally an essential party defendant. It must be served on him in person. See the authorities above.' As a general proposition, this is unquestionably true, but if it was intended as a statement that where an infant defendant appeared by an attorney, and the court, on such appearance, and on the petition of the natural guardian appointed a guardian *ad litem*, it would not acquire jurisdiction without previous personal service of the process on the infant defendant, it is in conflict with the authorities, and is wholly unsupported by the cases cited in its support. This will appear on a scrutiny of the citations in the order in which they appear in the opinion. Equity Rule 87 is entirely silent as to the service on the infant defendants, and simply empowers the court to appoint guardians *ad litem*. In *Bank of United States v. Ritchie*, *supra*, a bill was filed in the Supreme Court of the United States for the District of Columbia to review a decree of that court upon various grounds, one of which was that the court 'appointed a guardian *ad litem* without naming the infant defendants, or causing them to be brought into court to have a guardian appointed, and without any averment or proof that either of them was a minor.' Page 131, 8 L. ed. 892. The court held in regard to this assignment of error as follows: 'In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court. They defend by guardian to be appointed by the court, who is usually the nearest relation not concerned, in point of interest, in the matter in question. It is not error, but it is calculated to awaken attention, that, in this case, though the infants, as the record shows, had parents living, a person not appearing, from his name, or shown on the record, to be connected with them, was appointed their guardian *ad litem*. He was appointed on the motion of the counsel for the plaintiffs, without bringing the minors into court, or issuing a commission for the purpose of making the appointment. This is contrary to the most approved usage, and is certainly a mark of inexcusable inattention. The adversary of counsel is not the person to name the guardian to defend the infants.'

"The decree under review was reversed upon other grounds, and there is nothing in the opinion of *Chief Justice Marshall* intimating that the service of process upon the infant defendants was such a prerequisite of the jurisdiction of the court as to render the final decree void for want of it. On the contrary, the criticism, as made, related to the person appointed as the guardian *ad litem*, and to the fact that the plaintiff named him without any action whatever to bring the infants into court.

"*O'Hara v. McConnell*, 98 U. S. 150, 23 L. ed. 840, was an appeal from a decree of the United States circuit court for the western district of Pennsylvania, entered against a minor who was a married woman, without appointment of any guardian *ad litem*, or any appearance by or for her. The court says: 'It was the duty of the court, where the bill, on its face, showed that the party whose interest was the principal

one to be affected by the decree was both a minor and a *feme covert*, and that no one appeared for her in any manner to protect her interest, to have appointed a guardian *ad litem* for that purpose. If neither her husband, nor he who is styled her guardian in the bill, appeared to defend her interests, it was the more imperative that the court should have appointed some one to do it. . . . It was therefore error in the court to proceed to the decree without appointing a guardian *ad litem*.'

'There is no suggestion that personal service of the minor defendant was a prerequisite to jurisdiction, [much less that want of service would render the decree void.

'*New York L. Ins. Co. v. Bangs* has already been referred to. The record there of an equity suit in Michigan to cancel a contract made by the father of an infant defendant showed an attempt to acquire jurisdiction over such infant, notwithstanding he was a nonresident of the state, and possessed no property in it, and that the suit did not concern any property, real or personal, within the state, belonging to the infant. The opinion expressly distinguished it from cases affecting the interest of infants in real property within the state of their residence, and cited with approbation cases where decrees of judgments have been upheld though rendered where a guardian *ad litem* had been appointed, 'without service of process on the infant.' 108 U. S. 440, 26 L. ed. 589.

'The last case cited by Judge Hammond is *Carrington v. Brents*, 1 McLean, 174, in which Judge McLean held, expressly, that while it did not appear that, in the suit which was under review before him, process had been served on the infant, or a guardian *ad litem* appointed by the court, and that for these omissions or errors the decree might have been reversed by an appellate court, these were only irregularities, and did not render the judgment void.

'I think it is clear that the *dictum* of Judge Hammond is meant only to express the general proposition that infant defendants must be served with process as other defendants are served, and that the court will not take action in regard to them until they have been brought before it in the same manner as other defendants, but does not mean that they cannot appear by attorney, and petition by their natural guardian for the appointment of a guardian *ad litem*, and thus give the court jurisdiction to protect their interests. Such a proposition would be directly counter to what is said by Mr. Justice McLean in *Nelson v. Moon*, 8 McLean, 819, as to the appointment of a guardian *ad litem* on an appearance by an attorney without service of process on the infants: 'A judgment or a decree may be treated as a nullity if it appear from the record that there was neither a service of process nor a waiver of it. But in the present case there was an appearance according to the forms of law, and that gave jurisdiction to the court.' P. 831.

'In *Robb v. Irwin*, 15 Ohio, 689, the court considered the whole question whether infants can be made parties defendant in a chancery suit, so as to bind them by a decree, without personal service, merely by the appointment of a guardian *ad litem*, and held that decrees entered under such circumstances are generally,

if not universally, upheld. The Supreme Court of the United States in *New York L. Ins. Co. v. Bangs*, *supra*, refers with approval to the case last cited, and says: 'In *Robb v. Irwin* it appeared that a guardian *ad litem* for infant heirs had been appointed in a proceeding for the sale of certain real property in which they were interested. In an action of ejectment subsequently brought by the heirs, it was held by the supreme court of Ohio that the proceeding was not vitiated by the appointment of the guardian *ad litem* without previous service of process on the infant.'

'After a careful examination of the question I see no reasonable ground of objection to the validity of the decree in the Drake suit for want of service of process on the Goodridge infants, jurisdiction having been acquired by the court by their voluntary appearance, and the appointment of a guardian *ad litem*, on the application of their natural guardian. To hold otherwise would involve the assumption that the English court of chancery acted without authority in all cases where the court controlled the manner of service of process on infants according to its discretion, and exercised jurisdiction by appointing guardians *ad litem* where no service has been made on the infant defendants sought to be bound, and would also be against the weight of authority in the federal courts, and the courts of this state and of other states. Upon both branches of the case, and upon the facts and the law, as they appear to me, I am therefore of opinion that no reasonable doubt exists as to the validity of the title to the entire premises in question, tendered by the plaintiff to the defendant; that such title was and is good and marketable; that the plaintiff is entitled to a specific performance by the defendant of the contract alleged in the complaint; and that judgment for such specific performance should be entered. Following such precedents which seem to me to be applicable here, in reference to the rule as to costs in cases of this description, I think the judgment should be without costs.'

Messrs. William G. Choate and Charles C. Marshall, for appellant:

Under the laws of the United States, as they existed in 1868, the court could not acquire jurisdiction over the persons of the infants without service upon them in the mode prescribed by the equity rules of the supreme court, of the subpoena issued upon the complainant's bill.

Ingersoll v. Mangam, 84 N. Y. 622.

Circuit courts of the United States are the creatures of statute. The statute which is the sole basis of their existence and the only source of their power declares them to be subject to such rules as another and superior tribunal shall declare. Those rules when framed and while unrevoked are the law of the land and have the force and effect of statutes.

Seymour v. Phillips & Colby Constr. Co. 7 Biss. 460; *Scott v. The Propeller Young America*, Newberry, Adm. 107; *Story v. Livingston*, 38 U. S. 18 Pet. 868, 10 L. ed. 204.

Giving to the equity rules prescribed by the supreme court for the circuit court the force and effect of positive enactments to which they are entitled, what is the distinction between

their provisions and those of the code of civil procedure in respect of the necessity of the service of summons or subpoena in obtaining jurisdiction over infant defendants?

Cameron v. McRoberts, 18 U. S. 8 Wheat. 591, 4 L. ed. 467; *Woolridge v. McKenna*, 8 Fed. Rep. 650; *New York L. Ins. Co. v. Bangs*, 108 U. S. 435, 26 L. ed. 580; *Hysslop v. Hop-pock*, 5 Ben. 533; *Bronson v. Keokuk*, 2 Dill. 498.

An infant four years of age cannot enter a voluntary appearance by an attorney or solicitor, and it cannot, therefore, be held in this case that the proceeding here questioned derives any force or validity from the appearance of Mr. Lane as solicitor for the infants, which preceded the petition of the mother for the appointment of a guardian *ad litem*.

Bird v. Pegg, 5 Barn. & Ald. 418; *Bird v. Orme*, Cro. Jac. 289; *Forrester v. Tremaine*, 3 Saund. 212, note; *Colt v. Colt*, 111 U. S. 578, 28 L. ed. 525; *Skiver v. Shelback*, 1 U. S. 1 Dill. 165, 1 L. ed. 84; *Bryan v. Kennett*, 118 U. S. 196, 28 L. ed. 914; *Robinson v. Fair*, 128 U. S. 58, 32 L. ed. 415; *Reg. v. Tanner*, 3 Ld. Raym. 1284; *Austin v. Charlestown Female Seminary*, 3 Met. 196, 41 Am. Dec. 497; *Ingersoll v. Mangam*, 84 N. Y. 623.

Mr. Charles I. McBurney, with Messrs. M. B. Macclay and A. M. Macclay, for respondent:

The old practice in chancery was to have the subpoena served on the natural or legal guardian of the infant and not on the infant at all.

Taylor v. Atwood, 2 P. Wms. 643; *Freeman v. Carnock*, 2 Dick. 439; *Re Graves*, 3 Week. Rep. 355; *Fletcher v. Rogers*, 1 Week. Rep. 74; *Storr v. Pannell*, 1 Week. Rep. 209; *Jongema v. Pfel*, 9 Ves. Jr. 355; *Thompson v. Jones*, 8 Ves. Jr. 141; *Lingren v. Lingren*, 7 Beav. 66; *Smith v. Palmer*, 3 Beav. 10; *Nixon v. Few*, 7 Beav. 349; *Lushington v. Sewell*, 6 Madd. 28; *Stilwell v. Blair*, 18 Sim. 399; *Anonymous*, 18 Jur. 770; *Topping v. Howard*, 10 Jur. 629; *Paddocke v. Smith*, 15 Jur. 1120; *Kyan v. Galk*, 12 L. J. Ch. N. S. 72; *Egremont v. Egremont*, 2 De G. M. & G. 730; *Baker v. Holmes*, 1 Dick. 18; *Garnum v. Marshall*, Id. 77; *Kirwan v. Kirwan*, 1 Hogan, 264; *Lloyd v. Lloyd*, 2 L. J. N. S. Ch. 109; *Lane v. Haráwicke*, 5 Beav. 223; *Re Trusts of Ward's Will*, 2 Giff. 122; *Lloyd v. Rossmore*, L. R. 9 Ir. Eq. Rep. 488; *Wood v. Logaden*, 9 Hare, Appendix, XXVI.

If a bill be filed relative to an infant's estate or person, the court acquires jurisdiction and the infant, whether plaintiff or defendant, and even during the life of the father or of a testamentary guardian, immediately becomes a ward of the court.

Butler v. Freeman, Ambli. 303; *Hughes v. Science*, 3 Eq. Cas. Abr. 756; *Re Graham*, L. R. 10 Eq. 580; *Watson*, Principles of Eq. pp. 279-301.

In the Drake action property of the infants was directly involved in the proceedings before the circuit court, and that court had, in such an action, the general authority of a court of equity over the person of the infant parties, and would see that a guardian *ad litem* was appointed for them, and a neglect to summon the infant did not validate its decree.

Preston v. Dunn, 25 Ala. 507; *Robb v. Irwin*, 15 Ohio, 689; *Gronfier v. Puymiroi*, 19 Cal. 629; 28 L. R. A.

Ducanson v. Manson, 22 Wash. L. Rep. 321; *Reinhart v. Orme*, 1 Cranch, C. C. 244; *Sprague v. Litherberry*, 4 McLean, 442; *Nelson v. Moon*, 3 McLean, 819.

In New York it has been recognized that service of notice upon infants is not indispensable to the exercise of jurisdiction over them.

Ingersoll v. Mangam, 84 N. Y. 627; *Oroghan v. Livingston*, 17 N. Y. 218; *Gotendorf v. Goldschmidt*, 88 N. Y. 110.

Finch, J., delivered the opinion of the court:

The very elaborate and exhaustive opinion of the learned referee, before whom this action was tried, so states the argument upon the fundamental question involved as to simplify our duty of review, and enable us to narrow the discussion, which has taken a wide range, to the single ground on which our decision should rest. The jurisdiction assailed is that of a federal court over infants not served with process, but for whom an appearance was entered and a guardian *ad litem* appointed, who defended in their behalf. The question thus is one of federal jurisdiction and practice, taking us away from our own procedure and into somewhat unfamiliar territory, and where the decisions of the United States courts should be our authority and guide. The precise question involved came before one of those courts, and was decided in favor of the validity of the judgment. The decision has not been reported, and does not appear in the books, but what it was the record before us distinctly and accurately shows. The action was brought in equity in the circuit court by Drake and others against Goodridge and others, among whom, named as defendants, were the infant children of Goodridge. The plaintiffs alleged, in brief, that they were creditors of the copartnership of Goodridge & Co., and had obtained judgment for specified amounts; that in such actions attachments had been issued and duly levied upon the land here in controversy; that the legal title stood in the individual name of one or more of the partners, but was in truth held in trust for the firm to which it actually belonged, and asked judgment that the land be declared to be partnership property, and that a receiver be appointed to sell it and apply the proceeds to the payment of plaintiffs' debt. Judgment was rendered to that effect, and, in pursuance of its directions, the receiver sold the land at a judicial sale. The purchasers thereafter refused to take the title tendered, alleging it to be defective and not marketable. Thereupon the receiver presented a petition to the court setting forth the facts, and praying that the purchasers be required to accept the deed and pay the purchase price. For the purposes of the motion it was stipulated, among other things, that the infant defendants were not in fact served with a subpoena or other process. Judge Blatchford, before whom the judgment had been obtained, decided that the title proffered was good, and the purchasers were bound to accept it. Deciding thus, with the stipulation before him, he necessarily ruled that the court obtained jurisdiction even though

there had been no actual service of process upon the infants, but instead merely the appointment of a guardian *ad litem* upon the petition of their mother. What we are now asked to do is to disregard that decision and hold it to be erroneous upon a presentation of the same question, founded upon the same alleged defect in the same judgment, and affecting the same land. I am very sure we ought not to do that unless upon some strong and clear conviction that the circuit court went astray and in opposition to the decided and manifest trend of federal authority. It is to that inquiry that the learned counsel for the appellant has addressed himself in an extremely able argument.

His principal reliance is upon the case of *Woolridge v. McKenna*, 8 Fed. Rep. 650, decided by Judge Hammond in the circuit court of the western district of Tennessee. If I regarded the language of the decision as applicable, or intended to be applicable, to a case like the present, where, instead of a mere personal action against infants, we have one in the nature of a suit *in rem*, prosecuted against property in which they had or claimed an interest, seeking to impress upon it a partnership character and devote it to the discharge of the partnership debts, I should feel bound to admit that it held service upon the infants to be imperative, without which the application of the mother and consequent appointment of a guardian *ad litem* would be ineffectual to confer jurisdiction. But I observe that the learned judge himself drew the distinction between the two classes of cases, and held the one at his bar to be a personal action against the infants. I am not sure that he was entirely right in so holding, but that for the present is an immaterial inquiry. He did so hold, and I think intended to confine his ruling to the class of cases in which he ranked the one before him. Speaking of the character of the action, he said: "It is rather in the nature of a personal suit against her to cancel as void the deeds under which she claims than a proceeding against the land." After some further argument, he says again: "If this were a case originally brought in this court, standing as to parties in the shape it now does, there is no doubt whatever that this infant defendant, like all other defendants, assuming that she is a citizen of Kentucky, would have to be sued in the district of her residence, so that process could be personally served on her, if the case is to be treated as a personal action to cancel the deeds of conveyance." He had already said that it should be so treated, and therefore was correct in the assertion that she would have to be sued in the district of her residence, irrespective of the possible fact that the land itself might be in another district, and in holding that personal service was required. He then proceeds thus: "Or if it be a suit *in rem*, or of that nature, against the land, there might be substituted process under the Act of March 8, 1875, which is understood to dispense with the requirement of personal service as well in the case of infants as other defendants." Here again the distinction between the two classes of cases

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is recognized, and, when it is finally held that actual service is essential to the jurisdiction, the ruling must relate to merely personal actions such as the one before the court was assumed to be. It, therefore, decides nothing as to the necessary mode of obtaining jurisdiction in a suit against the land. If what is said as to such an action permits an inference that where there is no service on the infants the only other mode of obtaining jurisdiction is under the Act of 1875, there are three answers to be made: First. The opinion does not so declare. The reference to the Act of 1875 grows out of the nonresidence of the infant in the district of the litigation, and assumes the necessity of making her a party against her will or without movement or intervention on the part of her natural guardian. Second. If the opinion had so declared, the statement would have been *obiter*, because relating to a class of cases not before the court. And, third, in that event the decision would stand wholly and entirely unsupported by the authorities cited to sustain it. If on examining them it shall become apparent that, so far as they are applicable at all, they do sustain the court in holding that actual service on the infants is imperative in a merely personal action, but do not support the decision, indeed tend to contradict and overthrow it, if regarded as applicable to a suit against the land, we shall be bound to understand the learned judge as I think he meant to be understood, and not put upon him a decision which he did not need or undertake to make.

The first case which he cites is *Bank of United States v. Ritchie*, 83 U. S. 8 Pet. 128, 8 L. ed. 890. That was a bill of review and a direct attack upon a judgment decreeing the sale of property in which infants had an interest. It did not appear that process had been served upon them. It did appear that a stranger had been appointed guardian *ad litem*, on the motion of counsel for the plaintiffs, without bringing the minors into court or issuing a commission for the purpose of making the appointment. As to that Chief Justice Marshall said: "It is not error, but is calculated to awaken attention." After pointing out other defects in the procedure, he affirms the reversal of the decree, citing many departures from correct usage, but never once intimating that the judgment was absolutely void for want of actual service of process on the infants. It is inconceivable that so great a jurist should have overlooked such a defect if he so regarded it at all. The learned counsel for the appellant perhaps weakens the suggestion by an explanation that something in the law of Maryland following the cession of the District of Columbia may have saved the jurisdiction. I do not know how that is, but obviously the authority, if not positively adverse, does not support the decision of Judge Hammond, as the appellant would construe it. The second case cited is *O'Hara v. McConnell*, 93 U. S. 150, 28 L. ed. 840. That was a case in which the assignees of the bankrupt sued to set aside his conveyance as fraudulent against creditors, making his wife, who was an infant, a party defendant.

The subpoena was served only on the husband, but that was held sufficient before 1874, while yet it was decided that the decree should be reversed because no appearance for the wife had been entered and no guardian *ad litem* had been appointed. The reversal was for the lack of the very steps which were taken in the judgment assailed on this appeal. The case, therefore, does not sustain the doctrine for which it is claimed to have been cited. The third case cited is *New York L. Ins. Co. v. Bangs*, 103 U. S. 435, 28 L. ed. 580. The question involved was the validity of a judgment pleaded as a defense, and it was adjudged void as against an infant not actually served with process, although a guardian *ad litem* had been appointed and had answered. But the court specially point out with constant reiteration the character of the action as having been purely personal. It is said that the infant had no property in Michigan; that the suit did not concern any property, real or personal, and that it was brought to cancel a contract of insurance made with the infant's father. Then it was added that "in all cases brought to enforce or cancel personal contracts, or to recover damages for their violation, the statute requires a personal service of process upon the defendants or their voluntary appearance." So far it is clear that the case is authority for the doctrine, in support of which Judge Hammond cited it, that is, as applicable to personal actions, but not at all to the opinion imputed to him as covering also actions in the nature of a proceeding *in rem*. But the opinion cited goes further. The attention of the court was called to three cases which held that non-service upon the infant did not render the judgment void where a guardian *ad litem* had been appointed. It is important to observe the attitude of the court towards these cases. They are in no respect criticised, or even doubted, but, on the contrary, are said to be consistent with the doctrine asserted. One by one their facts are developed, and it is shown that the actions were in the nature of suits *in rem*, and then the court added that there was nothing in them inconsistent with the doctrine asserted as applicable to a case which did not touch any property in the district, but to one brought to cancel a personal contract. I think this case fairly holds that the need of service on the infant exists in personal actions, but does not exist in those quasi *in rem*. There is still another case cited by Judge Hammond, which is *Carrington v. Brents*, 1 McLean, 174, Fed. Cas. No. 3,446. Speaking of a judgment obtained by Carrington, the court said: "It does not appear that in the above suit process was served on the infant, nor that the guardian *ad litem* was appointed by the court, and for these omissions or errors in the proceedings the decree might be reversed by an appellate court; but when the decree is used as matter of evidence it cannot be disregarded or treated as a nullity."

This examination of the cases cited by Judge Hammond makes it very clear, I think, that the rule which he formulated was a rule applicable only to personal actions, and that 28 L. R. A.

he did not at all intend or contemplate its extension beyond those. The difference between the two classes of cases was clearly noted in *Mohr v. Manierre*, 101 U. S. 422, 25 L. ed. 1054. In discussing the mode in which the federal courts acquired jurisdiction, Mr. Justice Field said: "This necessarily depended upon the nature of the subject upon which the judicial power was called to act. If it was invoked against the person to enforce a liability, the personal citation of the defendant, or his voluntary appearance, was required. If it was called into exercise with reference to real property by proceedings *in rem* of that nature, a different mode of procedure was usually necessary, such as a seizure of the property with notice by publication or otherwise to parties having interests which might be affected." He proceeds to say that these rules were "part of the general law of the land," and were to be applied by the courts of the United States. The words of the learned jurist indicate to my mind what is the vital difference between the two classes of cases, and the distinctive directions in which we should approach the question of jurisdiction. In the case of merely personal actions there is no possible ground upon which that jurisdiction can attach except the service of process upon the individual. The court must lay hold of him. In suits *in rem* it may lay hold of the land, aided, as in this case, by an attachment and *lis pendens*, and thereby the jurisdiction may attach, but can only be exercised upon notice to the parties interested. If they have that notice in fact, any irregularity in giving it may, indeed, be reversible error, but does not necessarily render the subsequent judgment void. A similar, though not the same, distinction runs through our cases in this state. On the one hand we held in *Ingersoll v. Mangum*, 84 N. Y. 623, by force of an explicit statute, that in foreclosure actions service of the summons must precede the appointment of a guardian *ad litem*; while, on the other hand, in an action of partition which that statute did not govern, we also held that such precedent service was not essential to the jurisdiction. *Gotsdorf v. Goldschmidt*, 88 N. Y. 110.

It seems to me, upon this review of the subject, that the decision of Mr. Justice Blatchford pronouncing the title good under the judgment authorizing the sale is not contradicted, and not even made doubtful, by the other federal authorities, but that, on the contrary, their manifest drift is towards the result reached by that decision. I think, therefore, we ought to follow it, and that, if it is to be overruled at all, it should meet that fate, not at our hands, but from the ultimate federal tribunal, carefully considering the nature and limits of its own jurisdiction. I have said nothing of the rules of the United States courts, because I do not think that they at all settle the question or bear very seriously upon the argument, and also because they have been sufficiently discussed in the report of the referee. Nor have I adverted to the position sustained by him and adopted by the general term, that the jurisdiction is saved by the presumptions which

attach to the judgment in view of the condition of the record, not because I disapprove of the conclusion which has been reached, but because I think we ought to put our decision upon the ground which I have already stated.

The judgment should be affirmed, with costs.
All concur.

Miles M. O'BRIEN *et al.*, Receivers of Madison Square Bank, *Appts.*,

v.

Hugh J. GRANT, Receiver of St. Nicholas Bank, *Receipt.*

(146 N. Y. 163.)

1. **A bank which is a member of a clearing-house** and bound by contract and the constitution of the clearing-house to clear checks drawn on another bank, which is not a member, until the completion of exchanges on the morning after notice to terminate the arrangement, is not relieved from paying such checks on the morning after such notice by reason of the known insolvency of the bank on which they were drawn.
2. **A preference to creditors of an insolvent bank in violation of the New York Corporation Law of 1892, chap. 687, §43, prohibiting transfers with intent to give a preference when the corporation is insolvent, or its insolvency is imminent, is not made by the payment of checks drawn on an insolvent bank in the course of exchange at a clearing-house by a member of the clearing-house which knew of the insolvency but by its contract and the constitution of the clearing-house was under obligation to pay them, and held securities which it was entitled to and did apply to its own reimbursement.**
3. **The arrangement between a clearing-house and a bank which is one of its members and another bank which is not a member, whereby the latter pays the clearing-house a fee for the privilege of being represented by such member, and makes a certain deposit of money and securities with such member in consideration of the latter's agreement to clear through the clearing-house checks drawn upon the other bank, while the constitution of the clearing-house prohibits the discontinuance of such arrangement without previous notice, which notice shall not take effect until the exchanges of the morning following the receipt of the notice shall have been completed, constitutes a tripartite agreement upon ample consideration for the mutual benefit of all the parties who enter into it.**

(*Andrus, Ch. J., and Peckham, J., dissent.*)

(May 21, 1895.)

A PPEAL by plaintiffs from a judgment of the General Term of the Supreme Court,

NOTE.—For the previous authorities on the subject of clearing-house business, see *note* to *Yardley v. Philler* (C. C. App. 8d C.) 25 L. R. A. 824, and for a *note* on exceptions to the prohibition of preferences by insolvent national banks, see *Elmira Sav. Bank v. Davis* (N. Y.) 25 L. R. A. 544, 28 L. R. A.

First Department, affirming a judgment entered in the office of the clerk of New York County in favor of defendant in an action to recover possession of certain securities alleged to belong to the Madison Square Bank and to be among the assets of the St. Nicholas Bank. *Affirmed.*

Statement by **Gray, J.:**

This action was brought to recover from the defendant certain securities which had been deposited by the Madison Square Bank with the St. Nicholas Bank, and the proceeds of the securities, which the latter bank had converted into money. The following facts were found, and are either undisputed or proved: In January, 1891, an arrangement was made between the Madison Square Bank and the St. Nicholas Bank (both of them being state banks) by which the latter bank, which was a member of the New York Clearing-House Association, became the agent to clear, through the clearing-house, checks drawn upon the Madison Square Bank. The St. Nicholas Bank submitted in writing a memorandum of the conditions on which it would undertake this business for the Madison Square Bank, as follows: "\$50,000 balance to be kept at all times, to be free from interest. An allowance at the rate of 2 per cent per annum shall be allowed on average exceeding this amount. The Madison Square Bank is to keep with this bank \$100,000 in approved bills receivable." In a letter dated January 9, 1891, addressed by the Madison Square Bank to the St. Nicholas Bank, the cashier of the Madison Square Bank says: "Referring to conversation of our president with your good selves, we would say that we accept the terms and conditions on which your bank agrees to clear for us as per your memorandum, namely \$50,000 balance to be kept with you at all times, free of interest. Interest at 2 per cent per annum to be allowed us on average exceeding that amount. This bank to keep with you \$100,000 of approved bills receivable. . . . We inclose copy of a letter addressed by us to the clearing-house committee to conform with the requirements of their circular of December 18th, last." The letter to the clearing house committee inclosed a copy of a resolution signifying the acquiescence of the Madison Square Bank with the terms of the circular, and authorizing its cashier to send a check for the annual payment of \$200 required of banks clearing through members. It was verbally agreed between the parties, at the time of the arrangement referred to in said letter of the 9th of January, that other securities, of equal value, might be substituted from time to time for those first deposited, making up the \$100,000 of bills receivable. The Clearing-House Association was and is a voluntary association of banks and banking associations of the city of New York. The object of the association, as stated in its constitution, is "the effecting at one place of the daily exchanges between the several associate banks, and the payment at the same place of balances resulting from such exchanges." The St. Nicholas bank was a member of the as-

association. The Madison Square Bank was not so. Section 25 of the Constitution was as follows: "Whenever exchanges shall have been made at the clearing-house, by previous arrangements between members of the association, through one of their number and banks in the city and vicinity who are not members, the receiving bank at the clearing-house shall in no case discontinue the arrangement without giving previous notice, which notice shall not take effect until the exchanges of the morning following the receipt of such notice shall have been completed." This section was in force at and before January 9, 1891, and is still in force, and it was known to be so by the Madison Square Bank at the time of the making of this arrangement. After the making of this arrangement, and on and after the 13th January, 1891, the St. Nicholas Bank made the clearances at the clearing-house for the Madison Square Bank up to and including the 8th day of August, 1893; and the Madison Square Bank deposited and kept good, as to amount and value, its deposit of bills receivable with the St. Nicholas Bank, and up to some time in July, 1893, kept good its money balance of \$50,000 in addition thereto. Some time prior to August 8, 1893, the St. Nicholas Bank desired to terminate the arrangement for making clearances for the Madison Square Bank. At that date it held, also, certain collateral securities, taken upon loans made upon notes of the Madison Square Bank, and by agreement they or their proceeds should be applied to any other obligations of that bank. On the 8th day of August, 1893, the St. Nicholas Bank gave the notice required by the twenty-fifth rule, — that it would cease to make clearances for the Madison Square Bank. This was served upon the banks constituting the Clearing-House Association on that day. By the terms of section 25 this notice took effect upon the completion of the exchanges at the clearing-house on the 9th of August. These clearances were made every day immediately after 10 o'clock, and were completed before 12 o'clock. The St. Nicholas Bank paid on the 9th of August, through the clearing-house, checks drawn upon the Madison Square Bank by depositors having amounts to meet the same to their credit as depositors on the books of the Madison Square Bank, \$373,000. On the 8th day of August, 1893, the Madison Square Bank, after ineffectual efforts to obtain a loan to relieve its immediate necessities, was visited by the clearing-house committee and its condition examined; also by an officer of the state banking department. After this examination by the committee of the clearing-house, their conclusion that the bank was not in a condition to continue business was communicated to the officers and some of the directors of the Madison Square Bank. The Madison Square Bank did not open for business on the following day. It was, in fact, insolvent on the 8th of August, 1893; and the officers of the St. Nicholas Bank knew before the exchanges were made on the 9th of August that the Madison Square Bank was insolvent, or that its insolvency was imminent, and that it had stopped bus-

iness. Included in the gross sum of \$373,000, the amount of the checks upon the Madison Square Bank cleared by the St. Nicholas Bank on the 9th of August, were two checks drawn by Elliott Danforth, the treasurer of the state of New York, against funds of the state deposited in the said bank, which checks were signed and dated on the 8th day of August, 1893, and were deposited in banks in the city of New York which were members of the Clearing-House Association, before 10 o'clock on the morning of the 9th of August, 1893, and were by such banks sent to the clearing-house on said 9th day of August. The clearance of said checks was regular, and according to the usual course of business among the banks constituting said Clearing-House Association, notwithstanding the fact that they were not deposited for collection with a clearing house bank until the morning of the 9th day of August, 1893. The St. Nicholas Bank had no knowledge on the 9th day of August, 1893, of any irregularity in regard to the drawing, deposit, or transmission to the clearing-house of any of the checks going to make up said gross amount of \$373,000. The referee found that the payments of checks on the morning of August 9, 1893, were in the performance of its contract with the Madison Square Bank, and were not made with the intent on the part of either of the banks to give a preference to any creditor of the Madison Square Bank over any other creditor, or in violation of the corporation law of the state, and he held that the plaintiffs were not entitled to recover any part of the money or securities held by the St. Nicholas Bank. From the affirmance of the judgment entered upon his report, at the general term, the plaintiffs have appealed to this court.

Mr. Louis Marshall, for appellant:

The St. Nicholas Bank was the agent of the Madison Square Bank in the clearing-house, and, as such, was not entitled, after the insolvency of its principal became known to it, to pay any checks drawn upon the latter, and was not bound by its contract or by the rules of the clearing-house to make such payment.

The object of the clearing-house rule was to enable the members of the clearing-house to present their checks to such bank as had been designated as the representative of the nonclearing-house bank, to hold indorsers and drawers of paper, payable to the latter bank, until a reasonable time had elapsed, to enable the nonclearing-house bank to designate another representative or to enable the clearing-house banks to adjust their business in such a manner as to enable them to present their checks drawn on the nonclearing-house bank at its banking house.

Morse, Banks & Banking, pp. 450 *et seq.*; *Overman v. Hoboken City Bank*, 80 N. J. L. 61, affirmed 31 N. J. L. 563; *Merchants Nat. Bank v. National Bank of the Commonwealth*, 139 Mass. 517.

It was not intended that a bank which was the representative of a nonclearing house bank should be required to honor the checks on the latter after its known insolvency.

People v. St. Nicholas Bank 77 Hun. 159.

The drawers of checks on the Madison Square Bank had no right to rely upon the clearing-house rules, and the securities in the hands of the St. Nicholas Bank did not inure to their benefit.

Merchants Nat. Bank v. National Bank of the Commonwealth, and Overman v. Hoboken City Bank, supra; Merchants Nat. Bank v. National Eagle Bank, 101 Mass. 281; *National Bank of North America of Boston v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; *Manufactures Nat. Bank v. Thompson*, 129 Mass. 483, 87 Am. Rep. 376; *National Exchange Bank v. National Bank of North America*, 132 Mass. 147.

The St. Nicholas Bank when it paid the checks drawn on the Madison Square Bank on August 9, 1893, was in the situation of an agent acting without authority; or, in other words, in the situation of an agent whose authority had become revoked by the incapacity of the principal.

People v. St. Nicholas Bank, 77 Hun, 181; *Farmers Loan & T. Co. v. Wilson*, 139 N. Y. 284; *Weber v. Bridgman*, 113 N. Y. 600; *Mechem, Agency*, § 238; *Wright, Principal & Agent*, (1894) 207-209; 1 Evans, *Agency*, Am. ed. 1893, *100; *Story, Agency*, § 481; *Winnett v. Forrester*, 4 Taunt. 541; *Parker v. Smith*, 16 East, 389; *Re Daniels*, 18 Nat. Bankr. Reg. 46; *Audenried v. Betteley*, 8 Allen, 802.

A rule or custom of business must be moral, reasonable, and not in contravention of the law. If it is such as honest and right minded men would deem unfair and unrighteous it cannot be maintained.

Paxton v. Courtney, 2 Post. & F. 131; *Taylor v. Devey*, 7 Ad. & El. 409; *Metcalf v. Weld*, 14 Gray, 210; *Noble v. Durell*, 3 T. R. 271; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Oleago County Bank v. Warren*, 18 Barb. 290; *Commercial Bank of Kentucky v. Varnum*, 3 Lans. 90; *Dunham v. Dey*, 13 Johns. 40; *Dunham v. Gould*, 16 Johns. 367, 8 Am. Dec. 323; *New York Firemen Ins. Co. v. Ely*, 2 Cow. 678; *Cayser v. Taylor*, 10 Gray, 274, 69 Am. Dec. 817; *Lawson, Usages & Customs*, p. 466, and cases there cited; *Security Bank of New York v. National Bank of the Republic*, 67 N. Y. 458, 28 Am. Rep. 129; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74, 43 Am. Rep. 65; *Fuller v. Robinson*, 86 N. Y. 306, 40 Am. Rep. 540.

Such contract involved the creation of a preference, in violation of section 43 of the Stock Corporation Law.

Cole v. Millerton Iron Co. 133 N. Y. 164; *Throop v. Hatch Lithographic Co.* 125 N. Y. 530; *Kingsley v. First Nat. Bank of Bath*, 31 Hun, 329; *Robinson v. Bank of Attica*, 21 N. Y. 409; *Gillet v. Phillips*, 13 N. Y. 119; *Brouwer v. Harbeck*, 9 N. Y. 593.

Mr. William Allen Butler, with **Messrs. Smith & White**, for respondent:

The provisions of the banking law relied on by the plaintiffs are highly penal, as they work a forfeiture by invalidating the payments to which they apply.

They "will not be extended by implication or construction to cases within the mischief if they are not at the same time within the terms of the act, fairly interpreted."

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Wood v. Erie R. Co. 72 N. Y. 196, 28 Am. Rep. 125.

Under the terms of section 48, invoked against the defendant in this action, there can be no application of it unless the acts alleged to be in violation of it were done with the intent to violate it.

Verona Central Cheese Co. v. Murtaugh, 50 N. Y. 814; *Cameron v. Seaman*, 69 N. Y. 396, 25 Am. Rep. 212; *Health Department of New York v. Knoll*, 70 N. Y. 530; *Stearns v. Gage*, 79 N. Y. 103; *Shulte v. Hoagland*, 85 N. Y. 464; *Grant v. First Nat. Bank of Monmouth, Illinois*, 97 U. S. 80, 24 L. ed. 971; *Barbour v. Priest*, 108 U. S. 293, 26 L. ed. 478; *Winkman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *Olase v. Lord*, 77 N. Y. 1; *Elmira Sav. Bank v. Davis*, 25 L. R. A. 546, 143 N. Y. 596.

The fact of the insolvency of the Madison Square Bank, whether known to the St. Nicholas Bank or not, worked no change in the contract relation existing between them.

People v. Remington, 8 L. R. A. 458, 121 N. Y. 323.

A party holding any of the checks paid through the clearing-house, was entitled to the protection of the security in the hands of the St. Nicholas Bank, who was a trustee for his benefit.

Watts v. Shipman, 21 Hun, 598; *People v. Merchants & Mechanics Bank of Troy*, 78 N. Y. 269, 34 Am. Rep. 532; *People v. Saint Nicholas Bank*, 77 Hun, 159.

Gray, J., delivered the opinion of the court:

The St. Nicholas Bank claims the right to apply the securities and moneys theretofore deposited with it by the Madison Square Bank towards the reimbursement of its payments or clearances of the morning of August 9, 1893. With respect to that claim the proposition of the plaintiffs is twofold: They say that rule 25 of the clearing-house did not require the St. Nicholas Bank to clear the checks drawn on the Madison Square Bank, presented after it became aware of the insolvency of the latter, and that such insolvency terminated the relation of clearing-house agents, and rendered any payments made unauthorized; or, if the clearing-house rule is susceptible of the interpretation that it required the St. Nicholas Bank to honor checks drawn on the Madison Square Bank after its insolvency became known to it, the contract between the banks, in so far as it contemplated such payment, and the use of the securities of the Madison Square Bank to secure the advances made by the St. Nicholas Bank, was an illegal preference, under the statute. The controversy must turn, in my opinion, upon the nature of the relation which existed between the two banks in question and the clearing-house, and upon what was the extent of the obligation entailed upon the St. Nicholas Bank, in engaging to receive and to clear checks drawn upon the Madison Square Bank, when presented at the clearing-house. For the plaintiffs it is argued that, as between the Madison Square Bank and the St. Nicholas Bank, the relation, simply, of principal and agent was

created, and therefore, upon the insolvency of the former becoming known, on the morning of the day when clearances of the previous day's checks were to be effected, that the latter bank was not entitled to pay checks drawn upon the former bank. But I think to view the relation as such is altogether incorrect, and unwarranted by the facts. In a certain and limited sense, the St. Nicholas Bank, of course, would act as an agent, in clearing and paying checks drawn upon the Madison Square Bank. That, however, was a mere feature of that larger contractual relation into which the two banks had entered with the Clearing-House Association, and which characterized all their dealings. The agreement of January, 1891, was one to which there were three parties, each of which was moved to enter into it by a legitimate consideration. The Madison Square Bank acquired the very substantial advantages which the members of the Clearing-House Association enjoyed, in the increased convenience, dispatch, and safety of banking transactions. The St. Nicholas Bank acquired the advantage, benefit, and a protection by the deposit of collateral securities to the amount of \$100,000, and of the cash, required to be made by the Madison Square Bank. The cash deposit was to be free of interest, and maintained at a daily balance of \$50,000. The members of the Clearing-House Association, in extending to the Madison Square Bank the right to have its checks cleared and paid through one of its members, were assured that all checks presented would be paid up to, and including, the day following the giving of notice by the St. Nicholas Bank of the termination of the arrangement between itself and the Madison Square Bank. The learned referee very correctly defines the arrangement between these two banks and the clearing-house as constituting a tripartite agreement, upon ample consideration, for the mutual benefit of all the parties who entered into it. That agreement provided for the length of its duration, for the maintenance at all times of the stipulated security to protect the St. Nicholas Bank, and bound that bank to receive and pay the checks drawn upon the Madison Square Bank as it would its own. The St. Nicholas Bank could only agree and arrange to clear for the Madison Square Bank in accordance with conditions imposed by the constitution and rules of the Clearing-House Association; and an essential condition was that the arrangement could not be discontinued, nor should its liability cease, until after the completion of the exchanges of the morning next following the receipt of a notice of discontinuance. There was nothing in such a provision of the constitution of the clearing-house which was objectionable, legally speaking or otherwise. It was perfectly competent for the banks to form themselves into this voluntary association, and to agree that they should be governed by a constitution and by rules. When adopted, they expressed the contract by which each member was bound, and which measured its rights, duties, and liabilities. *Belton v. Hatch*, 109 N. Y. 593. If not in conflict with rules of law, they must be

awarded that effect which is always accorded to the deliberate engagements of parties. The provisions of section 25 of the Constitution of the Clearing-House Association were designed as a security and a protection for the members, in the event mentioned. When the Madison Square Bank made its arrangement with the St. Nicholas Bank, and also made compliance with the terms of the demand of the clearing-house circular, I think it is clear that a definite contractual relation was at once created between the three parties, whose provisions and relative engagements were effectually defined in and controlled by the constitution and rules of the clearing-house, in so far as they touched the proposed clearances of checks. The contract which bound the members of this voluntary association of banks, and regulated their duties, rights, and liabilities, permitted the representation of an outside bank through a member, provided that member assumed a liability which should not cease until the completion of clearances on the morning next after its notice of a discontinuance was given. That liability so exactly provided for is, however, sought to be limited to cases where insolvency has not supervened, as to the non-member bank. If the relation here was strictly that of an agent acting for a principal, the question might be a serious one; but even then much might be said in favor of the liability which the agent had, with the consent of the principal, assumed. That, however, was not the relation. The Madison Square Bank was a contracting party in an agreement to which the other parties were the St. Nicholas Bank and the Clearing-House Association, and it had accepted, and had become bound by, provisions in the latter's constitution and rules. That agreement was entered into at a time when it was perfectly competent to make it, and its duration was fixed by section 25 of the Constitution of the clearing-house. As the respondent's counsel says, every bank entitled to the payment of checks sent by it through the exchanges of the clearing-house, in due course, had a right to rely upon the liability of any other bank clearing for a non-member, and unless this liability continued definitely, and up to a certain period, the liability of the clearing bank would not be fixed and enforceable. Here the effect of the constitution and rules of the clearing-house upon the agreement was as though it had been stated, in so many words, that it should commence upon January 13, 1891, and should be at an end on August 9, 1893, after the clearances of that day had been completed. What was there in the agreement and its incidents which contravened any rule of law or of policy? The plaintiffs say that the effect is to give an illegal preference, under the statute, which, it is meant, would be accomplished by the payment of checks after the insolvency of the non-member bank is known, and by the use by the clearing bank of the deposited securities in reimbursement thereof. To that I cannot agree. The statute referred to is the State Corporation Law (Laws 1892, chap. 688), which, in section 48, contains previously existing provisions of the banking law of

this state. The provisions of the section forbid the assignment or transfer of any property "when the corporation is insolvent, or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation." This provision has no application to such a case as this, where, at the time when the arrangement was made with the St. Nicholas Bank, the Madison Square Bank was solvent. It would be absurd to speak of the agreement of January, 1891, as having been made in contemplation of future insolvency, or with the intent to give a preference to any creditor of the Madison Square Bank. If there is any presumption respecting the business engagements of going concerns, it is that they will be fulfilled; and, when security is exacted, it is as a business precaution, to compel exact and prompt performance, rather than a provision in contemplation of insolvency. If it were otherwise, business transactions which have for their subject the accommodation of one corporation by another in the loan of money, or the extension of credit, would be seriously embarrassed, if not checked. The statute recognizes the right of a banking corporation to transfer promissory notes or evidences of debt, received in the transaction of its ordinary business, to purchasers for a valuable consideration; and it may lawfully do so in pledge to secure its creditor, when it is in a condition of solvency. The deposit of securities made by the Madison Square Bank with the St. Nicholas Bank constituted a lawful pledge of its assets to protect the former against any possible loss in undertaking to clear and pay all checks drawn upon the latter, and sent through the clearing-house. The invalidity of a transfer or assignment of property by a banking corporation, under the banking law, is where it has been made while in a condition of insolvency, or in contemplation of it, and with the "intent" of giving a preference. The "intent" must exist, and be inferable, to vitiate the transaction. In this connection our recent decision in *Elmira Sav. Bank v. Davis*, 142 N. Y. 590, 25 L. R. A. 546, may be referred to, where the question involved was whether the preference given to savings bank deposits by the state banking law was in contravention of the United States national banking law, which avoids transfers or assignments or deposits made with a view to prefer a creditor. It was there said—and the observation is applicable here—that "It is the voluntary act of the national bank, in contemplation of its insolvency, and with the view of then preventing the ratable application of its property, which is avoided by the national law. In the present case, while a going concern, it entered into an engagement with the savings bank, which the state law required and regulated, which vested in the latter superior rights or equities, and which, in the possible event of future insolvency, would give to it a prior claim to payment from the assets. When that event happened, and the receiver was appointed, he took over the property of the insolvent concern, as trustee for its creditors

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and shareholders, under the same conditions as the bank held it, and subject to the right of this plaintiff to be first paid in full before other creditors were paid." So I say here the plaintiffs, upon becoming vested, as receivers, with the property of the insolvent Madison Square Bank, held it subject to all rights lawfully acquired, and to all superior equities, among which was the right of the St. Nicholas Bank, by virtue of an agreement valid in its inception and at all times, to apply the securities in its possession in reimbursement of its payments of checks presented through the clearing-house on the morning of August 9, 1893,—payments which it was obliged to make, as well by the rule of commercial honor as by force of the obligations imposed by the constitution and rules of the clearing-house. Nor do the cases of *Overman v. Hoboken City Bank*, 80 N. J. L. 61, and *Merchants Nat. Bank v. National Bank of the Commonwealth*, 139 Mass. 518, referred to, touch this question of the obligation of the clearing bank under the constitution and rules of the clearing-house, and with reference to which the non-member had contracted,—a distinction recognized in the *Overman Case* cited.

The plaintiff's counsel suggests a possible illustration of the effect of the construction, which is given to this section of the clearing-house constitution. He says all the creditors of the Madison Square Bank, becoming aware of its insolvency, might have drawn checks upon their deposits, and, if they succeeded in getting them presented by clearing-house banks, the St. Nicholas Bank would have been compelled to pay them, to its possible ruin. The illustration, however, proves nothing. That may be said to have been a risk assumed by the St. Nicholas Bank, but very much of the business of the land, and especially that portion which is done in Wall street, is conducted upon faith; and experience has shown that it has not, in the main, been misplaced. For such a contingency as counsel suggests, it was necessary that the officers of the Madison Square Bank should have been parties to an immoral and illegal scheme. The St. Nicholas Bank must be deemed to have contemplated and to have assumed every risk, in undertaking to become responsible for the Madison Square Bank, and to have exercised such reasonable judgment in doing so, and to have taken such security against loss therein, as the practical observation and the business experience of its officers suggested.

The conclusion I have reached is that the insolvency of the Madison Square Bank did not excuse the St. Nicholas Bank from the performance of its obligations towards the clearing-house banks. What rather emphasizes the interest in the question of the right of the St. Nicholas Bank to clear and pay on August 9, 1893, all the checks drawn upon the Madison Square Bank and presented by clearing-house banks, is the fact that there were four checks, exceeding in the aggregate the sum of \$300,000, which were drawn upon somewhat peculiar circumstances. I may refer to two of them, aggregating \$250,000, which were drawn by Mr.

Danforth, then state treasurer, on August 8, 1893, who had heard enough, in some way, to take alarm at the situation of the Madison Square Bank, with which were state funds on deposit. He arranged to deposit them with the Manhattan Trust Company, which kept accounts with the Chase and the Continental National Banks, and which had its checks cleared through them. The two checks were handed into the two banks at a little before 10 o'clock of the morning of August 9, 1893, and were at once sent, with all other checks, to the clearing-house, where the business of clearances commences to be transacted at 10 o'clock. The evidence conclusively shows that there was nothing unusual in this transaction. It is the general and invariable custom of the banks in New York city to pass all checks dated upon the previous day, and received between 10 o'clock of that day and 10 o'clock in the morning of the day following, by hand or by mail, through the clearing-house, with the clearances of that morning. Checks may come in the morning by mail, or may be brought in by local depositors, before 10 o'clock; and it is considered to be regular, and in the exercise of business prudence, to have them cleared as promptly as the rules allow. In this case there is nothing to show that the officers of the Madison Square Bank knew of the manner in which the state treasurer's checks were deposited for payment by the Manhattan Trust Company, or that they had anything to do with their drawing. It appears that that company acted in good faith in the matter, and Mr. Waterbury, its president, testified that there was nothing unusual, or contrary to the usual course of business, in getting Mr. Danforth's checks put promptly through the clearing-house that morning; and it is difficult to see how it would be material, if it was otherwise. As to the two banks which acted for the trust company, they appear to have merely performed their duty to their depositor, in passing the checks severally through the clearing-house. Nor can it be pretended that the St. Nicholas Bank had any knowledge or notice respecting these checks, or any of the checks, which it paid in its clearances of August 9th. Its officers had no knowledge of the insolvency of the Madison Square Bank until that morning. Its notices of the day previous, to the various banks, that it would no longer continue to clear for the Madison Square Bank, were based on a dissatisfaction with its failure to keep good its promised daily cash balance of deposits. Until the clearing-house committee completed its examination of the condition of the latter bank, in the afternoon of the 8th of August, it was not known how it stood. The time was one of great excitement and of distrust in financial circles, which cast its shadow over many banks; and a bank, to justify being assisted by the associated banks, must show itself to possess sufficient resources, in the possession of assets of real value. The attention of the clearing-house committee being called to the Madison Square Bank, their examination resulted in

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the advice that it should suspend. They did not decide as to the solvency of the bank. It might resume, if it succeeded in making such arrangements as would put it in the possession of funds by realization upon its assets. However that might be, the bank decided not to open its doors on the following morning. It was affirmatively testified to by the cashier of the St. Nicholas Bank that they had no suspicion of the inability of the Madison Square Bank to continue its business, when sending out notices to other banks, but thought it unsafe to continue clearing for it, in view of its past conduct. If the evidence showed any knowledge in the St. Nicholas Bank as to the particular checks, as to which so much has been urged, and which it paid in the clearances of the morning of August 9th, or if it had such notice concerning the designs of their drawers as to make it an abettor in an unlawful scheme to obtain a preference over other creditors, a very different question would be presented. But there was nothing whatever to charge it with any knowledge or notice, and all the evidence goes to prove that it acted in perfect good faith; and that being so, and its payment of checks passing through the clearing-house on the morning of August 9th having been made in discharge of the liability resting upon it, under the constitution and rules of the association, it not only could not, but it should not, be made to suffer a loss. The knowledge possessed by it, in common with the public, in the morning of August 9th, did not change its position, or affect its liability. The presumption was that every check presented at the morning's clearances was held for value, and it was for the plaintiffs to rebut that presumption, and to show that the banks presenting checks were not acting in good faith in what they did, but merely as agents for the drawers, in obtaining the funds drawn against. They failed to do so. More than that, the evidence established the contrary, except in the possible instances of the two checks drawn by the Uhlmans, which were two of the four checks I mentioned as taking the clearances of August 9, 1893, out of the ordinary. I deem it unnecessary to discuss the facts respecting them. The St. Nicholas Bank was in no respect more informed about their making or their collection than it was about the other checks. If there was anything irregular concerning them, I agree with the learned referee that the question would affect, not the St. Nicholas Bank, but the right of the bank which presented them to hold their proceeds. If we leave out of consideration the two Uhlman checks, the balance of account is still against the plaintiffs, and their action would have to fail any way. For these reasons, as for those which were well expressed by the very learned referee, and with which they are in harmony, I think the judgment below was right, and I advise its affirmance here.

Judgment affirmed.

All concur, except *Andrews, Ch. J.*, and *Peckham, J.*, dissenting.

NEBRASKA SUPREME COURT.

W. J. CLAIR, *Ptff. in Err.*,

v.

STATE of Nebraska.

(40 Neb. 534.)

- *1. A wide discretion is allowed to the presiding judge in directing the attention of the grand jury to particular subjects of inquiry, or to particular offenses or classes of offenses, and that discretion appellate courts will not assume to control.
2. But where a party indicted, in the honest belief that he has been prejudiced by an abuse of discretion by the judge in his charge to the grand jury, in respectful language alleges the action of the judge as error, in order to secure a ruling thereon, he is not guilty of contempt of court.
3. So held, although he mistakes his remedy by assailing the charge of the judge by motion instead of by plea.
4. The existence of facts which will war-

*Headnotes by POST, J.

NOTE—Improper influence or interference with grand jury.

- I. By charge to grand jury.
- II. By prosecuting attorneys.
- III. By deputy and assistant prosecutors.
- IV. By attorneys generally.
- V. By bailiff, messenger and officer.
- VI. By clerk.
- VII. By stenographer.
- VIII. By interpreter.
- IX. By other persons present.

I. By charge to grand jury.

CLAIR v. STATE is a somewhat unusual case of an "inflammatory" charge. The court in its charge said "such criminals as these are defiantly walking our streets, sneeringly, brazenly, and insultingly bidding defiance to the law that punishes bribery, by asking, 'What are you going to do about it?'—and he emphatically declared that the crime of bribery and receiving bribes by public officers has been recently committed in Douglas county accompanied by directions to indict some one therefor and a reminder that a demand has come up from the people for a forward march, and patience and long-suffering endurance have at length reached their limit. On a motion to quash the indictment, the attorneys were fined for contempt of court by alleging that such charge was "inflammatory" but the supreme court reversed the order of contempt and held that such criticism was merited.

There are not many cases on the question of inflammatory or prejudicial charges to the grand jury, the judges generally recognizing the propriety of defining the duties of the grand jury and calling their attention to crimes generally, and then to particular statutes, but refraining from expressing any opinion as to the guilt or innocence of any particular person. But it is believed that any intimation by the court that a particular person has been guilty of any particular crime or that evidence can easily be found which will convict them, or that the grand jury should indict him, would vitiate an indictment, if proper objection is taken, except in Louisiana. The cases in regard to charges to grand juries are included in this note only so far as they touch the question of improper influence upon their action.

In *Com. v. Crans*, 3 Pa. L. J. 442, it was said that 28 L. R. A.

rant the finding of an indictment is a question for the grand jury, and should not, as a rule, be assumed by the judge.

5. A charge to the grand jury which, after assuming that the crime of bribery had been committed, and that it was the duty of the jurors to indict therefor, concluded as follows: "There comes up from the people a command for a forward march all along the line of your duty. You should give heed to that cry, for it comes from a patient and long-suffering endurance which has at last reached its limit."—Held, that the term "inflammatory," as applied to said charge, is a merited criticism.

(May 15, 1894.)

ERROR to the District Court for Douglas County to review an order punishing plaintiff in error for contempt of court. *Reversed.*

The facts are stated in the opinion.

Mr. Charles Offutt, with Messrs. W. D. McHugh and Lee S. Estelle, for plaintiff in error.

The statute only gives the power to punish

if a judge in his instructions to the grand jury should pervert the law so as to oppress those he ought to protect, or to paralyze the arm of public justice, instead of infusing into it vigor and energy, impeachment, removal from office, public infamy, may be the just retribution of his official malversation.

A plea in abatement that the grand jury were told by the prosecuting attorney to hurry up with those indictments against defendant, because Judge Field wanted to leave, and wanted them found before he left; and that the grand jury dispensed with the hearing or reading of the indictments, but not alleging that such wishes induced the finding of the indictment,—is insufficient. *United States v. Terry*, 30 Fed. Rep. 355 (pl. abate.).

In *State v. White*, 37 La. Ann. 173 (mo. qu.), it was held that an erroneous or misleading charge to the grand jury is not a ground for quashing an indictment.

In *King v. Earl of Shaftesbury*, 8 How. St. Tr. 754, the lord chief justice required the grand jury to hear the evidence in open court and endeavored by all means to force an indictment. Referring to the statute which they demanded, he says: "Look ye, gentlemen, it is grounded upon the statute of this king, although there is enough to find an indictment of treason upon Statute of 25 Edw. III." and in regard to an association to set up a government, he said, referring to the evidence: "I may mistake, for I propose to speak only out of memory, but it seems to me of great consequence and there is great matter to be presumed upon it, it being found under look and key in his study, but I suppose my Lord Shaftesbury may give an account of it, but there is great presumption upon it." But the grand jury refused to indict.

In *Re Charge to Grand Jury No. 3*, 62 Fed. Rep. 840, 4 Inters. Com. Rep. 784 (charge), in the matter of railroad strikes, and the obstruction of mails on the Southern Pacific Company, the court said the situation has been of such an extraordinary character, and the interruption to commerce and the transportation of the mails so serious and long continued, as to have required of the railroad company temporarily to waive questions concerning the makeup of regular trains (as the officers claim to have done), and employ such resources as the company had in the movement of other trains in an effort to relieve the prevailing congestion and

for what was already a criminal contempt at common law.

Criminal contempts are all those acts in disrespect of the court, or of its process, which obstruct the administration of justice, or tend to bring the court into disrepute.

Rapalje, Contempt, § 28.

These actions of these attorneys did not constitute a criminal contempt at common law.

Mullin v. People, 9 L. R. A. 566, 15 Colo. 437; *Re Dalton*, 46 Kan. 258; *Ex parte Curtis*, 8 Minn. 274; *Neel v. State*, 9 Ark. 259, 50 Am. Dec. 209; *Dunham v. State*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207.

There is notable precedent for the use of the word "inflammatory" as applied to the action of trial judges.

McFadden v. Reynolds, 20 W. N. C. 312.

The intention of the parties was a material element in the offense.

Rapalje, Contempt, § 121; *Thomas v. People*, 9 L. R. A. 569, 14 Colo. 254.

The power to punish summarily is confined to that branch of the court presided over by the particular judge in whose presence the act was committed.

Marvin v. Weider, 81 Neb. 775; *Boyd v.*

State, 19 Neb. 128; *Johnson v. Bouton*, 85 Neb. 898; *Butchelder v. Moore*, 42 Cal. 414; *Stuart v. People*, 4 Ill. 395; *Dunham v. State*, 6 Iowa, 255; *Mullin v. People*, *supra*; *Gandy v. State*, 13 Neb. 450; Rapalje, Contempt, § 22; *Re Wood*, 82 Mich. 75; *Thomas v. People*, *supra*. The motion was in effect a plea in abatement.

Jansen v. Mundt, 20 Neb. 824; *White v. State*, 28 Neb. 841; *McMurtry v. State*, 19 Neb. 147; *Barton v. State*, 12 Neb. 260; *State v. Bishop*, 22 Mo. App. 485.

As a plea in abatement Clair & Cobb not only had the right to file it, but they were charged with that duty, and it was error in the trial court to overrule it.

1 Bishop, Crim. Proc. §§ 118 *et seq.*; *State v. Turlington*, 102 Mo. 642.

If the act was not committed *in facie curiæ*, there was no jurisdiction to make the order.

Gandy v. State, 13 Neb. 451; *Ludden v. State*, 31 Neb. 437; Rapalje, Contempt, § 111; *State v. Henthorn*, 46 Kan. 618; *Ex parte Garland*, 71 U. S. 4 Wall. 378, 18 L. ed. 370; *Fletcher v. Daingerfield*, 20 Cal. 430; *Ex parte Heyfron*, 7 How. (Miss.) 127; *Re Judson*, 3 Blatchf. 148.

distress. This obligation I believe to have been a public duty, and a willful failure to perform this duty with respect to the movement of the mails and interstate commerce is therefore, in my judgment within the purview of the statute.

No objection was made to this charge although it appears to express the opinion of the court somewhat emphatically.

In *State v. Turlington*, 102 Mo. 642 (pl. abate.), it was held that a plea in abatement that the charge was prejudicial will not avail where the judge committed an impropriety and corrected himself by modifying his charge as to the crime. Besides the statute gave the right to the defendant of another tribunal of which he should have availed himself. See this more fully set out in the opinion of the court in the above case of *CLAIR v. STATE*.

II. By prosecuting attorneys.

In some of the states the duties of the prosecuting attorneys are defined by statute and such statutes generally direct his attendance on the grand jury except when deliberating or voting. The cases are nearly uniform as to the duty of the prosecuting attorney to appear before the grand jury and superintend the examination of witnesses, and it may be said that no indictment has yet been set aside on account of his action before the grand jury. As to the assistant attorney and other attorneys, see appropriate subheads.

The prosecuting attorney should present the accusation to the grand jury in behalf of the government, causing witnesses to be subpoenaed, and he should examine the witnesses and assist in expediting matters before the grand jury, but he should not be present while they are deliberating or voting on the indictment. *Ex parte Crittenden*, Hemp. C. C. 178 (mo. to prohibit); *Cherry v. State*, 6 Fla. 679 (mo. ar.); *Charge to the Grand Jury by Mr. Justice Field*, 2 Sawy. 697 (charge); *Shoop v. People*, 45 Ill. App. 110 (mo. qu.); *State v. Aleck*, 41 La. Ann. 88 (mo. qu.); *State v. Adam*, 40 La. Ann. 745 (mo. qu.); *Re Charge to Grand Jury No. 3*, 62 Fed. Rep. 340, 4 Inters. Com. Rep. 784 (charge); and in *United States v. Reed*, 3 Blatchf. 435 (mo. qu.), the same was said to be the rule.

In *Charge to Grand Jury*, 3 Pittsb. 174 (charge) it was said, the least attempt on the part of the prosecuting attorney to influence the grand jury would 28 L. R. A.

be most improper, and should not be tolerated by them, and it would be his duty to decline to give any opinion as to the propriety of finding a bill, and that the interference of any other person, whether attorney, witness, or party, in reference to matters before the grand jury, must not be tolerated, but should be reported at once as a misdemeanor under the statute providing that any attempt to corrupt or influence any juror by conversation or writing shall be a misdemeanor.

In High-Treason, Kelyng, 8, it was resolved that any of the king's counsel might privately manage the evidence to the Grand Inquest, in order to the finding of the bill of indictment, and agreed that it should be done privately; it being usual in all cases, that the prosecutors upon indictments are admitted to manage the evidence for finding the bill, and the king's counsel are the only prosecutors in the king's case, for he cannot prosecute in person.

In the note on Colledge's Trial, 8 How. St. Tr. 550, it appears that when the grand jury at Middlesex returned an "ignoramus" on the indictment for treason, the foreman was apprehended before the council and sent to the tower and forced to fly beyond the sea, and when they tried to indict Colledge at Oxford, the witnesses and king's counsel by secret management, were privately shut up with the jury until they found a bill, which was afterwards complained of as intolerable practice.

In *Rex v. Fitzharris' Case*, 8 How. St. Tr. 224, the grand jury demanding instructions upon a point of law and evidence, the attorney-general said: "The grand jury, all but three, agreed to hear the evidence, whereupon Mr. Solicitor and myself did go on upon the evidence and spent some time in opening it to them, and truly the gentlemen did seem to be abundantly satisfied what a horrid villainy it was, and we did think they would have found a bill."

And where the prosecuting attorney said to the grand jury: "I suppose you don't want to hear any more evidence,"—the error was held immaterial. *Com. v. Salter*, 2 Pearson (Pa.) 461 (mo. qu.), or where he told them to "hurry up with those indictments," a plea in abatement not alleging influencing of grand jury was held insufficient. *United States v. Terry*, 39 Fed. Rep. 335 (pl. abate.).

That the foreman of the grand jury as an attor-

The charge to the grand jury was "inflammatory and prejudicial."

Charge to the Grand Jury by Mr. Justice Field, 2 Sawy. 669; 2 Hale, P. C. 161; Chitty, Crim. L. 812; Thompson & Merriam, Juries, ed. 1882, § 597; State v. Turlington, supra.

Mr. George H. Hastings, Atty-Gen., for defendant in error:

Contemptuous or insolent language or behavior in the presence of or towards a court, tending to disturb its proceedings or impair the respect due its authority, or a disobedience of its authority or its rules or orders which interfere with a due administration of the law, is contempt.

See Whart. Crim. L. 7th ed. § 8426; Bishop, Crim. L. 7th ed. § 247; 8 Am. & Eng. Encyclop. Law, p. 777.

A court of justice has an inherent power to punish all persons for contempt of rules or orders or for disturbing it in its proceedings.

8 Am. & Eng. Encyclop. Law, p. 780, cases cited, *note 4*.

Insulting language to a judge, relative to his conduct in a suit pending before him, even though out of court, is a contempt punishable by fine and imprisonment.

Com. v. Dandridge, 2 Va. Cas. 408; Lechmere Charlton's Case, 2 Myl. & C. 816; Holman

v. State, 105 Ind. 518; State v. Frew, 24 W. Va. 416, 49 Am. Rep. 257; United States v. Duane, Wall, C. C. 5; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; Wyatt v. People, 17 Colo. 252; Re Pryor, 18 Kan. 72, 26 Am. Rep. 747.

A court has power on the ground of self protection, outside of the common law and statutory doctrine of contempt, to punish an attorney who, as an officer of the court, has violated an order of the court, and this right to punish for contempt extends to where an attorney has been guilty of doing that which was calculated and intended to injure the court.

See *Ex parte Biggs, 64 N. C. 202; Re Woolley, 11 Bush, 95; Lechmere Charlton's Case, supra; Ex parte Robinson, 1 Cent. L. J. 280.*

The filing of the motion to quash, containing the charges against the court, is certainly contemptuous conduct towards a trial court.

People v. Turner, 1 Cal. 153; Respublica v. Onoald, 1 U. S. 1 Dall. 829, 1 L. ed. 160.

A general privilege extended to all courts is the power to commit for contempt, whether the contempt is by word or deed offered in the presence of the court.

Lining v. Bentham, 3 Bay. 1; Lechmere Charlton's Case and People v. Turner, supra.

All acts calculated to impede, impress, or

ney occupied the same law office with the state's attorney, and that the guilt of the defendant was discussed in the presence of the foreman prejudicing him, could not be pleaded in abatement, and could not be proved except by evidence from grand jurors which could not be allowed. *State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54 (pl. abate.).*

And the grand jury or prosecuting attorney will not be allowed to testify as to the action of the prosecuting attorney before them during their investigation, and the Missouri statute does not prohibit him from being present during the expression of opinion or voting. *State v. Johnson, 111 Mo. 378 (pl. abate.).*

And in *Com. v. Twitchell, 1 Brewst. (Pa.) 551 (mo. qu.)*, the same was held, but it was said that if a third person was present and misconduct occurred, such person could be called to prove that fact.

In *United States v. Terry, 39 Fed. Rep. 355 (pl. abate.)*, it was held that a plea in abatement that "the district attorney was present during the expression of opinion of the grand jury upon a charge made in said indictment, and during the expression of their opinions and voting thereon," but not alleging that he exercised or attempted to exercise any influence upon the grand jury to induce them to find a bill, is insufficient, and it did not distinctly appear whether he was present when the grand jury voted that he should be instructed to prepare a bill, or afterwards when the bill was presented to them and voted upon, or on both occasions. *Cal. Penal Code, § 923*, prohibiting any person from being present is not binding on the federal courts.

And in *Com. v. Bradney, 126 Pa. 199 (mo. qu.)*, a similar ruling was made on a motion to quash, the court going further and holding that his presence while the vote was being taken, would not invalidate, although the court said he should be required to retire when the grand jury are deliberating or voting.

And in *Gitchell v. People, 146 Ill. 175 (mo. qu.)*, it was held that he may interrogate witnesses but he should not influence the grand jury, or be present while they are discussing or voting; but there was no evidence as to any misconduct on his part in that case.

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And in *United States v. Schumann, 7 Sawy. 439 (mo. to dismiss)*, it was held that he could not control the body or prevent indictments, but should attend their sessions, advise them upon the law, and examine witnesses.

And in *Baker v. State, 58 Ark. 513 (mo. set aside)*, the objection that he was present when they were deliberating on the charge was not sustained by evidence.

And where he refused to draw an indictment for murder in the second degree, claiming that it had to be in the first degree, the court would not set aside the indictment under *Tex. Crim. Code, art. 523*, because that provided only two grounds for setting aside an indictment; first, when not found by nine grand jurors, and, second, when an unauthorized person was present. *Johnson v. State, 29 Tex. App. 206 (mo. set aside).*

And in *State v. McNinch, 12 S. C. 89 (mo. qu.)*, where the prosecuting attorney went into the grand-jury room and instructed them how to write a bill, the indictment was not quashed, distinguishing *State v. Addison, infra*,—as in that case the attorney was a paid attorney.

The repeal of the W. Va. Code of 1868, chap. 120, § 5, providing that the prosecuting attorney should go before the grand jury whenever in his opinion it is required by public interest or he is called upon by the foreman to aid them with his advice and assistance, but not to be present when voting, leaves the matter to be controlled by the common-law rule and the examination of witnesses by the prosecuting attorney before the grand jury will not invalidate the indictment. *State v. Baker, 38 W. Va. 319 (pl. abate.).*

Idaho Rev. Stat., § 7640, providing no other person can be permitted to be present during the expression of their opinion or giving their votes upon matters before them, refers to persons other than members of the grand jury. But it was said that under *Idaho Rev. Stat., § 7640*, the district attorney may appear before them and interrogate witnesses as provided in such statute. *Territory v. Staples, 2 Idaho, 778 (mo. set aside).*

In *Anonymous, 7 Cow. 563*, where the district attorney claimed the right to be with the grand jury,

obstruct courts of justice should be considered done in presence of the court, and this is applied to contemptuous acts of officers.

Desty, Crim. L. § 73a; Re Cary, 10 Fed. Rep. 629; note; Stuart v. People, 4 Ill. 895; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528.

Contempt towards the judge on the part of an attorney or party to a pending matter consists of abusive language uttered either in court or out of court.

Com. v. Dandridge, 2 Va. Cas. 408; Reg. v. Onslow, 13 Cox, C. C. 359; Tichborns v. Mostyn, L. R. 7 Eq. 55, note.

Contempt may consist of a petition signed by a party and filed with the clerk of the court.

Brown v. Brown, 4 Ind. 627, 58 Am. Dec. 641; Ex parte Greevy, 4 W. N. C. 808; Re Moore, 63 N. C. 897; Ex parte Biggs, 64 N. C. 202.

Courts will punish in a summary manner misconduct of an attorney in the exercise of his office.

People v. Smith, 3 Cal. 221; Com. v. Newton, 1 Grant, Cas. 453.

It was held that he ought not to attend the grand jury for the purpose of examining witnesses, nor for any other purpose, except to advise them upon any question which they may put to him in relation to their duty.

But N. Y. Code Crim. Proc., §§ 263, 264, now provide that the district attorney may examine witnesses but should not be present at the expression of opinion or giving votes.

In *Lung's Case*, 1 Conn. 428 (charge), in a charge, the grand jury were instructed, "You will admit no counsel, on the part of the state, or on the part of the prisoner. You will permit the prisoner to put any proper questions to the witnesses, but not to call any witnesses on his part. You will admit no spectators to be present during their inquiries and deliberations."

And in *United States v. Kilpatrick*, 16 Fed. Rep. 765 (mo. qu.), it was said that when permitted by the court and when requested by the grand jury, the district attorney and his assistant may go before the grand jury, but they cannot give opinions on questions of law or advice upon sufficiency of evidence.

III. By deputy and assistant prosecutors.

The presence of special counsel appointed to assist the district attorney before the grand jury will not invalidate the indictment where the defendant is not prejudiced as every attorney is an officer of the court. *Raymond v. People, 3 Colo. App. 329 (mo. qu.).*

And the presence of an attorney at the request of the prosecuting attorney, examining witnesses without permission of the court or without having been sworn, will not invalidate, where the accused was not prejudiced, but his presence while they were investigating the crime was improper and the fact that he is styled a deputy solicitor would not make it proper. *Reyna v. State, 66 Ala. 22 (mo. qu.).*

And it will be presumed that the presence before the grand jury of the assistant prosecutors, although their appointment was not in writing, was proper, and misconduct must be specifically pointed out in the objection to the indictment; but it was said that the better practice is that no person shall be present when the vote is taken. *Shattuck v. State, 11 Ind. 473 (pl. abate.).*

And that the deputy state's attorney, who was before the grand jury, was not twenty-five years of age as required of the state's attorney by the constitution. *L. R. A.*

An attorney is liable for contempt for entering a dismissal of an action in disrespectful language.

Ex parte Smith, 28 Ind. 47; Lockwood v. State, 1 Ind. 161.

It is contempt for an attorney to use unprofessional and disrespectful language before the court.

Redman v. State, 28 Ind. 205; Withers v. State, 36 Ala. 252.

It is contempt of court for an attorney to file an indecent petition in a case.

Brown v. Brown, supra.

The court when in session is present in every part of the place set apart for its own use and for the use of its officers, jurors, and witnesses, and misbehavior anywhere in such place is misbehavior in the presence of the court.

Baker v. State, 4 L. R. A. 128, 82 Ga. 776; Ex parte Sevin, 181 U. S. 267, 53 L. ed. 150.

The judge may act upon his own knowledge of what has been said and absolutely refuse to hear any evidence as to the language used by the party.

stitution, will not invalidate where the age of the deputy is not fixed by the constitution or statutes, and it was held that he was a *de facto* officer. *State v. Phelps (S. Dak.) June 13, 1894 (mo. qu.).*

And the court will take judicial notice of the official character of the person who is United States district attorney, and that he has the right to be in the grand jury room while evidence is being taken. *People v. Lyman, 2 Utah, 80 (mo. new tr.).*

And where an attorney was appointed by the court to represent the state and the district attorney was recused, and acted only in reference to another case, and was not present at any deliberations affecting the defendant, it did not invalidate the indictment. *State v. White, 37 La. Ann. 173 (mo. qu.).*

But a motion to quash, because attorneys appointed by the solicitor to act in his absence entered the jury room and counseled them if they had reasonable suspicions of guilt, it was their duty to find a true bill, and read to them from law books, and advised them against all law, was properly sustained. *State v. Addison, 2 S. C. N. S. 356 (mo. qu.). See State v. McIninch, 12 S. C. 82.*

And where the attorney-general gave no directions in regard to the indictment, and the gentlemen indorsing the indictment did so because they were representing the crown at the criminal term of the queen's bench, in Montreal under general authority to conduct the crown business at such term but without special authority from the attorney-general in reference to this indictment, the same will be quashed. *Abrahams v. Queen, 6 Can. Sup. Ct. Rep. 10 (mo. ar.).*

IV. By attorneys generally.

If a private or paid attorney appears before the grand jury and urges an indictment, it will invalidate their action.

Where an attorney for the prosecution procures himself to be summoned as a witness and addresses the grand jury against the defendant, the indictment should be quashed. *Welch v. State, 66 Minn. 341 (pl. abate.).*

And the fact that the attorney for the father of the girl in an abortion case had procured interviews with the grand jurors detailing circumstances was held, in connection with incompetent evidence of physicians, sufficient to invalidate the indictment. *People v. Sallick, 4 N. Y. Crim. Rep. 229 (mo. set aside).*

So where a private counsel sent memoranda to

State v. Gibson, 83 W. Va. 97.

To refuse to obey an order of a court is contempt.

Ex parte Robinson, 71 Cal. 606.

The state of mind of the offending party toward the court is immaterial.

Thompson v. Pennsylvania R. Co. 48 N. J. Eq. 105; *Re Crown Bank*, L. R. 44 Ch. Div. 649; *People v. Brown*, 17 Colo. 481.

Post, J., delivered the opinion of the court:

This is a petition in error, and brings before us for review the judgment of the district court of Douglas county, whereby the plaintiff in error was adjudged guilty of contempt of court, and sentenced to pay a fine of \$25, and, in default thereof, to be committed to the county jail. The alleged contempt consists in the filing, as attorney for the defendant in the case of *State of Nebraska v. Edward F. Morsarty*, then pending in said court, of a motion in the following language: "Motion to Quash Indictment. Comes now

the defendant in the above-entitled cause, and moves the court to quash the indictment herein for the following reasons, to wit: First. That the charge heretofore given to the grand jury who found the indictment herein, by the Honorable C. R. Scott, Judge, was inflammatory and prejudicial, in that said charge aroused the prejudice of said grand jury so that they were not fair and impartial grand jurors. Said charge is filed in the office of the clerk of this court, and is herein referred to and made a part of this motion. Second. That the said indictment does not charge any offense under the laws of the state of Nebraska. Third. That said indictment is insufficient in law, and is not specific enough, in that it fails to point out what said claim and bill of said C. E. Squires it was that was before the city council at the time of the alleged commission of said crime. W. J. Clair, Silas Cobb, Attorneys for Defendant."

For a perfect understanding of the essential facts in the case it is proper to state that there

the grand jury of the list of witnesses and points on which to examine them, it invalidates the indictment. *Com. v. Frey*, 11 Pa. Co. Ct. Rep. 523, 1 Pa. Dist. Rep. 175 (mo. qu.).

And where an attorney of a defrauded company or of creditors of the defrauded company appeared before the grand jury and discussed the defendant's guilt, the indictment should be set aside. *Wilson v. State*, 70 Miss. 585 (pl. abate.); *United States v. Farrington*, 5 Fed. Rep. 348 (mo. qu.).

And while it is improper for any attorney assisting in the prosecution to go before the grand jury with the witnesses and frame the indictment, it is questionable whether the objection could be taken advantage of on a motion to quash, as a plea in abatement is the mode of reaching it. *Durr v. State*, 58 Miss. 435 (mo. qu.).

But where the evidence shows that an attorney only acted as witness and did not advise the indictment, a motion to dismiss should not be sustained. *People v. Bradner*, 44 Hun, 233 (mo. dismiss).

And the drawing of a final report of the grand jury by an attorney, if he was not present at the deliberations or finding, will not invalidate an indictment. *State v. Harris*, 30 La. Ann. 225 (error).

V. By bailiff, messenger, and officer.

That an indictment was brought into court by the bailiff of the grand jury without any showing of misconduct, will not invalidate, as Ga. Code 1883, § 3603, providing for the oath of the bailiff, contemplates such a delivery of indictment from the grand jury to the court. *Davis v. State*, 74 Ga. 869 (pl. abate.); *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 430 (pl. abate.). But see *Bowen v. State*, *infra*.

A motion to quash because the district attorney brought in the bills from the grand jury should be overruled, and it was said that in many counties it was customary to send the bills by a messenger, instead of the grand jury all leaving their room to bring them into court; and that the innovation on ancient custom would be permitted, for it was only a custom, and the court did not apprehend the slightest danger to any one by a change of the bill, either by the district attorney or a messenger. *Com. v. Salter*, 3 Pearson (Pa.) 464 (mo. qu.).

But in *Bowen v. State*, 51 Ga. 433 (pl. abate.), where the presentment was privately handed to the solicitor-general by one member of the grand jury, it was held invalid, and it was said that *Davis* 28 L. R. A.

v. State, and *Danforth v. State*, *supra*, holding that a sworn bailiff may make such delivery, went far enough, but it was said that the transmission by the solicitor-general to the court in the presence of the grand jury would not invalidate.

And the objection that a bailiff was present while witnesses were being examined and the grand jury were deliberating on the defendant's case should be raised by a motion to set aside the indictment and it is too late to object after verdict, but in this case the proof shows that he was not present when the question was taken on the finding. *State v. Kimball*, 29 Iowa, 267 (mo. new tr.).

A motion in arrest on the ground that the officer waiting on the grand jury did not take the constable's oath should be overruled where he was a sheriff, who is a sworn officer of the court. *State v. Perry*, 44 N. C. 330 (mo. ar.).

VI. By clerk.

The appointment of a person who is not a grand juror as their clerk will avoid an indictment as his position would give him influence and make him an important factor. *State v. Watson*, 34 La. Ann. 669 (mo. ar.).

But in the United States courts, it is the practice for the district attorney, his assistant, and clerk, to attend the grand jury and assist in the investigation, and the fact that the son of the district attorney who was not sworn mixed with the grand jury while in session and participated in the proceedings will not invalidate in the absence of misconduct. *United States v. Reed*, 2 Blatchf. 435 (mo. qu.).

VII. By stenographer.

The use of a stenographer by the prosecuting attorney before the grand jury will not invalidate in the absence of evidence of misconduct although *Indiana Rev. Stat.* 1881, § 1655, provides that a grand jury must select one of their own number as clerk. *Courtney v. State*, 5 Ind. App. 355 (pl. abate.).

And in *United States v. Simmons*, 46 Fed. Rep. 65 (mo. qu.), it was held that where one of the staff of the district attorney employed by the government to take notes for his use in the discharge of his official duties, attends before the grand jury, he will come within the designation of an assistant to the district attorney, and taking notes of evidence before the grand jury will not be a ground to quash. The court says that in the case of *State v. Natali* (unreported, Louisiana Crim. Dist. Ct.) as

are, for the fourth judicial district, seven judges, six of whom are assigned to Douglas county, and usually engaged in the disposition of causes on separate dockets. Judge Scott, who presided over the criminal division of the court at the opening of the February, 1892, term, gave to the grand jury the charge mentioned in the motion above set out, and to which an extended reference will hereafter be made, but to Judge Davis was assigned the trial of criminal causes for the term. On the 19th day of March following, while Judge Davis was engaged in the trial of Morearty on the charge of bribery upon an indictment found by the grand jury previously charged by Judge Scott, the following proceedings were had, quoting from the bill of exception: "Be it remembered that on March 19, 1892, that in the criminal court room No. 1 of the court aforesaid, Judge Davis presiding, on the trial of *The State of Nebraska v. Edward F. Morearty*, at about 11:45 A. M. the said jury in said cause were dismissed until the afternoon hour of adjournment, to wit, 2 o'clock P. M., by his honor, Judge Davis; and just about that time, and shortly before the said jury were dismissed, his honor, Judge Scott, took the bench in connection with Judge Davis, and, after the retirement of said jury, his honor, Judge Scott, called Attorneys W. J. Clair and Silas Cobb, the same who are defendants herein, and calling their attention to a motion which has been filed by the said attorneys to quash the indictment against said

Edward F. Morearty, and which said motion is in words as follows [referring to the motion copied above]; and thereupon the said Judge Scott asked said attorneys if this was their motion [holding the same in his hand], to which question they both answered that it was, and that their names were signed to it, whereupon said Judge Scott asked them if they were willing to strike out the first count of said motion as above, and they were asked if they knew of any statute authorizing the filing of such a motion, whereupon Mr. Clair said: 'I will state for myself that the motion was not filed under any provision of the statute that I know of. I never looked to see whether there was a provision of that kind, but I proposed to fix myself in such a position by the filing of that motion that, if it were necessary in taking this case to the supreme court, I could raise the question as to whether or not the charge of the grand jury, given at the beginning of this term by your honor, was one which is contemplated by the law of this state. I simply did it as an attorney. I did not do it for the purpose of casting any reflection one way or the other.' Mr. Cobb said: 'I was a party to the filing of the motion. I filed it myself. Mr. Clair and myself prepared it in my office. I did it in good faith. I did it with no disregard for the court who gave the instructions to the grand jury heretofore. I did it after consultation, and in fact upon the suggestion of one of the oldest criminal practitioners at this bar. In fact, to show

indictment was quashed because of the presence before the grand jury of the shorthand reporter of the court, but he was an official having no connection with the district attorney's office, and possibly not under his control.

VIII. By interpreter.

Under Cal. Stat. 1872, § 540, providing for an interpreter before the grand jury, the fact that a deputy sheriff who was a witness acted as interpreter will not be ground for setting aside an indictment where the accused was not prejudiced. *People v. Ramirez*, 7 Pac. Coast L. J. (Cal.) 4 (mo. set aside).

IX. By other persons present.

No one should be present other than grand jurors during their deliberations and voting, and the presence of a third party in the grand jury room at such times should invalidate an indictment.

Thus, under Texas Code, § 2950, an indictment will be set aside where an unauthorized person was present during the deliberations of the grand jury or voting. *Rothschild v. State*, 7 Tex. App. 519 (mo. set aside).

The presence of the government examiner to assist the grand jury in their investigations cannot be allowed or the indictment will be quashed. *United States v. Kilpatrick*, 16 Fed. Rep. 765 (mo. qu.).

And it is contempt of court to attempt to cause an indictment by writing to the grand jury. *Com. v. Crans*, 3 Pa. L. J. 442 (recogn.).

And in *McCullough v. Com.*, 67 Pa. 80 (mo. qu.; mo. ar.), it was said that it is highly improper for volunteers to go before the grand jury and urge an indictment.

But a motion for new trial because of the presence of a third party assisting in framing the indictment, is too late, as an objection must be made 28 I. R. A.

at an earlier stage, and the statute prohibiting other persons than the district attorney from being with the grand jury is not a statutory ground for setting aside an indictment. *State v. Justus*, 11 Or. 178, 50 Am. Rep. 470 (mo. new trial).

And a motion to set aside an indictment because an unauthorized person was present during the sitting of the grand jury is not one of the causes given in Or. Crim. Code, § 115, providing for setting aside an indictment if it is not indorsed as required and the names of the witnesses are not indorsed or inserted. *State v. Whitney*, 7 Or. 336 (mo. set aside).

And where the evidence is conflicting as to whether or not other persons were present at the finding, as prohibited by Cal. Penal Code, § 995, the order sustaining an indictment will not be reversed. *People v. Ah Chung*, 54 Cal. 336 (mo. set aside).

A plea that a third person was present suggesting questions to the grand jury is not sufficient where it does not allege that he was not sworn, as he may have been a witness, and will not be reviewed where no exception was taken. *Lawrence v. Com.* 86 Va. 578 (pl. abate.).

And in *Reg. v. Hughes*, 1 Car. & K. 519, the court allowed evidence in a perjury case to be given by another witness who was in the grand jury room and a police officer who was stationed within the grand jury room door to receive bills, holding that these persons, not being sworn to secrecy, might disclose the evidence.

And in *State v. Clough*, 49 Me. 578 (pl. abate.), it was said that the mere fact that a stranger was present when the indictment was found would not render it void. But in that case the question decided was as to the competency of a grand juror and this question, including that as to the presence of disqualified members, is presented in the note on "Qualifications of grand jurors." *State v. Russell*, ante, 195.

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that I had no ill faith in the matter, I did it thinking it was simply doing my duty to my client, and at the suggestion of this attorney who has practiced at the bar. I do not desire to give his name.' *Judge Scott*: 'Do you refuse to disclose his name?' *Mr. Cobb*: 'Yes; because I do not think it is necessary. An attorney who has practiced at this bar for years,—one of the best lawyers, civil or criminal, at this bar. But I am not giving that to clear my skirts, but to show my good faith. And as I tried to say, I did it, furthermore, so that we, as attorneys for the defendant, would have the advantage of everything that it was our duty to take advantage of; and I considered it, and I consider it at the present time, my duty to take advantage of everything that has gone before the grand jury as well as the jury. I think that is what an attorney is employed for. I consider that he would not be doing his duty if he considered that this might be held by the supreme court as one of the grounds of reversal. I say I consider that an attorney would not be doing his duty unless he did all these things. And with no disrespect to the court I did what I thought was my duty to my client.' *Judge Scott*: 'Do you know of any provision of the statute that makes that a ground to quash?' *Mr. Cobb*: 'I do not know of any provision in the statute. I do not know whether there is or not.' *Judge Scott*: 'Gentlemen, you are both young men, and I do not wish to injure you. I know that sometimes attorneys, and especially young attorneys,—sometimes old ones,—in the flash of the moment and amid excitement, say things and do things which are a reflection, and which should not have been said or put in the record. You say here "that the charge of the court heretofore given to the grand jury who found the indictment herein, by the Hon. O. R. Scott, *Judge*, was inflammatory and prejudicial," and that "said charge aroused the prejudice of said grand jurors." You both admit that there is no ground laid down in the statute for quashing the indictment as contemplated by the matters I have just read.' *Mr. Cobb*: 'I do not know that we do.' *Judge Scott*: 'I will give you an opportunity to strike it out if you are so advised. It is a direct charge at the court of prejudicing the grand jury by a inflammatory charge. You look at the word "inflammatory," and you will see that it has a bad meaning when applied to a court. I will give you an opportunity to strike it out.' *Mr. Clair*: 'I would like to take time to consider it.' *Judge Scott*: 'You will do it now or not at all. It is my turn now.' *Mr. Cobb*: 'At the present time I am not prepared to strike out anything from the motion that we have filed heretofore. In consideration of the fact that we are called upon peremptorily to do so "now or never," my answer will be, "Never." If I were permitted to deliberate for an hour or two, I might be led to strike it out; but in due consideration for my client, still believing that that would be one of the things that would possibly promote his interests in the trial of this case if taken to another court, I refuse

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to strike anything, so far as I am concerned, from the motion."

At this point, both defendants were adjudged to be guilty of contempt, although the colloquy was continued at considerable length, and ended with a statement by the judge that further action would be deferred until the termination of the trial with which the accused were engaged; but, according to the transcript, sentence appears to have been pronounced immediately. The charge in question is a lengthy and able discourse on the duties of grand jurors, in which especial prominence is given to the crime of bribery, as shown by the following quotations therefrom: "Bribers and bribed alike are, as other criminals often appear to be, moving in straight lines. When their ways are most devious and serpentine. Nor should you expect always to find a money consideration paid direct as the price of the bribery, as criminals generally act upon the principles of 'indirect radiation.' It takes two or more to commit bribery,—the briber and the bribed; purchaser and seller. Both are guilty, and both should receive merited mention in your proceedings. Such criminals as these are defiantly walking our streets, sneeringly, brazenly, and insultingly bidding defiance to the law that punishes bribery by asking, 'What are you going to do about it?' If you do your duty as a grand jury, such criminals will have no occasion or excuse for asking that question hereafter. . . . If any public officer converts or diverts the public funds under his care, or subject to his direction or control, or directly or indirectly uses them, in whole or in part, for his own or his friends' personal advantage, benefit, or emolument, he also is a criminal; and you should not abate your energy, or forget your obligation, or be discharged, until all such public officers, whether now in or out of office, are made to know, by proper bills of indictment (if the evidence can be had before you by the exercise of diligence on your part), that the people will not longer be robbed by their public officials without a pronounced protest, so long as there remains room for convicts in the state penitentiary, and a grand jury can be found to do its duty. . . . A dishonest public official, whether ministerial, legislative, or judicial, is a public menace, and should be hunted down as a blighter of public confidence, and a speculator and speculator upon the property and rights of the public; a perjurer who makes merchandise, for his own selfish and corrupt purposes, of the confidence and faith reposed in him by the people; worse than a highway robber, because his victims, the people, have not a fighting chance to protect themselves ere he robs them. To call such an officer a thief would be flattery. That such persons have held office within the boundaries of this county, and within the statute of limitations, is quite manifest, unless all indications point the wrong way. Nor will you have to exercise a very high degree of diligence to find them if you are looking for public criminals. . . . A little well-directed effort on your

part, as grand jurors, in the direction here indicated, would doubtless open up a field into which a stone could not be thrown without hitting a criminal. You should see to it that the stone is thrown, and thrown hard. You owe it to yourselves, the people whom you represent in your present service, and to your sworn obligations to make that effort, and to make it with such an uncompromising zeal that hereafter a mark more indelible than that put upon Cain shall be stamped upon their foreheads, marking them as 'ticket of leave men' and moral blisters upon the body politic. There comes up from the people a command for a forward march all along the line of your duty. You should give heed to that cry, for it comes from a patient and long-suffering endurance which has at last reached its limit."

The first question suggested by the record is whether the term "inflammatory," as applied to the charge of the judge, is an unmerited criticism. The adjective "inflammatory," as here used, is derived from the verb "inflamm," which is thus defined: "(1) To set on fire; to kindle; to inflame. (2) To excite or increase, as passion or appetite; to kindle into violent action. (3) To exaggerate; aggravate in description. (4) To heat; to excite excessive action in the blood vessels. (5) To provoke; to irritate; to anger. (6) To increase; to exasperate. (7) To increase; to augment." *Vide Webster Dict.* Fairly construed, the charge under consideration is an impassioned appeal, if not, indeed, an express direction, to the grand jury to present, by indictment, certain persons not named, but who are assumed to be guilty of the crime of bribery. In that sense, if not inflammatory, it is at least what, in the science of medicine, is denominated heroic treatment. In directing the attention of the grand jury to particular subjects of inquiry, or to particular offenses or classes of offenses, a large discretion is conferred upon the presiding judge, and which discretion appellate courts will not assume to control. In this instance we assume that sufficient ground existed within his knowledge for the giving of especial emphasis to the crime of bribery; but, when resort is had to a remedy so drastic as that here adopted, it must be with the understanding that parties whose rights are affected thereby may, by a proper proceeding, call for judgment upon the action of the court or judge, in order to determine whether there has been an abuse of discretion to their prejudice. This we understand to have been the object of the motion to quash the indictment against Morearty, and is, we think, a sufficient justification in this prosecution, unless a different rule is to be applied on account of the mistake of remedy in presenting the question by motion instead of by plea,—a subject which will be hereafter considered.

2. We are constrained, after a careful consideration of the subject, to regard the objection made to the charge, so far as it assumes the commission of the crime of bribery, as a merited criticism. While doubtless intended as an admonition to the jurors with respect to their duty, it cannot be construed otherwise than as an invasion of their prov-

ince which amounts to an abuse of discretion. The finding or presentment of the grand jury, of necessity, includes two elements, viz.: First, the *corpus delicti*; and, second, a finding that the offense named was committed by the persons charged. Both facts must be found by the jurors, and cannot be dictated by the judge. The history of the English constitution presents no more interesting or instructive field for study than the long and stubborn contest between the people and commons on one side, and the ministers and judges on the other side, concerning the independence of grand and petit juries, and the right of judiciary to dictate verdicts and bills of indictment. We are told that during the existence of the star chamber it was the practice to punish jurors by fine and imprisonment for refusing to find verdicts and indictments when commanded by the judges; and according to 2 Hall, Const. Hist. (Standard ed.) 227, such punishments were not infrequent at the time of the Restoration, in 1660, and until declared to be illegal by Sir Matthew Hale, who subsequently said: "The privilege of an Englishman is, that his life shall not be drawn in danger without due presentment or indictment, and this would be but a slender screen or safeguard, if every justice of peace, or commissioner of oyer and terminer, or gaol delivery, may make the grand jury present what he pleases, or otherwise fine them." 2 Hale, P. C. 161. The development of this branch of the law during the next century is shown by the observation of Mr. Chitty in his treatise on Criminal Law (volume 1, p. 312), where, referring to the duty of the court in charging the grand jury, he says: "In the performance of this duty the judicious magistrate will take care, not only that his remarks are, in general, suited to the offices which a grand jury have to discharge, but have a plain reference to local objects, events, discussions, and concerns, as far as they properly fall within the limits of his jurisdiction, and seem entitled to his notice. He will strive to allay animosities, to destroy the spirit of party, to discountenance every receptacle of idleness and vice, as well as every vestige of popular barbarity and grossness." The trend of judicial sentiment in this country is illustrated by the language of *Justice Field*, of the Supreme Court of the United States, who, in charging a grand jury in the year 1872, said it was "designed as a means of not only bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizens against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity." See 2 Sawyer, 669. In the recent case of *State v. Turlington*, 102 Mo. 642, it was shown on the trial of a plea in abatement that in charging the grand jury which returned the indictment for murder the presiding judge had said: "Your sheriff has been assassinated—not assassinated, but murdered—in the jail of your county, by one whom he had in charge at the time. It is your duty, gentlemen, to investigate this matter. The crime is no greater because it was committed in the jail, for mur-

der is murder, and the aggressor is equally responsible for the crime as if he had met his victim on the street, and shot him down. What the circumstances of the killing were is not for me to say. It is my duty to give the charge to the jury, and it is then your duty to hear this matter when it comes before you, and treat each party fairly; and, after your determination of the case, the court sits here for the protection of the accused as well as for the public. Whether the crime was committed in the jail I don't know, and it is not for me to say; but if you find that such a murder has been committed in your jail, whether it was the object of this party to secure his liberty or not, makes no difference whatever. It is my duty, gentlemen, to charge you in regard to this matter. It is your duty to investigate the matter, and, if you find the facts sufficient to justify you in believing that there has been a murder committed in your jail, you should find an indictment against the party committing it." The charge was held not prejudicial on account of the caution contained in the concluding paragraph; but, referring to the language quoted above, the supreme court says: "It is manifestly improper for a circuit judge, in his charge to a grand jury, to express an opinion as to the guilt or innocence of a party accused of a crime to be investigated. The action of the grand jury is a part of the judicial proceedings which may terminate in a conviction and sentence of the accused. The court sits in judgment between the state and her citizens, and should 'hold the scales with a firm hand, without bias or prejudice.' The language of the judge in this case was improper, and cannot be justified." It is true that case differs from the one before us, inasmuch as reference was therein made to a particular person as guilty of murder. The difference is, however, in degree only, and not in principle. Here, although the charge does not point to any particular person, it is emphatically declared that the crime of bribery and receive-

ing bribes by public officers has been recently committed in Douglas county, accompanied by direction to the jurors to indict some person or persons therefor, and a reminder that a demand has come up from the people for a forward march, and that a patient and long-suffering endurance has at last reached its limit. We must not be understood as intimating that the presiding judge is in every case prohibited from assuming that indictable offenses have been committed, concerning which it is the duty of the grand jury to inquire. We can conceive of cases which may be committed *in facie curiæ*, and possibly others, of which it is the duty of courts to take notice without proof; but such cases are exceptions. Here, according to the record, and as conceded by the state, the crime of bribery was a pure assumption, perhaps correctly assumed, but of which the judge possessed such information only as was derived from current rumor. The reference to the conditions of the public sentiment above mentioned is especially unfortunate, and for which the charge is justly subject to criticism. Public sentiment in a representative government controls in the solution of political questions, but we recognize in it a dangerous force when it seeks to dictate judicial decisions. So potent is this proposition that further discussion of the question is deemed superfluous.

3. It is conceded that the remedy was by plea, and not by motion to quash. But, as we have seen, it was Morearty's right to put in issue the question of the propriety of the charge, and the fact that he mistook his remedy to his prejudice we regard as unimportant. The accused appears to have acted in perfect good faith in advising and signing the motion, and should not be held to a stricter liability than he would have incurred had he alleged the same facts in a plea in abatement.

The judgment of the District Court is reversed, and remanded for further proceeding in accordance with the views herein stated.

NEW YORK COURT OF APPEALS.

Isabella M. BAIRD, Exrx., etc., of John Baird, Decensed, *Appt.*,

v.

William BAIRD, Impleaded, etc., *Resp.*

(45 N. Y. 652.)

Evidence is admissible on the trial of a foreclosure suit as against the mortgagee's executrix to show that the mortgage was without any consideration, but was taken by the mortgagor from his son merely because of a fear that the latter might not be able to take care of the property, but might lose it in speculation or otherwise, and it is immaterial whether or not the purpose was lawful, or practicable, or possible.

(April 16, 1895.)

NOTE.—For admissibility of parol evidence in respect to the consideration of a deed, see *note* to *Velten v. Carmack* (Or.) 20 L. R. A. 101.

38 L. R. A.

A PPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of the Monroe County Court in favor of defendant in an action brought to foreclose a certain mortgage. *Affirmed.*

The facts are stated in the opinion.

Mr. W. A. Sutherland, for appellant:

The decisions below have been, pure and simple, that these mortgages can be wholly, absolutely, and unconditionally contradicted and wiped out.

No court of last resort has ever held this doctrine.

Hutchins v. Hutchins, 98 N. Y. 56; *Fuller v. Artman*, 69 Hun, 546; *Murdock v. Gilchrist*, 52 N. Y. 246; *Rockwell v. Brown*, 54 N. Y. 213; *Grout v. Townsend*, 2 Denio, 336; *Brown*, Parol Ev. § 81.

A party is estopped by his deed. He is not permitted to contradict it.

M'Crea v. Purmort, 16 Wend. 473, 30 Am. Dec. 103; *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; 3 Phill. Ev. Cowan & Hill's notes, p. 293.

The deeds under which the defendants hold the title to their farms, and the mortgages which they give back to their grantor, should stand or fall together. The defendants ought to hold the land subject to the mortgages, or else not at all.

Coutant v. Serross, 8 Barb. 128; *Pepper v. Haight*, 20 Barb. 429.

Even an infant grantee cannot keep the land and avoid a purchase-money mortgage.

Lynde v. Budd, 2 Paige, 191, 2 L. ed. 868, 21 Am. Dec. 84; *Kitchen v. Lee*, 11 Paige, 107, 5 L. ed. 78, 42 Am. Dec. 101.

The evidence by which these mortgages were disputed and destroyed is not of the convincing character which compels belief.

Law v. Merrills, 6 Wend. 268; *Booth v. Wilson*, 26 N. Y. S. R. 178.

Evidence of declarations such as were testified to for the defendants is insufficient to defeat the instrument in suit, even if the evidence be held to be competent.

Law v. Merrills, *supra*; 1 Greenl. Ev. § 200; *Hard v. Ashley*, 44 N. Y. S. R. 793; *Abbey v. Ferris*, 81 N. Y. S. R. 59; *Re Wheeler*, 28 N. Y. S. R. 638; *Morgan v. Freeborn*, 68 Hun, 296; *Booth v. Wilson*, *supra*; *Rogers v. Squires*, 98 N. Y. 49.

Mr. George A. Benton, for respondents:

These mortgages were defended upon the ground that they were executed and delivered without any consideration in fact, and without intending the same to be valid and subsisting securities or to be enforced against the defendants or either of them.

Upon competent evidence, the county court has so found, and the judgment in each case has been affirmed by the general term; these judgments being based upon conflicting, competent evidence are conclusive upon this court as to the facts.

Code Civ. Proc. §§ 1837, 1838; *Re Ross*, 87 N. Y. 514; *Re Kingland's Application v. Murray*, 133 N. Y. 170.

Failure of consideration is always a good defense.

Thomas, Mortg. 2d ed. § 847; *Jones, Mortg.* 5th ed. § 1297; *Carmichael v. Adams*, 91 Ind. 526; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424; *Grimball v. Mastin*, 77 Ala. 538; *Jones v. Jones*, 20 Iowa, 388; *Davis v. Bechtstein*, 69 N. Y. 440, 25 Am. Rep. 218; *Hill v. Hoole*, 5 L. R. A. 620, 116 N. Y. 299.

The defense may be interposed against the assignee of a mortgage.

Briggs v. Langford, 107 N. Y. 680; *Wearse v. Peirce*, 24 Pick. 141; *Best v. Thiel*, 79 N. Y. 15.

A seal is only presumptive evidence of a sufficient consideration which may be rebutted as if the instrument was not sealed.

Code Civ. Proc. 840; 2 Rev. Stat. 406, § 77; *Jones, Mortg.* 5th ed. § 613.

It was competent to show by parol the actual purpose and consideration of the mortgage, and the fact that it was without consideration.

Parkhurst v. Higgins, 88 Hun, 118; *Anthony v. Harrison*, 14 Hun, 198, 217, affirmed 74 N. 28 L. R. A.

Y. 618; *Cady v. Jennings*, 17 Hun, 218; *Produce Bank v. Bache*, 30 Hun, 351; *Schenck v. Warner*, 37 Barb. 258; Greenl. Ev. §§ 147-154; *Tousley v. Barry*, 16 N. Y. 497; *Chadwick v. Fonner*, 69 N. Y. 404; *Holmes v. Roper*, 141 N. Y. 64; *Lyon v. Ricker*, 141 N. Y. 225; *McDowell v. Fisher*, 25 N. J. Eq. 93; *Coll v. McConnell*, 116 Ind. 249; *Devlin v. Quigg*, 10 L. R. A. 665, 44 Minn. 584; *Hannan v. Hannan*, 123 Mass. 441, 25 Am. Rep. 121; *Bourne v. Littlefield*, 29 Me. 802.

It is a significant fact that no bonds were given to accompany the mortgages.

Lobdell v. Lobdell, 86 N. Y. 327; *Winchell v. Winchell*, 100 N. Y. 159; *Cawley v. Kelly*, 60 Wis. 815.

O'Brien, J., delivered the opinion of the court:

Prior to the year 1878, John Baird, the plaintiff's husband and testator, was the owner of the farm which is covered by the two mortgages sought to be foreclosed in these actions. In that year his two sons, William and James, defendants, went into possession of it, and the father directed the assessors to transfer the assessment on the farm to his sons. They have remained in possession ever since. In October, 1874, the father deeded the farm to the sons, who took title under these deeds as tenants in common. It appeared that the father had two other farms, all of which had been paid for and improved with the aid of the labor and services of his sons, who had worked for him after their majority. On a settlement between the father and the two sons, it was agreed that he was indebted to them in the sum of \$5,000, and that was the consideration for the conveyance. A deed was given to each son conveying an undivided half of the farm in consideration of \$2,500. The evidence tended to show, and the trial court has found, that the intention was to vest the title in the sons in fee; but it appears that the father had some fears that his sons would not be able to take care of the property thus conveyed, and that it might be lost in speculation or otherwise. In order to prevent such a result, as he said, he required the sons to give back to him mortgages for \$1,500 each on the farm. No bond was given, and no actual debt was intended to be secured, and they were not recorded by the father in his lifetime. With respect to the purpose and consideration of these mortgages, the testimony tended to show, and the trial court found, that they were not intended to secure any debt or to be or become a valid subsisting security, or to be recorded or enforced, and were, in fact, without any consideration whatever. In the year 1875 the wife of John Baird, and mother of the defendants, died, and the year following he married the plaintiff. He died in 1883, leaving a will, in which the plaintiff was named as executrix. In that capacity she brought actions against each of the sons to foreclose the mortgages given by them respectively. The complaint was dismissed in each case, and the judgments were affirmed at general term. There are two appeals and two records, but both judgments rest on precisely the same facts,

and the questions involved in both appeals are identical. Both cases may, therefore, be conveniently considered and disposed of as one.

The plaintiff's right to enforce the mortgage is the same and no other than the mortgagee, her husband and testator, had in his lifetime. She stands in the place of her husband, and cannot enforce the instrument unless he could, and every defense that the defendants could urge against the mortgage during the life of the father they may interpose now against his personal representative. The instruments purport to have been given to secure the payment of money, but it was shown at the trial affirmatively, and found by the trial court, that no debt in fact existed in favor of the father against either of the sons; that there was no intention to give the mortgage on the one hand, or to hold it on the other, as security for any debt; that in fact there was no legal or equitable consideration moving between the parties, and no intention on either side to treat the instruments as binding obligations or as valid or subsisting securities. The evidence upon which these findings were made, if competent, was sufficient, and the fact is not open to question or review here.

The findings are based upon the business relations which the parties occupied to each other before the father gave up the possession of the farm to the sons, and then conveyed it to them, taking back the mortgages in question, and upon his subsequent conduct and declarations as to the character of the instruments and the purpose of their execution and delivery. The general principle that an instrument under seal, in the form of a mortgage upon real estate, which upon its face expresses a consideration and purports to have been given as security for a debt, may, nevertheless, as between the parties, be shown to have been purely voluntary or without any consideration, and so invalid, is not denied. *Davis v. Bechstein*, 69 N. Y. 440, 25 Am. Rep. 218; *Hill v. Hooke*, 116 N. Y. 299, 5 L. R. A. 620; *Briggs v. Langford*, 107 N. Y. 680; *Thomas, Mortg.* § 847; *Jones, Mortg.* § 1297.

The point upon which the learned counsel for the plaintiff relies is that evidence was not admissible at the trial to wholly contradict and defeat the instruments by showing, contrary to what appeared on their face, that they were intended to have no operation whatever. It is sought to distinguish this case from that of a deed, absolute upon its face, which may be shown to be in fact a mortgage, and from the numerous other cases in which equity permits a party to show that an instrument, appearing upon its face to be of one character, is or ought to be in truth of quite another character. It is said that the principles upon which these cases rest give no sanction to what was held by the court below in this case, that a party may impeach his deed by showing, not only that it was without consideration, but that it was intended to have no validity or become of any binding force whatever. The desire on the part of the father to retain some sort of guardianship over the title to the farm which

he had conveyed to the defendants was, perhaps, natural enough under the circumstances, and it is frequently shown in such transactions. That the mortgages were not intended to be held by him for any other purpose is supported by the circumstances that no bond was given; that they were not recorded; and no claim was made by the mortgagee during his life, a period of about nine years, that they were in his hands for any other purpose, or for the payment of either principal or interest, though past due. All the circumstances, when considered with the proof of the statements and declarations of the father, were sufficient to warrant the findings of the trial court with respect to the real purpose with which the instruments were made and their true consideration. *Holmes v. Roper*, 141 N. Y. 67; *Lyon v. Ricker*, 141 N. Y. 225. The presumption of some consideration that arose from the presence of a seal was overthrown, and we must assume that the instruments were without consideration of any kind. *Gray v. Barton*, 55 N. Y. 68, 14 Am. Rep. 181; *Best v. Thiel*, 79 N. Y. 15; *Torry v. Black*, 58 N. Y. 185; *Horns Ins. Co. v. Watson*, 59 N. Y. 895; *Dubois v. Hermance*, 56 N. Y. 678.

There is no reason that we can perceive for giving to these instruments any greater force or effect than was contemplated by the parties when they were executed and delivered. There is no estoppel or any right which attached in favor of third parties, and we are not aware of any principle which would now require a court of equity to treat these instruments as valid subsisting obligations, unless they were intended as such when made, and this is negatived by the findings. Nor do we perceive any good reason why the real purpose and true consideration and object of the mortgages should not be made to appear when the aid of a court of equity is invoked for their enforcement. The authority relied upon by the learned counsel for the plaintiff in support of his contention is a remark of Judge Rapallo in the case of *Hutchins v. Hutchins*, 98 N. Y. 58, in which it is said: "It has never been held that a deed can be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the intention or agreement of the parties that the grantee should acquire no right whatever under it, or that he should reconvey to the grantor on his request without any consideration." That remark must be understood with reference to the facts of the case then under consideration, which was the case of a deed absolute in form, but intended as a mortgage. The defendant's answer was, however, so drawn as to leave room for the construction that he intended to urge that the conveyance was intended to be wholly inoperative, or in trust, or to secure a debt which the parties had agreed should never be paid and it was with reference to this feature of the case that the expression was used. It was applicable to the case then under review, but cannot be regarded as authority for the proposition that the defendants in this case are precluded from showing that the mortgages were without any consideration in fact, or that they were not intended

by any of the parties to have the effect of incumbering or defeating the title which the father had just conveyed to his sons. The rule which excludes evidence of parol negotiations or conditions, when offered to contradict or substantially vary the legal import of a written agreement, does not prevent a party to the agreement, in an action between the parties, from showing, by way of defense, the existence of a contemporaneous oral agreement, made at the time the writing was executed and delivered, which would render the use of the written instrument, for any purpose contrary to or inconsistent with the oral stipulation, dishonest or fraudulent. *Juilliard v. Chaffee*, 92 N. Y. 529. The consideration of a written instrument is always open to inquiry, and a party may show that the design and object of the agreement was different from what the language, if alone considered, would indicate. *Ibid.* Parolevidence may also be given to show that a writing, purporting to be a contract or obligation, was not in fact intended or delivered as such by the parties. *Grierson v. Mason*, 60 N. Y. 394. So, a conveyance absolute in form may be shown, as against the heir-at-law of the grantee, to have been made in trust for the benefit of a partnership firm, of which the grantee was a member, and so held by him in trust for the firm. *Rank v. Grote*, 110 N. Y. 12. Of course there may be cases where the rights of innocent third parties intervene to modify or change the rules, as in the case of negotiable instruments, or where there exists some element of estoppel; but as between the parties to the instrument there is no reason why the truth, with respect to the real object and consideration of the instrument, may not be made to appear. The plaintiff was not entitled to maintain the actions for the foreclosure of the mortgages unless it was found that there was some debt due to her for the payment of which they were the security. The findings are that no debt ever existed, and this is conclusive against the plaintiff's right of action. In an action to enforce a mortgage by sale of the land, the amount, if anything, of the lien is an issue which the parties certainly have the right to contest. It is the debt which gives the mortgage vitality as a charge upon the land, and generally, where there is no debt or obligation, there is no subsisting mortgage. The instruments contain a consideration clause and a seal, and much of what has been said by courts and writers to the effect that a party cannot be permitted to defeat his own deed by parol proof is based upon the importance which was attached to the presence of these conditions in an instrument by the common law. The conception that some consideration was necessary to support every promise and covenant was borrowed from the civil law, but the consideration was formerly deemed to be conclusively established by the presence of the consideration clause and the seal. It was originally supposed that the recitals and clauses of a contract expressing a consideration could not be raised by parol proof to the contrary, but that rule was gradually abandoned, and now that clause is open to

parol proof. *M'Cre v. Purmort*, 16 Wend. 460, 80 Am. Dec. 103; *Hobbs v. Haughian*, 70 N. Y. 54; *Ham v. Van Orden*, 84 N. Y. 269. So, also, the conclusive presumption of a consideration which formerly arose from the presence of a seal was modified by statute, and it is now open to the maker of such an instrument to allege and prove the absence of any consideration in fact as a defense. 3 Rev. Stat. 5th ed. p. 691, §§ 77, 78; Code, § 840.

There are, it is true, expressions to be found in some cases to the effect that while the question of consideration is open to be raised by parol proof, yet the party cannot be permitted to claim that a deed or other instrument with a consideration clause or a seal, or both, is wholly without consideration, and thus entirely defeat it. If this idea is anything more than a somewhat shadowy and fanciful remnant of the ancient law, it is not easy to define its precise scope or practical application when applied to an executory instrument like a mortgage. To say that in a case like this it is open to the defendant to reduce by parol proof the sum expressed as the consideration to one dollar or any other nominal sum, but that he cannot go any further, would be to confess that the distinction, if it exists, is altogether without substance. The instrument would be defeated in either case. It is quite certain that by recent adjudications deeds and other instruments have been defeated, in a great variety of cases, by parol proof of want of consideration, or that they were delivered upon conditions which would render their use for any other object a fraud upon the maker, or that the purpose for which delivery was made was different from that indicated upon their face. It will be sufficient to refer to some of the cases without further comment. *Reynolds v. Robinson*, 110 N. Y. 654; *Blewitt v. Boorum*, 142 N. Y. 857; *Andrews v. Brewster*, 124 N. Y. 433. So, also, actions to foreclose mortgages have been defeated upon allegations and proof differing in no substantial respect from that appearing in this case. *Briggs v. Langford*, 107 N. Y. 680; *Hannan v. Hannan*, 128 Mass. 441, 25 Am. Rep. 121; *Wearse v. Peirce*, 24 Pick. 141; *Hill v. Hoole*, 116 N. Y. 299, 5 L. R. A. 620; *Davis v. Bechstein*, 69 N. Y. 440, 25 Am. Rep. 213; *Parkhurst v. Higgins*, 88 Hun, 113. There may be cases, no doubt, where the party will be held estopped by his deed from claiming that it is void for want of consideration, especially where by its terms it appears to be an absolute conveyance of land. *Re Mitchell*, 61 Hun, 873. A voluntary conveyance, intended to take effect as such, and not executory, is generally good between the parties without actual consideration, but that principle has no application to this case. It is not quite correct to say that the defendant was permitted to show by parol that these instruments were never to have any operation or effect. They were in fact executed and delivered for a purpose, though not to secure the payment of money, and they may have accomplished the very object contemplated. That was to protect the defendants against their own improvi-

dence in contracting debt upon the faith of their title to the farm. Whether that purpose was lawful or practicable or possible, or the contrary, is quite foreign to the inquiry. It is enough to know that such was the motive and consideration in the minds of all the parties which induced the execution and delivery and no other. Having procured them in that way, it would be unconscionable now for the mortgages or his personal representative to use or enforce them as obligations for the payment of money. The defendants had been in possession of the farm under the final contract between them and their father to convey it to them, in consideration of the amount found due upon the settlement, for more than a year before the deeds or mortgages were given. During that time they were in a position to enforce specific performance, and hence the execution and delivery of the mortgages were purely voluntary acts on their part, and constituted, so far as appears, no element of the consideration for the deeds. The acts and declarations of the mortgagees with respect to the consideration, conditions, and purpose under which the instruments were made and delivered, being admissions against his interests, would have been competent proof against him in a suit to enforce the mortgages in his lifetime, and hence are now competent against the plaintiff, who represents him. *Holmes v. Roper*, 141 N. Y. 67; *Lyon v. Ricker*, 141 N. Y. 225; *Hobart v. Hobart*, 63 N. Y. 80.

We think there was no error in the result, and that the judgments should be affirmed, with costs.

Bartlett, J., concurs; **Peckham** and **Gray, JJ.**, concur in the result; **Andrews, Ch. J.**, dissents; **Haight, J.**, not sitting.

Dina SULZ, Admx., etc., of Charles H. Sulz,
Deceased, *Resp.*,

MUTUAL RESERVE FUND LIFE ASSOCIATION, *Appt.*

(145 N. Y. 563.)

1. A pending action on a policy of life insurance brought in another state by a duly appointed administrator of the insured who died there having in his possession the policy, which was payable to his legal representatives, service of process being duly obtained upon a designated agent of the company, will on the principle of comity defeat jurisdiction of an action brought on the policy in the state where it was payable at the home office of the insurer and where the insured resided when the policy was issued and his widow still resides, even if she

NOTE.—The doctrine of comity as applied to concurrent jurisdiction of actions on a policy of life insurance is fully developed in the above case, which may be considered the most important one on that subject.

That the mere pendency of an action in another jurisdiction will not preclude jurisdiction, see *O'Reilly v. New York & N. E. R. Co. (R. I.)* 6 L. R. A. 719; *Douglas v. Phenix Ins. Co. of Brooklyn (N. Y.)* 20 L. R. A. 112.

28 L. R. A.

has been duly appointed his administratrix in that state.

2. An action on a policy of life insurance payable to the "legal representatives" of the insured and which his application asked to be made to his "estate" cannot be maintained by his widow in her own right although he had no children and the object of the insurance association stated in its by-laws was to furnish aid to the "families or assigns" of the members in case of their death.

(April 16, 1895.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of a special term for Kings County in favor of plaintiff in an action brought to recover the amount alleged to be due on a mutual benefit certificate of life insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. F. A. Burnham and Raphael J. Moses, for appellant:

The widow had no title as widow under the policy in suit, and could not as widow retain a judgment granted her as administratrix.

Drake v. Fell, 8 Edw. Ch. 251, 3 L. ed. 646; *Tillman v. Davis*, 95 N. Y. 25, 47 Am. Rep. 1; *Grinwald v. Sawyer*, 125 N. Y. 418; *Bishop v. Grand Lodge Empire Order of Mutual Aid*, 113 N. Y. 636.

A mere exemption of property from forcible application to payment of debts does not necessarily deprive an administrator of the right to control and collect assets for distribution among next of kin, etc.

Wyman v. Prosser, 36 Barb. 368; *Mildmay v. Polgham*, 8 Ves. Jr. 472; *Angell, Ins.* § 889; *Stein v. Webber*, N. Y. Daily Reg. March 18, 1894; *Wms. Exrs.* 1877; *Parry v. Ashley*, 8 Sim. 97; *Schouler, Exrs.* §§ 198, 199, 200, 201, 211, 239; *Hassall v. Smithers*, 12 Ves. Jr. 119; *Jenkins v. Freyer*, 4 Paige, 47, 3 L. ed. 836; *Kellar v. Beelor*, 5 T. B. Mon. 574; *Wilkinson v. Perrin*, 7 T. B. Mon. 217.

The Washington administrator having possession of the written instrument evidencing the obligation and having first commenced suit, has a superior title to the plaintiff in this action.

Holyoke v. Union Mut. L. Ins. Co. 23 Hun, 75; *Morrison v. Mutual L. Ins. Co.* 57 Hun, 97; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 189, 28 L. ed. 379; *Atty-Gen. v. Bouvens*, 4 Mee. & W. 171; *Merrill v. New England Mut. L. Ins. Co.* 103 Mass. 245, 4 Am. Rep. 548.

Messrs. Charles J. Patterson and Ernest P. Brook, for respondent:

The widow is sole beneficiary. She can take the benefit-money as administratrix in trust for herself. The defendant owed no debt to the deceased member upon his death nor to his estate; only to the beneficiary.

Bishop v. Grand Lodge, Empire Order of Mutual Aid, 113 N. Y. 627.

In a proper case these words, "legal representatives," will be construed to indicate the beneficiary for whom the fund was actually intended by the deceased and to confer upon such beneficiary the right to collect the money directly.

Grinwald v. Sawyer, 125 N. Y. 411.

The by-laws informed him that the money was intended as a substantial aid to his family or assigns. That is, it would go to his family unless he plainly and unmistakably assigned it to some one else.

Greene v. Greene, 23 Hun, 478.

Being thus informed that creditors could not get the fund and that it was intended for his family, the use of the words "my estate" in designating the beneficiary make his meaning as clear as if he used the words, "my family."

The word "family" used in this connection means the immediate family of the deceased. *Brooklyn Masonic Mut. Relief Assn. v. Hanson*, 53 Hun, 149.

Creditors could not get any part of this fund. *Beckel v. Imperial Council, Order of United Friends*, 53 Hun, 7; *Boasberg v. Cronan*, 30 N. Y. S. R. 485.

Here the case is analogous to that of a policy of life insurance payable to the widow or child at the death of the insured. In such a case the fund goes, not to the administrator, but to the beneficiary direct.

Senior v. Ackerman, 2 Redf. 802; *Re Gordon*, 89 N. Y. S. R. 909; *Numrich v. Supreme Lodge, Knights & Ladies of Honor*, 24 N. Y. S. R. 287; *Masonic Mut. Ben. Assn. v. Buckart*, 110 Ind. 189; *Grossman v. Supreme Lodge, Knights & Ladies of Honor*, 18 N. Y. S. R. 596.

In a mutual benefit society, the presence or absence of a certificate of membership is immaterial, the by-laws fixing the rights of membership.

Sanger v. Rothschild, 50 Hun, 157; *Bacon, Mut. Ben. Soc.* 273; *Moise v. Mutual Reserve Fund Life Assn.* 45 La. Ann. 788; *Re Equitable Reserve Fund Life Assn.* 181 N. Y. 354; *Brown v. Supreme Council of Catholic Mut. Ben. Assn.* 53 Hun, 265.

The administratrix here is competent to take this money. It should not be remitted elsewhere to be charged with commissions and legal expenses and the balance returned here to the widow, less further depletion by alleged creditors in Washington.

Wilkins v. Ellett, 76 U. S. 9 Wall. 740, 19 L. ed. 588.

An ordinary policy of insurance payable to the assured, his executors, administrators, or assigns is a contract and an asset, but the certificate of membership herein is not a contract or specialty, but a mere evidence of contract of which the by-laws of the defendant are the primary proof.

Numrich v. Supreme Lodge, Knights & Ladies of Honor, supra; *Bacon, Mut. Ben. Soc.* 278.

The fund was "payable at the home office of the association in the city of New York."

For the purpose of founding administration all simple contract debts are assets at the domicile of the debtor; the bill or note does not alter the nature of the debt but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found.

Atty-Gen. v. Bouwens, 4 Mees. & W. 171; *Stocum v. Sanford*, 2 Conn. 538; *Owen v. Miller*, 10 Ohio St. 136, 75 Am. Dec. 602; *Pinney v. McGregory*, 102 Mass. 190; *Wyman v. United States*, 109 U. S. 654, 27 L. ed. 1068.

38 L. R. A.

This simple contract debt would be *bona notabilia* in this state, where the debtor lives; and the release by the foreign administrator cannot affect the plaintiff's right to recover.

Chapman v. Fish, 6 Hill, 555.

The foreign action has no bearing upon this action, the plaintiff herein never having appeared nor been served in the former foreign action.

De Meli v. De Meli, 120 N. Y. 485; *Williams v. Williams*, 14 L. R. A. 220, 130 N. Y. 198.

The determination of the surrogate of kings as to the inhabitancy of deceased in this state at the time of his death is conclusive and cannot be attacked collaterally in this court.

Bolton v. Schriever, 18 L. R. A. 242, 135 N. Y. 65.

Peckham, J., delivered the opinion of the court:

This is an appeal by the defendant from a judgment in favor of the plaintiff for the amount of a certain policy of insurance for \$3,000 issued by the defendant, an insurance company organized under chapter 175 of the Laws of 1883. The policy of insurance or certificate of membership, as it is sometimes called, was issued by the defendant association January 20, 1891, to Charles H. Sulz, payable to his "legal representatives" at the home office of the company in the city of New York within 90 days after satisfactory evidence of the death of the insured party. The application for membership and for a policy of insurance in the corporation defendant was made by the insured, Charles H. Sulz, in December, 1890. In such application, in answer to the requirement to state the name of the beneficiary in full, he answered, "My estate." Mr. Sulz, at the time of the issuing of the policy to him (January 20, 1891), was at San Francisco, in California, and upon its receipt he sent it to his wife at their residence in the city of Brooklyn, to which city he soon returned, and it remained in the possession of the wife for about six months, when, on the removal of the family (the husband and wife) from one house to another in the city of Brooklyn, the wife packed it in a trunk, which was taken by the deceased when he started on his journey to Tacoma, in the state of Washington. When the deceased went to Tacoma, in 1891, he left his wife at his old home in the city of Brooklyn. In August, 1891, he wrote from the city of Tacoma to the home office of the defendant in the city of New York, notifying them that he had made Tacoma, Wash., his home for the future, having gone into the manufacture of soaps and chemicals there, and he asked them to forward assessments to him at Tacoma, or to notify him who their agent was there, to whom he might make further payments. In January, 1892, Mr. Sulz died at Tacoma, having at the time this policy or certificate in his possession. At the time of his death his wife was still residing in Brooklyn. Letters of administration were applied for by his widow to the surrogate of Kings county, and were granted, and she duly qualified and entered upon the discharge of her duties as administratrix. A few days after the granting of such letters she signed a written re-

nunciation of her right to take out letters as administratrix in Tacoma, and forwarded it to the former attorneys of her husband at that place, and thereupon one R. P. Thomas was appointed administrator of the estate of her husband by the proper court in the state of Washington. Mr. Thomas at once commenced an action in that state to recover upon the policy of insurance, which he had taken possession of as part of the effects of the deceased, and such suit was commenced by the service of process upon an agent of the defendant residing in the state of Washington, and duly authorized under the laws of that state, and by the designation of the defendant corporation, to receive such service on its behalf. Within a few days subsequent to the commencement of that action the plaintiff herein commenced this action as administratrix of the estate of her deceased husband in the supreme court of this state to recover the amount due under such policy of insurance. The defendant set up a defense to this action, based upon an alleged breach of warranty by the insured in making false answers to certain questions contained in the application for insurance signed by him. It also set up the above facts in relation to the insurance policy and the pendency of the action against it in the superior court of the state of Washington, and claimed that the plaintiff herein had no right to maintain this action because of these facts. The case was tried at circuit, and the facts relating to the alleged breach of warranty submitted to a jury, and upon the whole case the jury found a verdict for the plaintiff; and the question is whether the judgment entered upon that verdict shall stand.

We will assume that the letters of administration granted to the plaintiff by the surrogate of Kings county are conclusive in regard to the status of the plaintiff as being the administratrix duly appointed upon the estate of her deceased husband, and the only question remaining is whether as such administratrix, and upon the facts in this case, she can maintain this action. We are of the opinion that the courts of this state ought not to take jurisdiction of this action. The defendant issued what it terms, in the blank application provided by it, a "certificate of membership or policy of insurance," by which certificate or policy it insured the life of Mr. Sulz for \$3,000 for the benefit of his "legal representatives," those words being used in the instrument instead of the words "my estate," as used by the insured himself in his application for the insurance. The constitution and by-laws of the company and the certificate or insurance policy itself must all be looked at for the purpose of discovering what was the contract entered into by the parties. *Re Equitable Reserve Fund Life Assn.* 181 N. Y. 354-368. In some companies—possibly in this—a person might become a member thereof, and his family or any other named beneficiary be entitled to receive the benefit of such membership upon his death, as provided for in the constitution or by-laws, even where no certificates of membership or policy of insurance had been issued; but where such a paper has been issued by

the company, and delivered to and accepted by the insured person, it must be read in connection with such constitution and by-laws for the purpose of determining what the contract was which existed between the parties at the time of the death of the insured. The policy in this case was in the possession of the deceased at the time of his death in the state of Washington, and I do not think that it differs materially from any other policy of insurance, so far as this question is concerned. Having been issued, it has become a material part of the contract between the parties to it.

The case of *Holyoke v. Union Mut. L. Ins. Co.*, 23 Hun, 75, is cited by defendant, and is somewhat in point. In that case the plaintiff, as executrix of George E. Holyoke, brought an action in this state against the insurance company (a New York corporation) for the purpose of recovering the amount of a paid-up policy issued upon the life of one Alfred S. Perkins, a resident of the state of Maine, and by him assigned to Holyoke. The plaintiff's testator died in Brooklyn, N. Y., May 7, 1875, where he had continuously resided for 16 years prior to his death, and he left a will by which he bequeathed and devised his whole property to his wife, the plaintiff, which will was duly admitted to probate in Kings county, and on June 8, 1875, letters of administration were issued to the plaintiff. After the death of Mr. Holyoke the assignment was found among his effects at his office in the city of New York, and was delivered to the plaintiff, and had been in her possession up to the commencement of the action. On October 8, 1878, Alfred S. Perkins, the insured person, died, and the plaintiff immediately gave proper proofs of his death, and otherwise duly performed all the conditions required of her by the policy, and demanded its payment. The defense interposed was that the assignment in question was a collateral assignment only to secure Perkins' indebtedness to Holyoke, and that the amount due the latter had been paid, and that letters of administration with the will annexed upon the estate of Holyoke had been issued to one Percival Bonney by the probate court of Cumberland county, Me., and that the policy of insurance was in the state of Maine at the time of Holyoke's death, and had been by Bonney assigned to, and was then held and owned by, another person residing in the state of Maine. The court held that at the time of the death of George Holyoke the legal title to the policy in controversy was vested in him; that he held written assignment of the policy; and that in contemplation of law it was in his possession. The policy was, however, as matter of fact, in the state of Maine when the testator died, and was taken possession of by the administrator of his goods, etc., with the will annexed, who had been appointed by the probate court in the latter state. The court said it was immaterial whether the assignment to Holyoke by Perkins was as collateral security for the debt due from the latter to Holyoke, or whether it was an absolute one. If collateral, the debt was due from Perkins himself, and, in

being a resident of Maine, no one could enforce payment of the debt in the courts of Maine, or release or control the same, save an administrator appointed in that state, and that, if the assignment were absolute, the policy of insurance is the thing which formed a part of the property of the testator; that the assignment was only a muniment of title to that property, and must follow the thing assigned. It was stated that, if the testator had left a chattel in Maine which remained in that state until after his death, it was clear that the chattel would belong to the administrator in Maine as against the administrator in New York, although the bill of sale transferring the chattel to the testator was found among his papers in New York, because administration of the property of the deceased person can be had only in the jurisdiction where the property is found after the death of such person, and the fact that the property in controversy is a chose in action makes no difference in the rule of law on this subject. Upon appeal to this court the decision of the general term was affirmed upon the opinion delivered by the court below. 64 N. Y. 648. There are some expressions in the opinion delivered in the supreme court in this *Holyoke Case* which we might doubt the correctness of. While the decision itself, upon the facts appearing in the report was proper, we do not think that the mere fact that a policy of insurance if found on the person of an individual dying in another state, but who was a resident of this state at the time of his death, would preclude the maintenance of an action by an administrator appointed here upon the policy in the courts of this state against a company residing here. A simple contract debt (and such is a policy of insurance) is assets where the debtor resides, even though evidenced by a written instrument. *Wynman v. United States*, 109 U. S. 654, 27 L. ed. 1068; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 188, 28 L. ed. 879; *Chapman v. Fish*, 6 Hill, 554. The case of *Morrison v. Mutual L. Ins. Co.*, 57 Hun, 97, is something like the *Holyoke Case*, and it was held by the general term, first department, that the administrator in New York could not enforce the payment of a policy of insurance issued by a company incorporated in this state to a resident of the state of Maine, where the policy had never thereafter been within the state of New York, even though the principal office of the company was in the city of New York. It was stated that the policy in question, not having been in the state, could not, under the principle of the *Holyoke Case*, form any part of the assets of the deceased to which the plaintiff, an administrator appointed in the city of New York, acquired title. That case does not seem to have been brought to this court.

The facts in the case of *New England Mut. L. Ins. Co. v. Woodworth*, cited *supra*, are as follows: The husband of the insured commenced an action against the insurance company in the state of Illinois, although the party insured (his wife) died in the state of New York, and the insurance company was organized under the laws of the state of Massachusetts, and it was only after the death of

the wife that the husband came into Illinois having the insurance policy in his possession. The United States Supreme Court held that a company may be regarded as present in, and an inhabitant of, the state where it has an agent upon whom, pursuant to the laws of that state, process may be served, and that an administrator is duly appointed in such state when the policy is brought within the state prior to such appointment, although the person insured died outside the limits of the state and not a citizen thereof. As the company is to be regarded as an inhabitant of the state where its agent is thus served with process, the court held that the principle that a simple contract debt followed the person of the debtor was not invaded, because the debtor was present in the state of Illinois when the suit was commenced by the husband as his wife's administrator, being at the same time the beneficiary under the policy. Under such facts the policy was assets in the state where it was when the administrator was appointed. In this case the fact is the same; that is, the state of Washington had enacted a law providing for the designation of an agent by a foreign company, upon whom process could be served for it, and the company had duly appointed such an agent, and process was properly served upon him in the action by the Washington administrator upon the insurance policy in question. Within the above case in the federal court the person of the debtor in this case was within the state of Washington, and the debt could be collected there as well as here. It is a case, therefore, of a concurrent jurisdiction, so far as the general facts go, and in such case the *situs* of the policy, the death of the insured in Washington, and the issuing of letters of administration in that state, and the prior commencement of the Washington action, are material facts. In this case we do not assert that the courts of this state might not have had jurisdiction to entertain this action, even though the policy were in the state of Washington, provided the courts of that state had not appointed an administrator, and the administrator thus appointed had not commenced an action on the policy prior to the action in this state. On the contrary, we are inclined to the opinion that jurisdiction of this action would in such event be entertained by the courts here. But in the case of administrators duly appointed in each state, when the foreign administrator first duly commences an action by the service of process upon an agent of the company to recover on the policy, and the policy is found in the foreign state at the death of the assured in that state, we think the courts of the foreign state have obtained jurisdiction, and therefore could give a full and complete discharge to the company if it paid upon a judgment obtained in such action, and we ought not to permit a second action in the courts of this state upon the same policy. In such a case as this we think that the principle of comity between the states calls for the refusal on the part of the courts of this state to entertain jurisdiction.

It is claimed, however, that the plaintiff

might recover in this action under another aspect, and in her own right, irrespective of her character of administratrix. It is said that the policy is by its terms payable to the legal representatives of the insured. Attention is then called to the by-laws of the defendant, which states its object to be "to promote the well-being of all its members, and to furnish substantial aid to their families or assigns in the event of a member's death." This, it is said, means the immediate families, or, in other words, the dependents of the members, and not remote relatives and immediate relatives and dependents indiscriminately, and that this provision coupled with the proof of the dependence of the plaintiff upon her husband and that they had no children, makes the true construction of the policy to be that the amount due upon it belongs, not to the general estate of the deceased, but to his widow. *Grinold v. Sawyer*, 125 N. Y. 411; *Bishop v. Grand Lodge, Empire Order of Mutual Aid*, 112 N. Y. 627, 636. We do not think that this argument should prevail. Giving due consideration to the by-laws above quoted, the words "legal representatives" must still have their ordinary meaning. The by-law provides not only for the well-being of its members, and for the furnishing of substantial aid to their families, but it adds the words "or assigns," showing that the company is not restricted in its objects to the immediate families of its members, but the members are themselves at liberty to designate another than a member of their family as the beneficiary. As the members are not in any way restricted in the naming of a beneficiary by any by-law of the company or by its constitution, if there is any beneficiary named in the certificate or policy itself, that person is the one to whom the money shall be distributed. In the case at bar the insured named his estate in his application for insurance as the beneficiary thereof, and in the policy itself the words used are "legal representatives." We see nothing in the mere fact that the insured was married, and had no children, to vary the ordinary significance of the words "legal representatives" when used in a policy of insurance. As was said in *Grinold v. Sawyer*, *supra*, the words "legal representatives" mean, ordinarily, executors or administrators, and that meaning will be attributed to them in any instance unless there be facts existing which show that the words were not used in their ordinary sense, but to denote some other and different idea. The facts in this case are not sufficient to change the ordinary meaning of this language, and we therefore must attribute to the insured an intention in conformity to the ordinary meaning given to those words. We think that such meaning is strengthened if resort be had to the written application herein, because there the insured designates the beneficiary as his estate. That expression, it seems to us, is equivalent to all the property which a man leaves behind him at the time of his death. *Taylor v. Dodd*, 58 N. Y. 385, 349. A testator frequently uses in a will the expression, "all my estate I give, devise, and bequeath," or "all my estate, real and per-

sonal," or "all my estate of every name and nature," meaning by the expression all the property which belonged to him, and which could be devised or bequeathed. So here, by the use of those words, the testator meant to include the money arising from this insurance policy or certificate in the general amount of his property, or that which would be left behind him to be distributed to his next of kin as in case of intestacy. In such case the administrator represents this estate which is to be added to by the payment of this money, and such administrator takes the estate, together with the addition thus made to it as a trustee, to be distributed to those who by law are entitled to it. We do not think that under the circumstances arising in this case the creditors of the insured would take any interest in or right to any portion of the money arising from this policy. The statute under which the defendant is organized provides that the money arising from such insurance shall be exempt from execution, and shall not be liable to be seized, taken, or appropriated by any legal or equitable process to pay any debt or liability of the member. Reading the statute in connection with the language used by the deceased, and it would seem to be plain that he intended this money should go to his legal representatives, to be appropriated by them free from his own debts, and for the benefit of those who would take his estate under the statute of distributions. The administrator of this estate, therefore, represents the claims of those who may be eventually entitled to the money arising from the payment of this policy, and neither the widow nor the next of kin could maintain an action in their own right for the recovery of any portion of this money. In *Bishop v. Grand Lodge, Empire Order of Mutual Aid*, 112 N. Y. 627, we simply held that in the absence of any certificate designating the beneficiary, where no policy or certificate had been issued, there was enough in the constitution and by-laws of that company defendant to enable the court to say that the parties entitled to the moneys arising from the insurance were those to whom the estate of the deceased would pass as in case of intestacy, and that the administrator had sufficient interest in the fund to sustain the action in her capacity as such, and that the money, while subject to distribution as in case of intestacy, yet still would be a special fund subject to the exemption provided for in the act of incorporation, and would not be liable for the payment of the debts of the decedent, or to be taken on any process in the payment of such debts. We did not hold in that case that, where an administratrix had been appointed, those who were the next of kin could themselves maintain an action for the recovery of the money due under the policy or certificate of membership, nor did we hold that the administratrix could herself maintain the action in any other character. We cannot, therefore, see any way by which the plaintiff ought to be permitted to maintain her action, either as administratrix, or as the widow and alleged sole beneficiary covered by the policy. We confess that we do not see how the money arising from the

payment under this policy or certificate can be made liable for any of the debts of the deceased any more in the state of Washington than in case the action was brought here. The statute under which the company is organized makes provision upon that subject; but, as the courts of Washington have jurisdiction of that question, it will be matter for them to decide, which they will do in a manner consistent with their views of the law.

The judgment in this action ought not to stand, and it must therefore be reversed, and, as the plaintiff cannot in any event succeed upon a new trial, her complaint should be dismissed, with costs out of the estate.

All concur, except O'Brien, J., not sitting.

Judgment accordingly.

PEOPLE of the State of New York, *Resp't.*,
v.

William F. RATHBONE, *Appt.*

(145 N. Y. 484.)

A constitutional provision prohibiting a public officer from receiving any free pass or free transportation applies to a notary public who is appointed by the governor and takes an official oath and whose term of office, powers, and duties are fixed by law.

(April 9, 1896.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of a special term for Albany County overruling a demurrer to the complaint in an action brought to remove defendant from his office of notary public for violating the constitutional provision against public officers receiving passes from railroads. *Affirmed.*

The facts are stated in the opinion.

Mr. Lewis E. Carr, for appellant:

A notary public is not a "public officer" within the meaning and intent of subdivision 5 of article 13 of the new Constitution, and therefore not subject to its provisions.

A constitution is a law.

Mississippi & M. R. Co. v. McClure, 77 U. S. 10 Wall. 511, 19 L. ed. 997.

And to its provisions must be applied the general rules of statutory construction.

People v. Potter, 46 N. Y. 375; *Newell v. People*, 7 N. Y. 9.

It is a cardinal rule of construction that the intent of the makers of the law must govern, and that matters within the letter but not within the intent are not included in or affected by it.

Riggs v. Palmer, 5 L. R. A. 840, 115 N. Y. 506; *Re Livingston*, 121 N. Y. 94; *People v.*

NOTE.—On the question who are public officers, see also to *McCormick v. Pratt* (Utah) 17 L. R. A. 243; note (as to election commissioners) *State v. Dillon* (Fla.) 22 L. R. A. 124, and (as to attorneys) *Re Rieker* (N. H.) 24 L. R. A. 740.
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Potter, supra; *Smith v. People*, 47 N. Y. 330; *Lake Shore & M. S. R. Co. v. Boach*, 80 N. Y. 339.

That intent is to be ascertained in accordance with well-settled rules:

A. By the language used, if clear and unambiguous, but this is not the unfailing rule.

Smith v. People, supra; *People v. Angle*, 109 N. Y. 564.

B. By the occasion of the law the evil existing that called for a new enactment, and by the circumstances leading to its adoption.

People v. Potter, Smith v. People, and People v. Angle, supra; *O'Brien v. New York*, 189 N. Y. 543; *Diddle v. Hathway*, 11 Hun, 571.

It is not true that the terms "office" and "officer" have so clear, precise, and limited a meaning that search may not be made for the intent and purpose underlying and prompting their use.

Re Hathaway, 71 N. Y. 238.

The true test of an office is the nature and character of the acts the officer may perform.

The office is of ancient origin, and notaries were originally what the word signifies, writers.

The law of nations and the customs of merchants added to their authority by giving authenticity to their acts, attested by the affixing of their notarial seals.

Young v. Bryan, 19 U. S. 6 Wheat. 146, 5 L. ed. 228; *Burke v. McKay*, 48 U. S. 2 How. 66, 11 L. ed. 181; *Commercial Bank of Kentucky v. Varnum*, 49 N. Y. 269; *Dennistoun v. Stewart*, 58 U. S. 17 How. 606, 15 L. ed. 238.

In this state the authority of notaries is defined by statute. What of a public duty is charged upon the notarial office?

1. His powers relate to, and, whenever exercised, are for private interests, and on private behalf.

2. Compensation for his services, in whatever capacity he may act, within his official power, is nowhere charged upon the public treasury, but must, in every instance, be paid by his employer.

3. With the sole exception of being required on request to affix his seal to a protest, no duty is upon him, or upon the office.

4. Is it the duty of the state to provide a notary for the protest of commercial paper? Clearly not, as to anything except foreign bills, because all other negotiable paper may be protested without the intervention of a notary.

Burke v. McKay, supra.

5. Is it the duty of the state to provide a notary to certify acknowledgments or take affidavits? If it be granted that it be so in a qualified sense the contention still holds good that he is nothing more than a quasi public officer.

That an attorney is not a public officer within the meaning of that term has been expressly held.

Re Oaths to be Taken by Attorneys & Counselors, 20 Johns. 492; *Re Hathaway*, 71 N. Y. 238.

This constitutional provision is highly penal.

Whittaker v. Masterton, 106 N. Y. 230; *Bonnell v. Griswold*, 80 N. Y. 128; *Dean v. Metropolitan Elev. R. Co.* 119 N. Y. 540.

No law can be sustained which makes one guilty of a crime for using his property, law-

fully acquired, in a way, or for purposes sanctioned by law when acquired.

Hartung v. People, 22 N. Y. 95; *Ratzky v. People*, 29 N. Y. 124; *People v. O'Neil*, 109 N. Y. 251; *Southwick v. Southwick*, 49 N. Y. 510; *Wynehamer v. People*, 13 N. Y. 878; *People v. Fire Comrs. of New York*, 73 N. Y. 437; *People v. Nichols*, 79 N. Y. 582; *People v. Whitlock*, 92 N. Y. 191; *Sherrill v. Christ Church of Poughkeepsie*, 121 N. Y. 701; *Suburban Rapid Transit Co. v. New York*, 128 N. Y. 510; *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291.

Mr. T. E. Hancock, Atty-Gen., for the People.

Gray, J., delivered the opinion of the court:

This action was brought to have the office held by the defendant as a notary public in and for the county of Albany, in this state, adjudged to have been forfeited for the violation by him of that provision of the constitution of the state which prohibits a "public officer or person elected or appointed to a public office under the laws of this state" from receiving "any free pass, free transportation, franking privilege, etc., from any person or corporation," or from making use of the same. The constitutional provision referred to is contained in section 5 of article 13 of the Constitution of this state, which was adopted at the last general election, and which went into effect on January 1, 1895. The defendant demurred to the people's complaint, for not containing facts sufficient to constitute a cause of action; and the question for our determination is whether a notary public fills a public office, and is a public officer, within the meaning of the constitutional provision.

The argument for the appellant proceeds upon the theory that it could not have been intended to include such an office within a constitutional prohibition which obviously was designed to guard against the mischief of a person engaged in the discharge of the functions of a public office being influenced in his action by a consideration for the corporation's giving to him free passes or privileges. That a notary public is a public officer I do not think to be open to serious doubt. He is one of the "public officers of this state" concerning whom chapter 5 of the Revised Statutes treats, and he is therein placed "in the class of judicial officers." The office of a notary public must be filled by appointment of the governor of the state, with the consent of the senate. The appointee, before he enters upon the duties of his office, is required to take and to file an oath to support the Constitution of the United States and of the state, and to faithfully discharge the duties of his office. 1 Rev. Stat. chap. 5, title 6, art. 3. His term of office is fixed by law, and in chapter 3 of volume 2 of the Revised Statutes are contained "general provisions concerning the powers and duties of certain judicial officers," among whom are specified notaries public. All their powers are defined by law, and their acts, within their legitimate sphere, have force and solemnity, because having the express au-

thorization and sanction of statute, the very designation of "notary public" indicating a relation which the incumbent of the office sustains to the body politic. It is impossible to regard him as other than a public officer, and we are brought to the consideration of the proposition of the appellant that his could not be one of the public offices intended to be included within the constitutional provision in question.

I concede the difficulty—indeed, the impossibility—of seeing any reason why a notary public should be prohibited from accepting any privileges or favors from corporations. On its face, the proposition seems absurd, and it is not easy to see the wisdom or necessity of incorporating in our constitution a prohibition so unnecessarily comprehensive in its terms, when it would have been possible to specify the public officers who were probably aimed at. But it is plainly to be read there; and for the very reason that it was possible to designate the public officers who should be restrained from accepting the favors of corporations, we are, perhaps, the less able to disregard it. In the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect, and we are not concerned with the wisdom of their insertion. As adopted by the people, the intent is to be ascertained, not from speculating upon the subject, but from the words in which the will of the people has been expressed. To hold otherwise would be dangerous to our political institutions. The constitution is the basis upon which rests that complicated social organization called the "state." It must be presumed that its framers understood the force of the language used, and, as well, the people who adopted it. Not only were the revisers of the constitution chargeable with knowledge as to who, under our laws, were regarded as public officers, but it is to be presumed that they used the words "public officer or person elected or appointed to a public office under the laws of this state" with some, if not a direct, reference to the classification made in the revised statutes. It is not necessary to suppose that they had in mind notaries public, but that, knowing of the existence of the various classes of public officers created by statute, they intended by the use of general words to include all persons holding offices in the gift of the people. The latitude allowed in the construction of legislative acts is out of place, and would be unwise when interpreting the fundamental law. Legislation aims at arranging the mechanism of the state for the benefit of its members, and the question of intention, necessarily, is often of great importance and must be open to judicial inquiry; but the constitution, which underlies and sustains the social structure of the state, must be beyond being shaken or affected by unnecessary construction, or by the refinements of legal reasoning. We may be compelled to have resort to such in the presence of contradictions or of meaningless clauses, but not otherwise. I see no case here for surmising as to the possible or even probable meaning of the section in question. The people have plainly declared, in precise

and unambiguous words, that no public officer shall receive or make use of a pass, and, within the territorial limits of the state, that command is enforceable, and it must be obeyed by every person who holds an office which, like the one before us, is public in its relations to the body politic, by reason of the mode of its creation and of the powers conferred and functions defined by the law. We are not to look beyond the instrument for the purpose of ascertaining the mischief against which the clause was directed, and thus restrict its operation. The only assumption that we have any right to indulge in is that it was made so sweeping in its terms in order to prevent doubts and to obviate refinements of reasoning as to its application to particular cases, under the varying conditions of our political life.

I cannot do better than, at this point, to append some forcible remarks made by two eminent judges of this state. In *People v. Purdy*, 2 Hill, 35, Bronson, J., delivering the opinion of the court as to the construction of that clause of the constitution which provides that "the assent of two thirds of the members elected to each branch of the legislature shall be requisite to every bill creating, continuing, altering, or renewing any body politic or corporate," said: "These words are as broad in their signification as any which could have been selected for the occasion from our vocabulary, and there is not a syllable in the whole instrument tending in the slightest degree to limit or qualify the universality of the language. If the clause can be so construed that it shall not extend alike to all corporations, whether public or private, it may then, I think, be set down as an established fact that the English language is too poor for the framing of fundamental laws which shall limit the powers of the legislative branch of the government." In *Newell v. People*, 7 N. Y. 9, Johnson, J., laid down this rule with reference to constitutional construction: "If the words embody a definite meaning which involves no absurdity, and

no contradiction between different parts of the same writing, then the meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have the right to add to or take away from that meaning. This is true of every instrument, but, when we are speaking of the most solemn and deliberate of all human writings, those which ordain the fundamental law of states, the rule rises to a very high degree of significance. It must be very plain, nay, absolutely certain, that the people did not intend what the language they have employed, in its natural signification, imports, before a court will feel itself at liberty to depart from the plain reading of a constitutional provision."

The further point that the defendant cannot be subjected to the penal consequences of this constitutional provision is untenable, inasmuch as the public officer is prohibited from making use of a pass, as well as from receiving one. It is no answer to say that the appellant having rightfully received a free pass for transportation over the railroad before the constitution went into effect, cannot be prevented from using what is his property. It is doubtful whether it is to be regarded as property, in the true sense of the term. But that is of slight importance. As a privilege extended to him by the corporation, the people may say to him that, while holding from them his public office, he shall not make use of this privilege. The provision was designed for the benefit of the public, and had no other object than to do away utterly with the power of corporations to influence any public officer in the performance of the duties of his office.

For these reasons, I think *the order and judgment below should be affirmed.*

All concur, **Bartlett, J.**, in result.

IOWA SUPREME COURT.

GIPPS BREWING CO.

v.

Charles DE FRANCE.

(.....Iowa.....)

1. **An amended complaint** alleging that the contract in the complaint for the sale of merchandise was only intended as an agreement as to the

NOTE.—As to what is the place of a contract where some acts in making or performing it are done in different states, see, in connection with the above case, authorities found in *notes* to *Seyk v. Miller's Nat. Ins. Co.* (Wis.) 8 L. R. A. 523, and *Baxter Nat. Bank v. Talbot* (Mass.) 13 L. R. A. 54; also *Tillinghast v. Boston & P. R. Lumber Co.* (S. C.) 22 L. R. A. 49.

For law of place as to contracts of married women, see *note* to *Rube v. Buck* (Mo.) 25 L. R. A. 178.

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price, and that no sales were made until orders were sent and accepted, states merely conclusions of law.

2. **The sale of beer shipped from Illinois to Iowa is an Iowa contract**, where the agreement fixing the terms of sale is forwarded from Illinois to Des Moines and there signed, making in effect a continuing offer to sell on terms stated, which offer is accepted by letter or telegram.

3. **An agreement to return or pay for beer barrels, kegs, and cases in which beer is shipped contrary to law is a part of the illegal contract which cannot be enforced**, when these articles were sent merely for the purpose of completing the sale of the beer.

(May 17, 1894.)

CROSS-APPEALS from a judgment of the District Court for Polk County in favor of

defendant in an action brought to recover the contract price of certain beer and the value of barrels, kegs, and bottles which defendant had failed to return to plaintiff in accordance with the agreement, in which the defendant had put in a counterclaim for the amount already paid under the contract; the defendant appealing from so much of the judgment as refused to permit him to recover the full amount claimed, and plaintiff appealing from so much of the judgment as allowed defendant to recover anything and refused the recovery claimed by him. *Affirmed on plaintiff's appeal; reversed on defendant's appeal.*

The facts are stated in the opinion.

Messrs. Bishop & Wilcoxon for plaintiff.

Messrs. McVey & Cheshire, for defendant:

The moment that a letter addressed to the brewing company was deposited in the post-office at Des Moines or a telegram was delivered to the telegraph company in the city of Des Moines, ordering liquors of the plaintiff, that moment the contract for the sale of that quantity of liquor was closed and consummated in the city of Des Moines.

Moore v. Pierson, 6 Iowa, 279, 71 Am. Dec. 409; *Teoler v. Shipman*, 83 Iowa, 194, 11 Am. Rep. 118; *Ferrier v. Storer*, 68 Iowa, 484, 50 Am. Rep. 752.

Where there is a continuing offer, as there certainly was in this case, and the party to whom it is made does order goods named in said continuing offer, the contract is made and executed where the acceptance is made.

Anson, Cont. p. 66; *Great Northern R. Co. v. Witham*, L. R. 9 C. P. 16; *Judd v. Day Bros.* 50 Iowa, 247; *Muscatine Water Co. v. Muscatine Lumber Co.* 85 Iowa, 112; *Dambmann v. Rittler*, 70 Md. 880; 2 Parsons, Cont. 657; *Wolf v. Willis*, 35 Ill. 88; *Jenkins v. Green*, 27 Beav. 487; *Chippendale v. Thurston*, 4 Car. & P. 101; *New Brunswick & C. R. Co. v. Wheeler*, 12 Fed. Rep. 877; *Boston & M. Railroad v. Bartlett*, 3 Cush. 224; *Thayer v. Burchard*, 99 Mass. 508; *Keller v. Ybarru*, 8 Cal. 147.

If a contract is invalid where it is made, it is invalid everywhere else.

See 3 Am. & Eng. Encyclop. Law, pp. 552, 553, and authorities cited in notes.

When the brewing company agreed to sell this liquor in refrigerator cars and deliver it "on track in Des Moines," then the property did not pass, nor the title thereto, until delivery in accordance with the contract, to the defendant in Des Moines, and, while the property was in transit, the carrier, instead of being the agent of the buyer, was in fact, the agent of the seller, the brewing company.

Devins v. Edwards, 101 Ill. 188; *Murray v. J. J. Nichols Mfg. Co.* 84 N. Y. S. R. 62; *Playford v. Mercer*, 22 L. T. N. S. 41; 21 Am. & Eng. Encyclop. Law, pp. 528-530; 2 Benjamin, Sales, § 1040; *Thompson v. Cincinnati, W. & Z. R. Co.* 1 Bond, C. C. 152; *Hooper v. Chicago & N. W. R. Co.* 27 Wis. 81, 9 Am. Rep. 439; *Higgins v. Murray*, 78 N. Y. 252; *The "Venus"*, 12 U. S. 8 Cranch, 253-257, 8 L. ed. 553, 554; *Suit v. Woodhall*, 113 Mass. 891; *Com. v. Greenfield*, 121 Mass. 40; *Mand v. Trail*, 92 Ind. 521, 47 Am. Rep. 163; *Pierson v. Hoag*, 47 Barb. 243; *Underhill v. Muskegon Booming Co.* 40 Mich. 660; *McLaughlin v.* 28 L. R. A.

Marston, 78 Wis. 670; *Vale v. Bayle*, Cowp. 294, 296; *Jenner v. Smith*, L. R. 4 C. P. 270; *Merchants Nat. Bank of Cincinnati v. Bangs*, 103 Mass. 291; *United States v. Woodruff*, 89 U. S. 22 Wall. 180, 188, 22 L. ed. 863, 868; *Whitlock v. Workman*, 15 Iowa, 851; *Sedgwick v. Cottingham*, 54 Iowa, 512; *Falvey v. Richmond*, 87 Ga. 99; *McNeal v. Braun*, 53 N. J. L. 617; *Johnson v. Bailey*, 17 Colo. 59.

If the goods are sold to be delivered in the place where the sale is prohibited, the purchaser will not be held liable. The sale in such instance would not be complete in the foreign state, and the contract, being repugnant to the laws of the country which made the prohibition, could not there be enforced.

Smith v. Godfrey, 28 N. H. 379, 61 Am. Dec. 617; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Banchor v. Mansel*, 47 Me. 58; *Tyler v. Carlisle*, 79 Me. 210; *Wasserboehr v. Boulcier*, 84 Me. 165.

Both parties understood and intended that liquors were to be delivered at the place expressly agreed upon, and there is not a word in the record to the contrary. Besides, it would have been incompetent for the court to have allowed the introduction of evidence to show what the brewing company intended by the use of these plain terms. They speak for themselves and need no explanation.

Barrett v. Wheeler, 71 Iowa, 662; 21 Am. & Eng. Encyclop. Law, p. 478.

The contract on which the liquors in question were sold was void.

McClain's Code, § 2407.

If the contract, by its terms, was to be performed in Iowa, and was performed in this state, its validity is to be determined by the laws of Iowa without regard to where it was made.

Butters v. Olds, 11 Iowa, 1; *Arnold v. Potter*, 22 Iowa, 194; *Burrows v. Stryker*, 47 Iowa, 477; *Bigelow v. Burnham*, 88 Iowa, 120; *Story*, Conf. L. §§ 242, 280, 281; 3 Am. & Eng. Encyclop. Law, p. 561, and authorities cited in notes. See also the following cases already cited in this brief:

Smith v. Godfrey, 28 N. H. 379, 61 Am. Dec. 617; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Tyler v. Carlisle*, 79 Me. 210; *Wasserboehr v. Boulcier*, 84 Me. 165.

The defendant should have recovered the cash he paid the brewing company for liquors delivered to him under the contract.

Church v. Simpson, 25 Iowa, 408; *Becker v. Betten*, 30 Iowa, 668; *Woodward v. Squires*, 41 Iowa, 877; *Tolman v. Johnson*, 43 Iowa, 127; *Connolly v. Searr*, 72 Iowa, 223; *Schober v. Rosenfeld*, 75 Iowa, 455.

The brewing company cannot offset against the cash paid the value of the empties not returned.

Reynolds v. Nichols, 12 Iowa, 398; *Pangborn v. Westlake*, 36 Iowa, 546; *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145; *Tootle v. Taylor*, 64 Iowa, 629; *McIntosh v. Wilson*, 81 Iowa, 839. See also 3 Am. & Eng. Encyclop. Law, pp. 868-872, and notes.

In cases of gratuitous bailment for the bailor's sole benefit, the bailee is only liable for gross negligence or breach of good faith.

Jourdan v. Read, 1 Iowa, 185; *Dougherty v. Posegate*, 3 Iowa, 88; *Story*, Bailm. § 23; 2 Am. & Eng. Encyclop. Law, p. 52, and authorities

cited in *note*; *Foster v. Pettibone*, 7 N. Y. 435, 57 Am. Dec. 530; *Dunlap v. Gleason*, 16 Mich. 158, 98 Am. Dec. 231.

Robinson, J., delivered the opinion of the court:

On the 28th day of March, 1891, the parties to this action entered into an agreement in writing, of which the following is a copy:

"Peoria, Ill., March 26, 1891. Mr. Chas. De France, Des Moines, Iowa—Dear Sir: We propose to sell you our keg and bottled beer, in refrigerator cars, delivered on track in Des Moines, from time to time, as you may order, on the following terms and conditions for the term of one year, viz.: Keg beer (our best brands), \$6.00 per barrel. Bottled beer, 'Amberlin', in cases, 2 dozen quarts, \$1.60 per case. Bottled beer, 'Export', in cases, 2 dozen quarts, \$1.40 per case. After the first two cars, cash to accompany each subsequent order; thus allowing a credit for two cars. All empty kegs, cases, and bottles are to be shipped back promptly, and at the end of six months from date, and, on the first settlement, all empties not in sight must be paid for at the following rates:

1/4 barrels C.....	\$2.25 each.
1/4 (kegs) C.....	\$1.50 each.
1/2 (ponies) C.....	\$1.00 each.
Cases C.....	.25 each.
Bottles (quarts) C.....	.50 per doz.

"If mutually agreed, this proposition may be renewed for a longer period. Yours, respectfully, Gipps Brewing Company."

"Des Moines, Iowa, March 28, 1891. I accept the above proposition. Charles De France."

"Des Moines, Iowa, March 28, 1891. We, the undersigned, hereby guaranty the faithful performance of all the stipulations and conditions of the above agreement, and the payment of all money due said Gipps Brewing Company, of Peoria, Illinois, from said Chas. De France, by reason of said agreement. S. G. Cogswell. F. C. Norfolk."

During the spring and summer of that year the plaintiff shipped to the defendant at Des Moines beer, in barrels, kegs, and cases of the aggregate value, as fixed by the agreement, of \$6,032.67, and money was paid, and cases returned, to the value of \$3,340.15. The plaintiff seeks to recover the remainder of the agreed price. The defendant alleges that the agreement between the parties was to be performed in this state; that it was for the sale of intoxicating liquors; that defendant was not authorized, under the laws of this state, to purchase or to own, or keep with intent to purchase or own, or keep with intent to sell, intoxicating liquors; that the agreement was in violation of the laws of this state; and that the liquors in question were sold to him under the agreement, in violation of law. The defendant further alleges that on the night of August 16, 1891, his place of business was destroyed by fire, and that in it were beer barrels, kegs, and cases owned by the plaintiff, which the parties agree were of the value of \$1,572.70, which were also destroyed; that the fire was without fault on his part; and that he is not liable to the plaintiff for its property, which

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was burned as stated. In his counterclaim the defendant asks to recover the amount of the payments for beer he has made under the agreement, which is admitted to be \$2,579.50. The judgment rendered was for what remained of that amount after deducting therefrom the value of the barrels, kegs, and cases burned.

1. Before the trial was commenced the plaintiff filed an amendment to the petition, in which it alleged that the contract inserted in the petition, and which we have set out, was not the contract for the sale of the merchandise for the value of which this action is brought, but only an agreement as to what the prices should be for merchandise defendant should order from time to time, and was only intended to be the basis or price list for such sales as the parties to it should afterwards agree upon; that no sales were made until orders were sent to and accepted by the plaintiff; and that the agreement was binding upon the parties thereto as to the price of the merchandise sold for one year. A motion of the defendant to strike the amendment from the files was sustained, and of that ruling the plaintiff complains. It is not alleged that the agreement first made was set aside, or in any manner modified by a subsequent one, and the amendment appears to have been intended to interpret the agreement, and to state its effects. Its statements were in the nature of conclusions of law, and it was properly stricken from the files.

2. It is admitted that, if the contracts of sale in question were Iowa contracts, they were in violation of the laws of this state, and that appellant cannot recover for the liquor sold. It is contended by the appellant that the sales were made in the state of Illinois, and are governed by the laws of that state, which permit sales of the character of those in question. It will be observed that the contract set out does not purport to effect any sale whatever. On the part of the plaintiff it is an offer to sell beer of certain kinds in specified packages, at stated rates, on terms indicated. It did not bind the defendant to make purchases, but was designed to induce him to do so, and to make definite the terms and conditions upon which he could rely. The orders he gave were based upon that agreement, and were governed in all respects by it. That is shown beyond question by the correspondence and dealings between the parties. When beer was shipped to defendant, an expense bill, but no bills of lading, was sent to him. There is nothing that shows that the beer was delivered to him on the cars at Peoria, where it was shipped. The place and manner of delivery were fixed by the contract, and was to be "in refrigerator cars, delivered on track in Des Moines, from time to time," as defendant should order. It was his right to insist upon delivery in Des Moines, and he could not be compelled to accept the beer elsewhere. Nor is there anything in the record to show that he waived his rights in that respect. The charges for transportation were paid in the first instance by the defendant at Des Moines, but were deducted from the contract price of the beer. The agreement

fixing the terms of sale was forwarded to Des Moines, and there signed. It contained, in effect, a continuing offer to sell beer on the terms stated. See *Muscatine Water Co. v. Muscatine Lumber Co.* 85 Iowa, 112; *Judd v. Day Bros.* 50 Iowa, 247. That offer was accepted when a letter was written or telegram sent ordering beer to the extent of the order, and the acceptance took effect from the time the letters were mailed and the telegrams were sent. *Ferrier v. Storer*, 68 Iowa, 487, 50 Am. Rep. 752; *Tegler v. Shipman*, 88 Iowa, 198, 11 Am. Rep. 118. The beer ordered was delivered at Des Moines, as required by the contract. We conclude that the sales were made in this state, and that they are governed by its laws which were in force at that time. Our conclusion is sustained to some extent by the following authorities: *Sedgwick v. Cottingham*, 64 Iowa, 512; *Hooper v. Chicago & N. W. R. Co.* 27 Wis. 82, 9 Am. Rep. 439; *Suit v. v. Woodhall*, 118 Mass. 391; *Wasserboehr v. Boutier*, 84 Me. 165; 2 Benjamin, Sales, § 1040; 21 Am. & Eng. Encyclop. Law, p. 528, note 1. Cases are cited by the appellant which are claimed to hold a different rule, but we think that in most, if not all, of them the controlling facts were unlike those in this case, and that different principles were involved. When the sales in question were made the defendant had not obtained the right to purchase and deal in intoxicating liquors. The sales were in violation of law, and no recovery therefor can be had.

§ 3. Section 1550 of the Code provides that: "All payments or compensation for intoxicating liquor sold in violation of this chapter whether such payments or compensation be in money or anything else whatsoever shall be held to have been received in violation of law and against equity and good conscience, and to have been received by a valid promise and agreement of the receiver in consideration of the receipt thereof, to pay on demand to the person furnishing such consideration the amount of said money." Under this provision the defendant is entitled to recover the money he has paid on account of the sales in question. He complains of the ruling of the court which deducted from that amount the value of the beer barrels, kegs, and cases in which beer had been shipped to him, which were burned. The contract in suit in terms required the defendant to return the property destroyed, or pay therefor the prices specified. That provision cannot be separated from the remainder of the agreement, but was a necessary part of it. The defendant was not dealing in the property therein described, excepting so far as was necessary to carry on his illegal business. It was sent as necessary to complete the sales, and for no other purpose; and the provision for its return, and for payment if it was not returned, was merely to fix the liability which the defendant would incur by reason of the sales, as an incident of them. It was said in *Reynolds v. Nichols*, 12 Iowa, 402, to be well settled "that any promise, contract, or undertaking, the performance of which would tend to promote, advance, or carry into effect any object or purpose which

is unlawful, is in itself void, and will not maintain an action." If the provision under consideration were separable, it would be void, because intended to promote an illegal purpose; but we think the agreement as expressed in the writing must be regarded as entire and indivisible, lacking only an order to give it effect, and that it is wholly illegal. It follows that it imposed no obligation on defendant to return the property in question. He had collected and stored it, and in law held it as a mere depository for the plaintiff, and was not liable for damage or loss which occurred without fault on his part. We are of the opinion that the court rightly instructed the jury to return a verdict for the defendant, but that it erred in not requiring a verdict for the full amount of the payments he had made to plaintiff.

On the appeal of the plaintiff the judgment is affirmed.

On the appeal of the defendant it is reversed.

RESSEGIEU

v.

SIOUX CITY, *Appt.*

(.....Iowa.....)

The establishment of a street grade several feet above the natural surface of the ground by a mere ordinance, without any actual improvement of the street in accordance therewith, and a subsequent ordinance changing the grade line to conform to the surface of the ground, and a permanent improvement of the street on that grade, entitles one who erected his building to conform to the grade established by the first ordinance while that was in force to the benefit of the Code, § 400, which provides for compensation to a person whose property is injured by the change of an established grade of the street.

(May 17, 1895.)

APPEAL by defendant from a judgment of the District Court for Woodbury County in favor of plaintiff in an action brought to recover damages for injuries caused by the change of a street grade. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. H. Burton, City Atty., and Kennedy & Kennedy for appellant.

Mr. John N. Weaver for appellee.

Kinne, J., delivered the opinion of the court:

1. This cause was tried to the court upon the following agreed statement of facts, a jury being waived: "That the plaintiff is and was the owner in fee simple of all that portion of lots 10, 11, and 12 in block 48 in Sioux City proper as stated in plaintiff's petition; that on the 16th day of June, 1883, the defendant, the city of Sioux City, by its council, passed an ordinance which, among other things, established a grade upon West Third street, in front of plaintiff's said prop-

NOTE—For note on damage to abutting owners by first grading and improvement of streets, see *Hickman v. Kansas (Mo.)* 28 L. R. A. 668.

erty; that said grade so established was from four to five feet higher than the then surface of said street along and in front of plaintiff's property; that in the year 1884 plaintiff built a large brick building on said lots, fronting and abutting on said West Third street, and built said building to conform to the grade line as established by said ordinance of June, 1882; that the defendant thereafter, and on or about the 23d day of July, 1890, by its city council, passed an ordinance changing the grade line of said street to conform to the surface of the ground, the surface then being about one foot higher than when said building was erected, said one foot raise having been made in 1886, thus lowering the grade line of said street from three to five feet; that at the time of the passage of the ordinance in 1892, establishing grade on said West Third street, the surface of the ground on said street was from four to five feet lower than the grade line established by said ordinance, and one foot lower than the grade line established in 1890; and that the defendant never actually graded or changed the physical surface of said street after the passage of said Ordinance of 1882, except that the same was raised one foot in 1886, and the surface of said street was never altered or changed to conform to said 1882 grade; and that the defendant has never made any physical change in the surface of said street in front of plaintiff's property, except as above stated, but left the surface of the same as it was at the time of the passage of the Ordinance in 1890; and that the passage of the Ordinance of 1890, upon which plaintiff relies as a basis for this action, simply changed the grade line of said street so as to conform the grade line to the surface of the street as it then was; that, immediately after the passage of the Ordinance of 1890, defendant proceeded to and did improve said West Third street, by paving, curbing, and guttering the same on said grade so last established, and has ever since so maintained said improvements upon said street, and the same now stands as the permanent grade of said street, in front of plaintiff's said property. If, on the above facts, record, and pleadings herein, the plaintiff would be entitled to recover, it is conceded and agreed that he shall recover the sum of two thousand dollars. It is further conceded that there has been no assessment or payment of damages."

2. Our statute provides that "when any city or town shall have established the grade of any street or alley, and any person shall have built or made improvements on such street or alley according to the established grade thereof, and such city or town shall alter said established grade in such a manner as to injure or diminish the value of said property, said city or town shall pay to the owner or owners of said property so injured the amount of such damage or injury." Code, § 469. Further provisions are made touching the assessment of such damages which are not material to the question presented for our determination. The contention of the city in this case is that, although plaintiff erected his building in conformity to the established grade, yet, as he could not

compel the city to so change the surface of the street as to make it conform to the grade it had established, and as it is claimed that the city simply passed an ordinance changing the grade, and did not in fact make any physical change in the grade, therefore plaintiff cannot recover. We do not think this contention can be sustained. A grade was "established," within the meaning of the law, by the passing of the Ordinance of June 16, 1882. As was said in *Kepple v. Keokuk*, 61 Iowa, 656: "We think the establishment of a grade means the passing of an ordinance, or other legislative action of the council of the city, prescribing and fixing grade lines to which the surface shall be brought when the streets shall be improved." Now, it is conceded that such a grade was established, and that plaintiff erected his building in conformity thereto. In 1890 the city council passed an ordinance changing the grade line of the street in front of plaintiff's building. They so changed the grade as to establish it on a line with the then surface of the street, which it is conceded was one foot higher than when the building was erected, thus lowering the grade from three to five feet. It thus appears that the surface of the street in 1882, at the time of the passing of the ordinance, was from four to five feet lower than the grade line established by said ordinance, and one foot lower than the grade line established in 1890. Plaintiff had a right to erect his building in conformity to the grade established in 1882. He had a right to assume that, when the street was permanently improved, it would be on the line of the grade the city had thus established. Cases are cited holding that the mere passage of an ordinance changing the grade, without more, is not an alteration of an established grade, within the meaning of the statute; that it contemplates a physical change. These cases mean no more than this: That, if a grade be once established, and a lot owner erects a building in conformity with such grade, and thereafter an ordinance is passed changing the grade, but no act of the city is done thereunder, no work done to bring the street to the grade last established, then the mere passage of the ordinance gives the lot owner no right of action. In this case, however, the facts are that not only was an ordinance passed changing the grade, but, in pursuance of it, the city undertook to and did permanently improve the street in accordance with the grade last established. Now, if appellant's contention is correct, no one could recover for damages caused by the change of grade if the grade was finally fixed on a line with the surface of the street, and the street thus permanently improved. If, however, the final grade was six inches above or six inches below the surface of the street, and the street was permanently improved upon said grade line, that would be a physical change, which would warrant recovery by one who had improved his property on the faith of a prior established grade. We discover no reason for such a distinction. This street was paved and permanently improved on the grade line last established. Plaintiff built, as he had a right to, relying upon the city's bringing

the street up to the grade theretofore established when it should pave the street. It did not do so. It changed the grade, and improved the street in accordance therewith; and his right of recovery is not affected by the fact that the final grade and improvement of the street was on a line with the natural surface of the street, rather than above or below it. In either event, it would be a physical change, within the contemplation of the law. To conform to the last grade and the permanent improvement of the street, it is evident he would be compelled to make

such a change in his improvements as would entail expense by reason of the city's action. Had the city, when it conformed the street to the grade, done so on the lines originally established, and on the faith of which plaintiff erected his building, such change and expense would not be necessary. We think the case made is fully covered by the statute, and, as it is conceded that the damages have not been assessed or paid, plaintiff is entitled to recover.

The judgment below is affirmed.

FLORIDA SUPREME COURT.

Rachael A. AXLINE, by Next Friend, *et al.*,
Appts.,
v.
J. R. SHAW.

(.....Fla.....)

***1. The land below high-water mark does not necessarily pass to a grantee of the upland as an incident and appurtenance of the latter, but the submerged land or any part thereof may be reserved upon a sale of the upland, or be made the subject of a separate sale, or be sold with the upland, the question of the intent of the grantor, that the submerged land or any part thereof shall or shall not pass with the upland, being one the solution of which is to be found in the terms of the deed of conveyance.**

2. Our Riparian Act of December 27, 1856, is by its terms expressly limited to those persons and corporations "owning lands actually bounded by and extending to low-water mark on such navigable streams." In order for one to have riparian rights, there must be an actual water boundary of the land in connection with which such rights are claimed.

3. As applied to inland waters, the word "shore" generally has application only to large bodies of water, as lakes and large rivers, and means the land adjacent thereto.

4. The deed under which riparian rights are claimed in this case extends the complainants' lands "to the shore of Orange lake." Such a boundary upon "the shore" is not an equivalent term to a boundary upon the lake itself, or the waters thereof. Such a boundary is land and not water, and does not confer riparian rights under our statute.

5. The submerged lands of Orange lake, in Alachua county, which were private property at the time of the passage of the riparian act, being included in the grant of the Spanish government to F. M. Arredondo and son, before the cession of Florida to the United States, were not affected by the provisions of that act.

(May 1, 1894.)

*Headnotes by LADDON, J.

NOTE.—For ownership of bed of lakes and ponds, see *note* to *Gouverneur v. National Ice Co.* (N. Y.) 18 L. R. A. 606, also *Noyes v. Collins* (Iowa) 26 L. R. A. 602.
28 L. R. A.

A PPEAL by plaintiffs from a judgment of the Circuit Court for Alachua County in favor of defendant in an action brought to recover possession of certain real estate. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. S. Y. Finley*, for appellants:

The waters of Orange lake, and the "steam-boat channel" connecting Orange lake with Luckloosa lake are actually navigable in fact, though they are inland fresh waters, and not connected with the tides.

Navigable waters are such as are in fact susceptible of navigation.

Sullivan v. Spotswood, 83 Ala. 163; *Buck v. Cone*, 25 Fla. 1; *"The Daniel Ball" v. United States*, 77 U. S. 10 Wall. 557, 19 L. ed. 999; *United States v. Montello*, 87 U. S. 20 Wall. 430, 22 L. ed. 391.

Appellants are protected by the Riparian Act of 1856.

Dumas v. Garnett, 83 Fla. 64; *Frink v. Lawrence*, 20 Conn. 117, 50 Am. Dec. 275; *Alden v. Pinney*, 12 Fla. 848; *Sullivan v. Moreno*, 19 Fla. 200; *Geiger v. Filor*, 8 Fla. 840; *State v. Black River Phosphate Co.* 27 Fla. 276; and 21 L. R. A. 189, 32 Fla. 82.

Water or "submerged land" and especially navigable waters and the land under them never passed by said grant from Spain to Arredondo and son.

Thomp. Dig. pp. 572, 573.

In a public grant nothing passed by implication.

See *Charles River Bridge Proprs. v. Warren Bridge Proprs.* 36 U.S. 11 Pet. 465, 9 L. ed. 791.

The language of the treaty is, "all grants of land not water, or water privileges."

United States v. Percheman, 52 U. S. 7 Pet. 86, 8 L. ed. 617.

The shore is that ground between the ordinary high and low water mark.

Hale, "de Jure Maris," chap. 4.

The grantee of a tract described as running along a "shore" took to the middle of the stream although strictly speaking, fresh water streams do not possess shores.

Child v. Starr, 4 Hill, 869; *Starr v. Child*, 20 Wend. 149.

Nearly all the courts recognize an inherent and exclusive right in the riparian proprietor to wharf front from his own land to navigable waters, provided that he does not thereby impede navigation.

6 Wait, Act. & Def. p. 367; *Geiger v. Flor.*, 8 Fla. 325; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; Angell, Tide Waters, p. 196.

The doctrine of riparian rights applies to lakes.

Dutton v. Strong, 66 U. S. 1 Black, 32, 17 L. ed. 82.

Messrs. T. F. King and W. W. Hampton, for appellee:

There is no such thing as a riparian right in those who own lands bordering on the lakes in the interior of Florida.

Rivas v. Solary, 18 Fla. 122.

This land was part of the Arredondo grant.

The only dominion was given to the United States over the land as over the rest of the territory of Florida, and all the right of property in this as other Spanish grants was intact in the hands of the grantees.

United States v. Arredondo, 81 U. S. 6 Pet. 691, 785, 8 L. ed. 547, 563; *United States v. Percheman*, 82 U. S. 7 Pet. 53, 8 L. ed. 605; *United States v. Clarke*, 33 U. S. 8 Pet. 467, 8 L. ed. 1012; *Delassus v. United States*, 34 U. S. 9 Pet. 183, 9 L. ed. 77; *Strother v. Lucas*, 37 U. S. 12 Pet. 437, 9 L. ed. 1147.

Liddon, J., delivered the opinion of the court:

Appellants, who were complainants below, filed their bill of complaint against the appellee, defendant below. The bill alleged, among other things, that the complainant Rachael A. Axline was a riparian proprietor of a certain lot of land in Alachua county, which "is fronted by Orange lake, which is a navigable stream." Said bill also alleged that said lot abuts upon the said lake; that said lake adjoins the same, and that said complainant was entitled as riparian owner to exclusive water privileges under, upon, and over the waters of the said lake adjoining and in front of her said property; and that said lot was purchased with a view to said water rights and privileges. The bill charged the defendant with erecting a fence and attempting to erect a wharf in front of her land, which prevented access to the channel of the lake, interfered with her use of said water privileges and facilities for navigation, shipping freight and other purposes.

An injunction was prayed against the keeping, using, repairing, etc., of the fence already built, and from building any other fence, wharf, etc. The building, etc., of the fence was not sought to be enjoined as a nuisance *per se*, but the complainants stand strictly upon the statutory riparian rights of Mrs. Axline.

The defendant filed his answer and demurrer, in one paper, denying that the complainant, Mrs. Axline, was a riparian proprietor; that Orange lake was a navigable stream in contemplation of the statute; and many other matters unnecessary to state. Voluminous testimony was taken by each party. At the final hearing the bill of complaint was dismissed, and complainants appealed.

The counsel for both parties have filed lengthy briefs evincing much labor and re-

search upon the question as to whether or not Orange lake, an inland fresh water lake in Alachua county, is a "navigable stream," within the purview of our Riparian Act of December 27, 1856. The conclusion we reach renders it entirely unnecessary to determine the question, because, in our opinion, if we conceded that said lake is such a "navigable stream" as is contemplated by the act, we do not think the allegations and proof in the case show that the complainant, Mrs. Axline, is such a riparian owner as is embraced within the terms of the statute. It appears by the testimony in the case that one T. B. Myers, through whom Mrs. Axline derived title, at the time he sold and conveyed the lots on account of which she claims to be a riparian proprietor, also owned the adjacent submerged lands covered by the waters of Orange lake. Conceding (only, however, for the purposes of this case) that Orange lake is a navigable stream, and that the submerged lands over which riparian rights are claimed, were included in the statutory grant made by the Act of 1856, does the deed of conveyance to Mrs. Axline make her a riparian proprietor? A solution of the question requires an examination of a portion of the act and the deed by which Mrs. Axline holds her title to the property in question. The last section of the act in question is as follows: "That nothing in this act contained shall be so construed as to release the title of the state of Florida, or any of its grantees, to any of the swamp or overflowed lands within the limits of the same, but the grant herein contained shall be limited to those persons and body corporate owning lands actually bounded by, and extending to, low-water mark, on such navigable streams, bays, and harbors." Chap. 791, § 2; McClellan's Dig. § 2, p. 690. The description of the land in the deed of Mrs. Axline is as follows: Beginning at the northeast corner of section one (1), township twelve (12), south of range twenty-one (21), in the Arredondo grant; thence south with the east line of said section one (1) a distance of ten chains; thence west on a line parallel with the north line of said section one (1) about thirty-six and a half chains, to the shore of Orange lake; thence northwesterly with said shore of said lake to the north line of said section (1); thence with said north line of said section one (1), about forty chains, to the place of beginning,—containing by estimation thirty-eight and 25-100 (38 25-100) acres, and composing lots one (1) and two (2) on the map of Kennedy's survey of said section, or of the land of Theodorus Bailey Myers and wife.

A principle applicable to the construction of this deed is stated in *State v. Black River Phosphate Co.*, 32 Fla. 82, 21 L. R. A. 189, in summarizing the effect of the decision in *Rivas v. Solary*, 18 Fla. 122, as follows: "The land below high-water mark does not necessarily pass to a grantee of the upland as an incident and appurtenance of the latter, but the submerged land, or any part thereof, may be reserved upon a sale of the upland, or be made the subject of separate sale, or be sold with the upland, the question of the

intent of the grantor that the submerged land, or any part thereof, shall or shall not pass with the upland being one of which the solution is to be found in the terms of the deed of conveyance." Numerous authorities are cited in support of the proposition asserted. Some of these are referred to and quoted in the further course of this opinion. This court has also laid down the proposition that in a suit to enjoin trespass upon riparian rights, the allegations of the bill must be clear and precise as to the title upon which relief is prayed. These requirements of clearness and precision have especial application to statements as to boundaries of the land upon the ownership of which riparian rights are claimed. *Sullivan v. Moreno*, 19 Fla. 200. The act in terms is expressly limited to those persons and corporations "owning lands actually bounded by and extending to low-water mark, on such navigable streams." In order for one to have riparian rights there must be an actual water boundary of the land in connection with which such rights are claimed. *Sullivan v. Moreno*, *supra*. Examining Mrs. Axline's deed, does it show a water boundary? One of the boundaries of her land is the shore of Orange lake. In conveying, the word "shore," as applied to the sea and to tidal waters, has a definite and generally understood signification. It means that portion of land at the water's edge which is daily covered, and daily left bare by the rising and falling of the tides. Gould, *Waters*, §§ 3, 28; Black, *Law Dict.* title, *Shore*; *Storer v. Freeman*, 6 Mass. 455, 4 Am. Dec. 155. As applied to inland waters, so exact a definition cannot be given. The word generally has only application to large bodies of water, as lakes and large rivers, and means the land adjacent thereto. Webster's International Dictionary. If a boundary upon "the shore" of the lake is an equivalent term to a boundary upon the lake itself, or the waters of the lake, then Mrs. Axline is a riparian proprietor; otherwise she is not. We do not think the expressions are equivalent. Her land is bounded by "the shore." The shore is land. The word "shore" is an antithetic term to that of "water." Their significations, instead of being synonymous, are the opposites of each other. Therefore the boundary is land, and not water. Her land being bound by the shore of the lake, the idea is excluded that it is bounded by the lake itself, or the waters thereof. The deed of Mrs. Axline does not even convey the shore. It conveys "to the shore." A deed conveys all within the boundaries, but does not convey the boundary itself. Gould, *Waters*, § 199. An early American case upon this subject is *Storer v. Freeman*, *supra*, in which it is said: "The present question is, therefore, a question upon the construction of the deeds of conveyance. The lands are not expressly bounded on the sea or salt water; but they extend to the sea-shore, and are bounded by it; which, as the plaintiff has argued, are expressions of the same import." The court then proceeded to define "shore" and "sea-shore," and then continued: "The shore mentioned in the deed is not

covered with rock, but forms a beach or flats. We shall for *shore* substitute *flats*. The land described will then extend to the flats, and be bounded by the flats. On this substitution the construction is manifest. The land conveyed extends to the flats, but not *over* them; and the flats being a bound of the land conveyed, are not a part of it." The deed under consideration makes the shore of the lake a monument, and it should be treated as such. A grantor in a deed may make the shore of a lake or stream a monument of boundary, just as well as a road, wall, or ditch, or other similar object. *Bradford v. Crossey*, 45 Me. 9; *East Hampton Trustees of Freeholders v. Kirk*, 68 N. Y. 459; *Boston v. Richardson*, 13 Allen, 146, and authorities cited. There is a manifest difference between land bounded by the lake itself, and bounded by the shore of the lake. Bounded by the navigable water, the lake or the stream, the law extends the boundary to the edge of the channel. If bounded by the shore or bank, the land does not reach the water, but is limited to the upland. *Clement v. Burns*, 43 N. H. 609; *Nickerson v. Crawford*, 16 Me. 245, and authorities cited on page 246; *Chapman v. Edmonds*, 3 Allen, 512; *Niles v. Patch*, 13 Gray, 254. Where a boundary is limited "to the bank of a stream," it necessarily excludes the stream itself. *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145; *Daniels v. Cheahire R. Co.* 20 N. H. 85. The description in the deed, by which the line extending to the shore is stated to extend "thence northwesterly with said shore of said lake to the north boundary line, etc., does not show an actual water boundary. A very similar case is *Montgomery v. Reed*, 69 Me. 510. We quote from the opinion of the court as follows: "The second call therein commences at a certain point south of the inlet and runs thence north . . . to the shore of the Damariscotta river. . . . The 'shore' is the ground between the ordinary high and low water mark—the flats—and is a well-defined monument. 'To' is a word of exclusion when used in describing premises—to an object named excluding the terminus mentioned. *Bradley v. Rice*, 13 Me. 198, 29 Am. Dec. 501; *Bonney v. Morrill*, 52 Me. 252, 256. 'To the shore,' then, includes no part of the 'flats.' The third call is, 'thence northerly and westerly, as the shore lies, round a point of land and round the head of a cove, to the northeast corner. . . . This obviously does not include any of the 'shore' or 'flats' in the cove, for the line called extends along the outside limits or margin of the shore, or of high-water mark. Thus a call 'to the margin of the cove, then westerly along the margin of the cove,' etc., was held to bound by a line without the edge of the water, and that the flats were not included." *Nickerson v. Crawford*, 16 Me. 245. See also *Dunlap v. Stetson*, 4 Mason, 349; *Litchfield v. Ferguson*, 141 Mass. 97. In a note to *Com. v. Roobury*, 9 Gray, 451 (524), is quite a collection of cases upon this point, of which a few have been cited herein.

Our conclusion is, that conceding Orange lake to be a navigable stream, Mrs. Axline

is not a riparian proprietor. She does not own lands actually bounded by and extending to low-water mark.

While what we have said disposes of the case, we think it useful to state, in order to prevent future litigation between the same parties, that the court also reaches the conclusion from the record that the submerged lands of Orange lake, involved in this controversy, were a part of the Arredondo grant.

This grant was made by the Spanish government to F. M. Arredondo and son before the cession of Florida to the United States. The lands in question were private property at the time of such cession, and at the time of the passage of the Riparian Act of 1856, and were not affected in any manner by the provisions of such act.

There is no error in the record, and the decree of the Circuit Court is affirmed.

KENTUCKY COURT OF APPEALS.

Mary HERR *et al.*, Appts.,

v.

CENTRAL KENTUCKY LUNATIC ASYLUM.

(.....Ky.....)

A nuisance is subject to injunction and abatement in a suit for that purpose although the defendant is a corporation maintaining a lunatic asylum at the expense of the state, especially when the statute creating it has provided that it may sue and be sued.

(May 10, 1896.)

APPEAL by petitioners from a judgment of the Chancery Court for Jefferson County sustaining a demurrer to a petition filed to enjoin defendant from interfering with or fouling a watercourse which flowed through petitioner's land. *Reversed.*

The facts are stated in the opinion.

Messrs. Alfred Selligman, O'Neal & Pryor, and Phelps & Thum for appellants.

Messrs. A. J. Carroll, John B. Barrett, and A. S. Brandies for appellee.

Lewis, J., delivered the opinion of the court:

Mary Herr and others brought this action against Central Kentucky Lunatic Asylum, created by statute a body politic, and in their petition state that they are, as was their intestate husband and father, owners in possession of, and reside upon, a tract of land containing about 300 acres, used as a farm and garden, through which flows a small watercourse, called "Goose Creek;" that adjacent to and above their land is a tract of about 400 acres, acquired and held by defendant for use of the commonwealth, upon which have been erected, at expense of the state, buildings extensive enough to accommodate, and which do accommodate, about 1,000 persons adjudged lunatics, besides about 100 attendants and servants; that defendant has wrongfully built across said creek two dams, making two artificial lakes or ponds, whereby the natural flow of water has been greatly diminished; that de-

fendant dumps, and causes to be carried through a sewer from said buildings, into the creek, all slops, offal, and refuse matter of every kind, a large part—though, because of feeble flow of the creek, not all—of which passes through and upon the premises of plaintiffs, whereby water of the creek, formerly used for watering their animals and other farming purposes, has become unfit for any purpose, and the air rendered so noxious and offensive as to make their homes unhealthy and untenable. Wherefore they ask an injunction against defendant's maintaining the alleged nuisance, and abatement of it, including the removal of the two dams. But to the petition a general demurrer was sustained, upon the principal ground, as stated in opinion of the chancellor, and now urged in argument, that defendant corporation is but an arm of the state, and consequently cannot be sued without express legislative authority. In terms of the statute creating defendant a corporation, it is not only given power to sue, but made, without qualification, liable to be sued. And, if an action for the cause stated in petition of plaintiffs cannot be maintained against it, we are at loss to know what character of default or wrong it could be sued for.

But it seems to us, independent of statutory liability, defendant is answerable for the wrong and injury complained of, in the same manner and to the same extent as one or more natural persons would be occupying the same attitude, which is that of agent or officer of the state. As a necessary consequence of exemption of the state from suit without its consent, an action nominally against an officer, but really against the state, to enforce performance of its obligation in its political capacity, cannot be maintained. But if officers or agents of the state invade private rights in a mode not authorized by the statute under which they claim to act, or if such statute is invalid, unquestionably, the person injured has at least a preventive remedy, although the state may be affected by the proceeding, yet not a party to it. As early as the case of *Osburn v. Bank of United States*, 23 U. S. 9 Wheat. 738, 6 L. ed. 204, in which an injunction was sought against officers acting under statute of a state, the rule was thus stated by Chief Justice Marshall: "If the state of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of

NOTE.—The distinction between nuisance and negligence is illustrated by the above decision holding a state charitable institution subject to injunction against a nuisance while *Williamson v. Louisville Industrial School of Reform* (Ky.) 23 L. R. A. 200, and some of the other cases cited in note thereto deny the liability of similar institutions for negligence.

23 L. R. A.

that party, and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true when it is in the power of the plaintiff to make them parties. But if the person who is the real principal, the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law,—be exempt from all judicial process,—it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him, could his principal be joined in the suit." The doctrine there stated has in numerous cases been since approved and applied by the supreme court, and this court has never held differently; for exemption of the state from suit without its consent was intended for its own protection, not at all to enable agents or officers to do, with impunity, injury to private rights. To say a court of chancery could not enjoin them from entering upon and appropriating, without compensation, land of a private person, though done under color of statutory power, and in interest of the state, would be, indeed, a startling proposition. Yet so using property of the state as to create a nuisance, whereby such private person is deprived of use and enjoyment of his land, would be not less a wrong and injury than forcibly ousting him of possession,

and carelessly taking and appropriating it; for, while holding and controlling property of the state, its officers and agents can no more than a private person disregard the maxim, "*Sic utere tuo ut alienum non ladas.*" It cannot be that in such case a person injured would be wholly without remedy merely because the wrongdoers are agents or officers holding and controlling property of the state. The case of *Williamson v. Louisville Industrial School of Reform* (recently decided by this court) 95 Ky. 251, 28 L. R. A. 200, is not like this, because there damages for a personal injury were sued for against, not the employé who committed the assault, but against the corporation,—against the state, controlling the institution,—which, if recovered, would have been payable out of the trust fund. Here the remedy sought is injunction against continuance of a nuisance, and, as a necessary consequence, abatement of it. And as the alleged wrong is such as to cause permanent mischief and continuous grievance, which cannot be, otherwise than by injunction, repaired or prevented, and as it is moreover alleged that plaintiffs have and will continue to suffer injury to both their health and property unless the court grants the relief, a *prima facie* cause of action is stated in their petition, and the chancellor erred in sustaining the demurrer.

Judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *Resp't.*,

v.

Fred W. FARRINGTON, *Appt.*

(.....Minn.....)

*In an indictment for larceny under section 428 of the Penal Code,—*Held*, that

*Headnote by MITCHELL, J.

the general allegations that the defendant withheld the money from the true owner, and appropriated it to his own use, are so limited and qualified by the allegations of the specific facts upon which the general allegations are predicated that the facts stated in the indictment do not constitute a public offense.

(November 16, 1894.)

NOTE.—*Limitation of general allegations in an indictment by specific allegations.*

The doctrine established in *STATE V. FARRINGTON*, is borne out by the majority of the following cases not mentioned or referred to therein, but cases exactly deciding the question are few.

It will be observed, however, that in the Ohio and District of Columbia cases upholding this doctrine there were strong dissenting opinions, which were directly followed by the court in the Oregon case of *State v. Brown* (1879) 7 Or. 186, 195.

In *United States v. Barber* (1891) 20 D. C. 79, it is said indictments have not yet come to be addressed to the intelligence or interpretation of a jury; they are the guides of the court in determining what issues are submitted for trial, and it is for the courts to understand them according to rules of law which have been established concerning their meaning and their sufficiency.

In the above case a motion in arrest of judgment on a verdict of guilty on the trial of an indictment for murder was allowed and the case remanded, upon the ground that the indictment itself did not upon its face show or legally charge and state the death of the prisoner's victim, although the conclusion showed the finding by the grand jury of 28 L. R. A.

that fact. The court held that the conclusion of the indictment by the grand jury contained only conclusions of law while the fact as contained in the body of the indictment amounted only to a charge that the prisoner committed an injury adapted and intended to effect the result—death, the act stated by such fact not constituting murder. *United States v. Barber, supra.* Bradley, J., dissenting.

The indictment charged that the prisoner by his acts as therein set forth "maliciously choked, suffocated, and drowned" his victim while the grand jurors' conclusion found that he by the means stated "feloniously, unlawfully, and of his malice aforethought did kill and murder." *Ibid.*

It is necessary to allege that the act, done with homicidal intent, and in manner calculated to cause death, actually accomplished its purpose, for without such averment the accused would be tried for an actual killing when he had only been charged with an act adapted and intended to cause that result. *Ibid.*

The indictment in the above case did not allege the place of death and show the jurisdiction of the court, although the conclusion showed such place. *Ibid.*

APPEAL by defendant from an order of the District Court for Hennepin County overruling a demurrer to an indictment charging him with larceny. *Reversed.*

The facts are stated in the opinion.

Messrs. Fred. C. Cook and Henry C. Belden, for appellant:

The offense should be properly described by stating the substantial circumstances necessary to show the nature of the crime, with sufficient precision and clearness to render the charge intelligible in its legal requisites, so as to inform the accused of the offense he is called upon to answer.

2 Hale, P. C. 188; *Rea v. Freeman*, 3 Strange, 1228; *Phelps v. People*, 6 Hun, 401, 72 N. Y. 834; Bill of Rights, art. 1, § 6; Stat. 1878, chap. 108, § 10, subdiv. 6.

In order to constitute the offense of larceny, it is necessary to charge that offense in the usual and ordinary language of such indictment.

The word "withhold" is a neutral term. It does not in common parlance or in legal usage import a criminal offense.

State v. Foster, 11 Iowa, 291; *United States v. Britton*, 107 U. S. 655, 27 L. ed. 520; *State v. Parker*, 43 N. H. 83.

The forms of indictment contain in no uncertain language the allegation that the property was appropriated or taken without the consent and against the will of the owner.

Whart. Crim. Pl. § 221, and cases cited.

It is one of the necessary requisites of the crime of embezzlement.

State v. Lyon, 45 N. J. L. 272.

In case of an offense at common law, the facts and circumstances constituting it are defined by the rule of the common law upon the subject; in offenses against statutes, by the statute creating it.

Archbold, Crim. L. Pom. ed. 265.

The indictment must generally state positively and explicitly what the defendant is called upon to answer, and it cannot be aided by inferences, and this rule is especially applicable to the higher grades of crimes.

State v. Seay, 8 Stew. (Ala.) 123, 20 Am. Dec. 66; *Com. v. Walters*, 6 Dana, 291; *Bullock v. State*, 10 Ga. 46; *Stephen v. State*, 11 Ga. 235; *State v. Wimberly*, 3 McCord, L. 190; *Kit v. State*, 11 Humph. 167; *State v. Hand*, 1 Ark. 166; *Com. v. Clark*, 6 Gratt. 675; *Markle v. State*, 3 Ind. 535; *Lambert v. People*, 9 Cow. 578; *State v. Philbrick*, 81 Me. 401; *Sherban v. Com.* 8 Watts, 212; *Sweeney v. State*, 16 Ga. 467; *Eubanks v. State*, 17 Ala. 181; *People v. Allen*, 5 Denio, 76; *Maukill v. State*, 8 Blackf. 249; *Phelps v. People*, 72 N. Y. 834, 6 Hun, 401; *Biggs v. People*, 8 Barb. 547.

The only exceptions to the foregoing rule are where the indictment is for the offense of being a common barrator, or for being a common scold, or for keeping a common gambling house, or bawdy house.

2 Hawk. P. C. chap. 26, §§ 57-59; *Harwood v. People*, 26 N. Y. 190, 16 Abb. Pr. 430.

But it has been held that general charges of public indecency are not sufficient, and that the specific acts and circumstances of public indecency must be stated in the indictment.

State v. Brunson, 2 Bail. L. 149; *State v.*

Again, in *Schaffer v. State* (1887) 22 Neb. 557, where the indictment alleged that the prisoner "did feloniously, purposely, and of his deliberate and premeditated malice make an assault on [the deceased] . . . with a certain gun . . . and . . . did then and there feloniously, purposely, and of his deliberate and premeditated malice shoot off and discharge at and upon the [deceased] and thereby and of his striking the said [deceased] . . . inflicted on and in the head of him . . . one mortal wound, of which said mortal wound the said [deceased] then and there instantly died," the finding of the grand jury being that the prisoner "did in manner and form aforesaid feloniously, purposely, and of his deliberate and premeditated malice kill and murder the said [deceased] contrary," etc., the court held the indictment bad under section 3 of the Nebraska Criminal Code there being an entire want of any allegation of an intent or purpose to kill and the latter clause or conclusion not bringing the case within the rules or curing the defect. See also *Smith v. State* (1878) 4 Neb. 277, *infra*.

So in *Fouts v. State* (1857) 8 Ohio St. 93, the indictment charged that the prisoner "unlawfully, feloniously, purposely, and of deliberate and premeditated malice did beat, bruise and strike, thereby then and there giving to him the said [deceased] in and upon the back side of the head of him the said [deceased] one mortal wound of the length of three inches and of the depth of one inch of which said mortal wound he the said [deceased] then and there instantly died," the conclusion of the indictment finding that the prisoner "in manner and form aforesaid . . . unlawfully, feloniously, purposely, and of deliberate and premeditated malice the said [deceased] did kill and murder contrary to the form of the statute," etc., and the court held that the indictment, although following strictly

the form of the indictment for murder at common law, did not conform to the material change which the Ohio statute had made in the definition of the act declared to be murder in the first degree, and that the indictment was therefore insufficient for want of a positive and direct averment of a purpose or intention to kill in the description of the offense.

In Ohio an indictment for murder in the first degree must contain a direct and specific averment of the purpose, or intention to kill, or intention to inflict a mortal wound in the description of the crime, and an indictment which avers an assault and battery resulting in death and committed purposely, deliberately, and premeditated with malice, does not *ex vi termini* import a purpose or intent to kill, and such omission cannot be cured by the legal conclusions of the grand jury as drawn from the antecedent averments descriptive of the crime. *Fouts v. State*, *supra*.

In the above case, however, there were dissenting opinions which looked upon the indictment as stating particularly and in detail the act of the prisoner which caused the death and as averring that the acts were done purposely, deliberately, with premeditated malice, causing instant death and as a finding of the grand jury that the prisoner purposely, deliberately, and with premeditated malice killed and murdered the deceased which showed no omission of a purpose to kill, but which presented a positive allegation that the prisoner did kill the deceased. *Ibid*.

But in *Robbins v. State* (1857) 8 Ohio St. 131, and *Loeffner v. State* (1857) 10 Ohio St. 598, mentioned and referred to in the above case of *Fouts v. State*, the indictment was not deficient as it contained a direct and positive averment of the purpose or intent to kill.

The same principles were applied in the case of

Scribner, 2 Gill & J. 246; *Randolph v. Com.* 6 Serg. & R. 398; *Com. v. Gillespie*, 7 Serg. & R. 469, 10 Am. Dec. 475; *Com. v. Maxwell*, 2 Pick. 189; *State v. Dent*, 8 Gill & J. 8.

In case of statutory offenses, the indictment must state all the facts and circumstances which constitute the definition of the offense in the statute.

1 Hale, P. C. 517, 526; *People v. Allen*, 5 Denio, 76; *United States v. Gooding*, 25 U. S. 12 Wheat. 460, 6 L. ed. 698; *Updegraff v. Com.* 6 Serg. & R. 5; *Maskill v. State*, 8 Blackf. 299; *State v. Raines*, 8 McCord, L. 593; *Sweeney v. State*, 16 Ga. 487; *Cook v. State*, 11 Ga. 58, 56 Am. Dec. 410; *Elubanks v. State*, 17 Ala. 181; *Moffatt v. State*, 11 Ark. 169; *State v. Eldridge*, 12 Ark. 608.

There must be a demand and refusal between the assignee and agent.

Blackman v. State, 98 Ala. 77; *State v. Munch*, 22 Minn. 75; *State v. New*, Id. 76; *State v. Coon*, 14 Minn. 456; *State v. Comings*, 54 Minn. 359; *Rapalje*, Crim. Proc. § 87, with copious citations.

It does not necessarily follow that the indictment is good simply because it was in the exact language of the statute.

Whart. Crim. Pr. & Pl. § 220.

Whether the statutory language is to be followed or not, depends upon the manner the offense is stated therein. Argument or reference cannot be resorted to.

Rapalje, Crim. Proc. § 90, and cases cited therein; *United States v. Britton*, 167 U. S. 655, 27 L. ed. 520; *United States v. Mills*, 32 U. S. 7 Pet. 188, 8 L. ed. 636; *United States*

v. Simmons, 26 U. S. 362, 24 L. ed. 820; *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1185; *United States v. Patterson*, 55 Fed. Rep. 605; *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Nelson*, 52 Fed. Rep. 649; *State v. Terry*, 109 Mo. 601; *Com. v. Slack*, 19 Pick. 304; *Com. v. Bean*, 11 Cush. 414; *Com. v. Clifford*, 8 Cush. 215; *Com. v. Filburn*, 119 Mass. 297; 10 Am. & Eng. Encyclop. Law, p. 566; *Com. v. Bolkom*, 3 Pick. 281; *State v. Brown*, 12 Minn. 490; *State v. Murray*, 41 Iowa, 580; *Luter v. State*, 39 Tex. Crim. Rep. 69; *United States v. Burns*, 54 Fed. Rep. 358; *People v. Hamaker*, 92 Mich. 11; *Koster v. People*, 8 Mich. 481; *Byrnes v. People*, 87 Mich. 515; *Hall v. People*, 43 Mich. 417; *Harris v. People*, 44 Mich. 905.

Where an information charging that defendant at divers times between certain dates, "did enter upon and exercise and continue the exercise and practice of the business, avocation, or profession of a private detective," without stating any facts to show in what way he acted as such was declared to be fatally defective.

State v. Bennett (Mo.) March 18, 1889; Whart. Crim. Pl. § 220; *State v. Kesslering*, 12 Mo. 565; *State v. Davis*, 70 Mo. 467; *State v. Hayward*, 88 Mo. 299, and cases cited; *State v. Smith*, 66 Mo. 92; *State v. Crooker*, 95 Mo. 389; 1 Bishop, Crim. Proc. §§ 81, 325, 494; 2 Bishop, Crim. Proc. §§ 98, 100, 200, 201.

The specific facts control, and if they are not sufficient to show ownership, the general

Kain v. State (1858) 8 Ohio St. 306, where the indictment averred that the prisoner "purposely and of deliberate and premeditated malice did strike, penetrate, and wound [the deceased] . . . giving to him the said [deceased] then and there with a leaden bullet aforesaid, so as aforesaid discharged and shot out of a pistol aforesaid by the said [prisoner] . . . one mortal wound . . . of which said mortal wound the said [deceased] . . . died," the finding of the grand jury being that the said prisoner "purposely and of deliberate and premeditated malice did kill and murder contrary," etc., the court held the averment insufficient, the purpose as shown therein being the assault and wounding but not the killing the defect not being cured by the former conclusion.

There were also dissenting opinions in the above case to the effect that the purpose to kill was a necessary ingredient of murder in the first and second degree, and must be alleged and proved, and that the indictments in that case, and also in the prior case of *Fouts v. State*, conform in this respect to the practice and precedents, of indictments for murder in that state, and to indictments which upon specific assignments of error as "informal and unsubstantial," had been pronounced sufficient by that court, relying on the case of *Moore v. State* (1853) 2 Ohio St. 502.

The rule declared in the two preceding cases of *Fouts v. State*, and *Kain v. State*, was approved of and followed by the court in *Hagan v. State* (1859) 10 Ohio St. 459, the court holding that where the purpose to kill is not averred by way of description of the offense the omission cannot be aided by the ordinary former conclusion of the indictment which avers that "so" the jurors "say that" the accused "in manner and form aforesaid purposely, willfully and of his deliberate and premeditated malice did kill and murder," the allega-

tion purporting to be nothing more than an argumentative statement of the legal result of the facts previously stated, and such a mere conclusion cannot cure any defects in the premises on which it remains to be predicated; the chief justice again dissenting.

In *Fouts v. State* (1854) 4 G. Greene, 500, the indictment contained four counts, the first alleging that the prisoner did willfully, feloniously, unlawfully, and with malice aforethought make an assault and willfully, feloniously, unlawfully, and with malice aforethought, did strike, thrust, cut, and stab, and by the striking, thrusting, cutting, and stabbing did then and there give unto the deceased two mortal wounds of which the deceased died, the grand jury stating that the prisoner willfully feloniously, unlawfully, and with malice aforethought killed and murdered the deceased, contrary to the statute, etc., the court held the indictment insufficient, as not complying with the provisions of section 2609 of the Iowa Code, and that therefore the prisoner could not be convicted of murder in the first degree thereunder.

The same conclusion would seem to have been reached by the court in the case of *State v. McCormick* (1860) 27 Iowa, 402, the court holding that under the Iowa statute the killing and not simply the assault, must be willful, deliberate, and premeditated, in order to constitute murder in the first degree, citing and relying upon the Ohio cases of *Fouts v. State* (1857) 8 Ohio St. 98; *Kain v. State* (1858) 8 Ohio St. 306; *Hagan v. State* (1859) 10 Ohio St. 459, and *Fouts v. State* (1854) 4 G. Greene, 500.

The holdings in the Ohio courts in the above cases of *Fouts v. State*, and *Hagan v. State*, to the effect that the allegations in the conclusion of the grand jury are nothing more than the argumentative statement of the legal results as the facts previously state, and could not cure any defects in the

allegation cannot be resorted to for the purpose of sustaining the indictment.

Pinney v. Fridley, 9 Minn. 34; *Casey v. McIntyre*, 45 Minn. 529; *Parker v. Jewett*, 53 Minn. 514.

Messrs. Frank M. Nye, James A. Peterson, H. W. Childs, Atty-Gen., and George B. Edgerton, for respondent:

The crime of embezzlement, as it is generally called, is purely a statutory offense.

6 Am. & Eng. Encyclop. Law, p. 451.

The indictment is drawn under section 428, Penal Code.

It is not necessary to set out in the indictment that a demand has been made upon the defendant.

State v. Comings, 54 Minn. 359; *State v. New*, 22 Minn. 80.

The indictment followed the words of the statute. Where the offense is a statutory offense, it is sufficient for the pleader to follow the words of the statute.

State v. Comfort, 22 Minn. 271; *State v. Stein*, 48 Minn. 466.

Mitchell, J., delivered the opinion of the court:

The defendant, having been indicted for the

crime of grand larceny under section 428 of the Penal Code, demurred to the indictment, specifying numerous objections, all of which may be included in the general objection that the facts stated did not constitute a public offense. The trial court, having overruled the demurrer, certified to this court, under Gen. Stat. 1878, chap. 117, § 11, five questions, which may also be all summed up in one, viz., whether the facts stated in the indictment constituted a public offense. Trespass is an element in every larceny at common law. The effect of this statute making conversion or embezzlement by a trustee, etc., larceny, is merely to do away with the necessity of a trespass. It does not change the rules of pleading. The mere common-law form of indictment for larceny would not be sufficient. In an indictment under this statute the allegations must be special, and must state all the facts necessary to constitute the offense. *State v. Henn*, 39 Minn. 484; *State v. Vorey*, 41 Minn. 184; *State v. Friend*, 47 Minn. 449.

The essential facts necessary to constitute larceny under this section are: First, that the person was acting as a trustee, etc., under appointment by will, deed, etc.; second, that the money or property alleged to have been

premises, were approved of in the case of *Smith v. State* (1878) 4 Neb. 277.

So in *State v. Halder* (1823) 2 McCord, L. 224, 13 Am. Dec. 733, upon an indictment for passing counterfeit money, it was held that the positive averment that the prisoner did feloniously utter and publish, dispose and pass, etc., was not supplied by the concluding averment in the indictment, to the effect that the prisoner at the time of uttering, etc., well knew that the said note was false, forged, and counterfeit and was fatal.

Again in *Leonard v. Territory* (1866) 2 Wash. Terr. 381, the indictment did not charge murder in either degree except in the closing paragraph beginning "and so" although in the body of the indictment both purposes and malice was ascribed to the assault and to the shooting and wounding, but neither of them to the killing or giving of the mortal wounds, and the court therefore held the indictment insufficient relying upon the prior Ohio and Iowa decisions, the latter statement being but an inference of the grand jury which former statement its language would not admit of.

Where the indictment charged the prisoners with killing with pistols and revolvers, but did not charge that they did the killing with any deliberate and premeditated intention of killing the deceased, and in conclusion charged that the defendant in the manner and by the means aforesaid unlawfully, feloniously, willfully, wickedly, purposely, and with malice aforethought did kill and murder, it was held that the first part of the indictment charged substantially that the defendant deliberately and premeditatedly committed an assault and battery by shooting, but did not charge that the defendant at the time had any deliberate and premeditated intention, nor indeed any intention of killing, but it substantially charged that he deliberated upon and premeditated the shooting, the assault and battery, but it did not charge that he deliberated upon and premeditated the killing, and that while the latter part of the indictment charged the defendant with unlawfully, feloniously, willfully, wickedly, purposely, and maliciously, and with malice aforethought killing and murdering, yet it did not allege that he did it either deliberately or premeditatedly, and that if this part of the indictment had charged a deliberate and premeditated

killing it would have been sufficient as an indictment for murder, but that as neither this nor any other portion of the indictment charged that the killing was done with any deliberate or premeditated design to kill, or by means of poison, or by laying in wait, or in the perpetration or intent to perpetrate some felony the indictment could not be considered as a good indictment for murder in the first degree, the court relying upon the cases of *State v. McCormick*, *Fouts v. State*, *Kain v. State*, and *Hagan v. State*, supra, and the cases of *State v. Watkins* (1869) 27 Iowa, 415; *Bower v. State* (1838) 5 Mo. 364, 32 Am. Dec. 323; *State v. Jones* (1854) 20 Mo. 58; *State v. Reakey* (1876) 1 Mo. App. 3; *Loeffner v. State* (1867) 10 Ohio St. 600; *State v. Brown* (1878) 21 Kan. 38, 43, 49.

In *State v. Jones*, supra, the indictment charged that the prisoner then and there feloniously, willfully and of his malice aforethought deliberately and premeditatedly did make an assault with a knife in and upon the left side of the belly and upon the right shoulder of the deceased then and there feloniously, willfully, and "deliberated and premeditated" of his malice aforethought did strike and thrust giving in and upon the places mentioned one mortal wound, mentioning the breadth and depth of the wound of which the deceased then and there instantly died, and concluded by finding that the prisoner in manner and form aforesaid, feloniously willfully and of his malice aforethought "deliberate and premeditated" did kill and murder contrary, etc. The court held that the indictment was not sufficient to sustain a judgment which deprived the prisoner of life not being drawn with accuracy sufficient, the words describing the offense not being sensible, being not only ungrammatical, but some of them not known or recognized as common English words.

But in *Anderson v. State* (1843) 5 Ark. 444, 451, where the first count of the indictment alleged that the homicide was committed feloniously, willfully, and of malice aforethought, but in the conclusion omitted the word "murder;" the second count charged the killing to have been done willfully, and wickedly, and in conclusion alleged the defendant did kill and murder, and it was contended that the omission of the word "murder" in the first count and of the words "of his malice

stolen was in his possession by virtue of such office or appointment; third, that he secreted or withheld it, or appropriated it to his own use, or to that of a person other than the true owner entitled to it. We think the first two of these facts are sufficiently alleged, but that as to the third the indictment is fatally defective. It might, perhaps, have been sufficient if it had, as to some matters, alleged less; but by alleging what it does it became necessary to allege still more. The general allegations in the indictment must be deemed to be controlled and qualified by the allegations of specific facts upon which the general allegations are predicated. The general allegations that the defendant withheld the money from the party entitled thereto, and appropriated it to his own use, are so limited and qualified by what follows as to amount merely to an allegation that he withheld it from Firth; and the

general allegation that Firth was the person entitled to it is qualified by the statement of the specific facts from which that ownership is alleged to have resulted. Having assumed to set out specifically the facts constituting Firth's right to the money, it was incumbent on the state to allege facts sufficient to show that right. In this the indictment is defective. All that is alleged might be strictly true, and yet Firth not be entitled to a dollar, and defendant have had a perfect right to retain and use the money for any or all of the purposes named in the 1st, 2d, 3d, and 5th subdivisions of that part of the trust deed which specifies the purposes for which he was to pay it out, or to which he was to apply it.

Order reversed.

Gilfillan, *Ch. J.*, absent on account of sickness, took no part.

aforethought" in the second count, were fatal,—the court held that an indictment charging with requisite certainty the killing to have been done with malice aforethought would be valid as containing the very terms of the Arkansas statute in defining the crime of murder, and that, however requisite the word "murder" might have been to an indictment under the English common law, it could not be regarded in that state in any other light than as a matter of form not tending to the prejudice of the defendant, and as cured by virtue of section 108 of Ark. Rev. Stat., p. 300.

In *Bechtelheimer v. State* (1876) 54 Ind. 123, the indictment charged that the prisoner unlawfully, purposely, feloniously, and with premeditated malice did kill and murder the deceased in an unlawful attempt, forcibly, feloniously, and against her will to commit an unlawful crime, and for that purpose willfully, feloniously, and unlawfully and with premeditated malice, administering deadly poison with a view to committing such unlawful crime, and further charged that the prisoner then and there and thereby feloniously, willfully, unlawfully, and of premeditated malice did kill and murder the deceased, and the court held that the indictment was sufficient as charging a murder with the administration of poison but not of murder in an attempt to commit a rape, the allegations in respect to the latter being treated as mere surplusage.

So in *Snyder v. State* (1877) 59 Ind. 105, the indictment charged that the prisoner unlawfully, feloniously, purposely, and with premeditated malice killed and murdered the deceased by then and there feloniously, purposely, and with premeditated malice unlawfully administering a certain deadly poison commonly called strychnine, by reason of which the deceased died the prisoner well knowing the same to be a deadly poison and wickedly intending then and thereby feloniously, purposely, and with premeditated malice to kill and murder contrary, etc., and the second count being similar to the first but more full and certain in its averments. A motion to quash was overruled the court holding each count good. The ground of the motion was that neither count averred with sufficient directness the intent to kill, and *Fouts v. State* (1857) 8 Ohio St. 93, was cited and relied upon, but the court held that the indictment must aver

that the killing was purposely done, and that both counts in the indictment in question made that averment and that the indictment was sufficient, relying upon *Dillon v. State* (1857) 9 Ind. 406, and *Bechtelheimer v. State*, *supra*.

In *State v. Brown* (1879) 7 Or. 186, 190, the indictment charged that the prisoners were unlawfully and feloniously engaged in the commission of the crime of robbery by then and there feloniously taking, stealing, and carrying away certain articles, specifying them, from the person of one named therein, and against his will by violence to his person, and that the prisoners while then and there engaged in the commission of such robbery, maliciously, unlawfully, and feloniously then and there assaulted with a pistol by shooting at him with intent then and there to kill and murder, and concluded that the prisoners then and there by their act of shooting at such named person as aforesaid killed and murdered another person, by then and there shooting him with said pistol contrary to the statute, etc. It was contended that the indictment was insufficient because it did not charge that the defendant purposely killed the deceased while in the commission of the robbery, the case of *Robbins v. State* (1857) 8 Ohio St. 181, being referred to in support of this view, and the court held that while the Ohio statute was somewhat similar to the Oregon one, yet there was such a difference between them as would warrant the court in holding that the decision in that case was not in point in construing the Oregon statute. Attention being drawn to the dissenting opinions of the court upon the point then presented for consideration, the court adopting the doctrine enunciated in such dissenting opinions, and regarding the reasons adduced in support of that decision unsatisfactory, held that the indictment in the case then on trial literally conformed to the precedent published in the appendix to the code, and was therefore good and sufficient in law.

This note is intended to present only those cases which relate to the effect of specific allegations to limit general allegations, and does not touch that large class of cases which consider the sufficiency of either general or special allegations when used alone. Matters of mere variance or surplusage are likewise outside of the intended scope of this note.

R. W.

DISTRICT OF COLUMBIA COURT OF APPEALS.

George GIBSON *et al.*, *Appts.*,

v.

George A. SHEEHAN *et al.*

(.....D. C.)

A surety company which indemnifies one of the sureties upon an official bond and is compelled to pay a judgment against all of them upon such bond, has no right of contribution against his co-sureties and can acquire none from the surety indemnified, as he holds the indemnity in trust for them as well as himself.

(March 4, 1895.)

A PPEAL by complainants from a decree of the Special Term of the Supreme Court for the District of Columbia sustaining a demurrer to a bill filed to compel defendants who had been co-sureties upon an official bond to contribute towards the amount which complainant Gibson had been compelled to pay because of the default of the principal. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. G. Riddle and Montgomery Blair, for appellants:

The bond taken by Gibson in no way changed the relations or liabilities of the three co-sureties to the United States or to each other. Had either paid the common loss, clearly he could compel contribution by the others without reference to the bond of the surety company. In no event could the ultimate liability of the surety company on its bond exceed the ultimate liability of Gibson on an adjustment of common loss among all the co-sureties of Karl. *Craythorne v. Swinburne*, 14 Ves. Jr. 160.

As between the surety company and Gibson upon the happening of the contingency guarded against by the indemnity bond, the company on notice and demand was to take up and discharge his liability as fully and entirely as if it in fact held his place on Karl's official bond.

The surety company by its bond became the insurer of Gibson as the surety of Karl against loss by reason of such suretyship. It also insured him against the possible insolvency of his co-sureties or either of them; and, having paid the whole loss to which Gibson was subjected, as it was bound to do, it is subrogated to all his rights as co-surety as well against his co-sureties as against Karl.

Phœnix Ins. Co. of Brooklyn v. Erie & W. Transp. Co., 117 U. S. 812, 29 L. ed. 873; *Comptons v. Vasse*, 26 U. S. 1 Pet. 193, 7 L. ed. 108; *Pretz v. Bull*, 53 U. S. 12 How. 466, 18 L. ed. 1068; *The Monticello v. Mollison*, 58 U. S. 17 How. 152, 15 L. ed. 68; *Garrison v. Memphis Ins. Co.*, 60 U. S. 19 How. 812, 15 L. ed. 656; *Hall v. Nashville & C. R. Co.*, 80 U. S. 18 Wall. 867, 20 L. ed. 594; *The Potomac v. Cannon*, 105 U. S. 630, 26 L. ed. 1194; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527.

Messrs. James G. Payne, W. L. Cole, and C. H. Armes, for appellees:

NOTE.—For some miscellaneous decisions on the general subject of indemnity to a surety, see *note to Free v. Baker* (Tex.) 13 L. R. A. 340.

When the surety company paid to the marshal the amount of the judgment against Karl and his sureties the *feri facias* was returned satisfied. The judgment is, therefore, discharged, not only as to the complainant Gibson, whose property was levied upon, but as to Karl, the principal debtor.

This act of the complainant Gibson in causing satisfaction of the judgment to be entered against the principal debtor without the knowledge or consent of his co-sureties discharged them from liability for contribution, if such liability ever existed.

Fielding v. Waterhouse, 8 Jones & S. 424.

Sureties are not only entitled to contribution from each other for moneys paid in the discharge of their joint liabilities for the principal, but they are also entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against such liabilities.

1 Story, Eq. Jur. § 499; *Wells v. Miller*, 66 N. Y. 255; *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. Hare & W's notes, 131 *et seq.*; *Shaeffer v. Clendenin*, 100 Pa. 565.

Persons subject to a common burden stand, in their relation to each other, upon a common ground of interest and of right, and whatever relief by way of indemnity is provided to either by him for whom the burden is assumed inures equally to the relief of all of the common parties.

Müller v. Sawyer, 30 Vt. 412.

A surety who takes indemnity against liability without the knowledge of his co-surety releases the co-surety from contribution.

Hoover v. Mower, 84 Iowa, 43; *Brown v. Ray*, 18 N. H. 102, 45 Am. Dec. 861; *Brandt, Suretyship*, § 233; *Story, Eq. Jur.* 499; *Bachelder v. Fiske*, 17 Mass. 464; *Steel v. Dixon*, L. R. 17 Ch. Div. 825; *Berridge v. Berridge*, L. R. 44 Ch. Div. 168.

Alvey, Ch. J., delivered the opinion of the court:

This case is presented on bill and demurrer. The court below sustained the demurrer and dismissed the bill, and the complainants have appealed; and the only question here is, Do the facts alleged present a case entitling the complainants to relief?

The bill was filed by George Gibson, of the District of Columbia, and the American Surety Company, of New York, who are the appellants, against George A. Sheehan and Edwin McLeod, the appellees. It is alleged that a certain Anton Karl, having been appointed by the secretary of the interior department special disbursing agent of the United States geological survey, was required to give bond in the sum of \$20,000 for the faithful performance of his duties as such disbursing agent. That he gave such bond on the 26th of June, 1889, with three sureties therein, namely George A. Sheehan, Edwin McLeod, and George Gibson; and that such bond was duly accepted and proved on behalf of the United States.

It is alleged that Gibson, one of the sureties in the bond, and one of the complain-

ants in this case, after the bond was given to and accepted by the United States, required of Karl full indemnity against possible loss and damage by reason of his suretyship, and that, on the 12th of August, 1889, Karl as principal executed a bond of indemnity to Gibson in the sum of \$20,000, with the complainant, the American Surety Company, as his surety—the said Karl then and there paying the American Surety Company one per cent on the penal sum of the bond as the consideration or premium for becoming such surety. This bond of indemnity is exhibited with the bill, and after the recitals therein the condition is as follows:

"Now, therefore, the condition of this obligation is such that if the above bounden Anton Karl shall well and truly save harmless and indemnify the said George Gibson from all loss, damages, cost, charges and expenses, by reason of his suretyship upon said bond, according to the true intent and meaning thereof, then this obligation to be void; otherwise to remain in full force and effect."

It is alleged that Karl made default as disbursing agent, and thereby forfeited his bond, and that the United States brought suit on the bond, and in January, 1894, recovered judgment thereon against Karl, the principal, and his three sureties before named, for the sum of \$3,444.78; that upon this judgment an execution was issued and levied upon the goods and chattels of Gibson, one of the sureties; that as required by the condition of the bond of indemnity, and upon the demand of Gibson, the American Surety Company paid the amount of the execution in full, with all interest and costs, amounting to the sum of \$4,083.87; and the property levied upon by the marshal of the District of Columbia was thereupon discharged, and the execution was duly returned as fully paid and satisfied.

It is further alleged that Gibson assigned to the American Surety Company all his right as co-surety to have just contribution from his co-sureties; and the bill prays for a decree against the defendants adjudging them to pay to the American Surety Company two thirds of the said sum of \$4,083.87, this latter sum being the amount paid by that company to save Gibson harmless, according to the condition of the bond of indemnity.

Without noticing other questions raised by the demurrer to the bill, upon the facts alleged, the question presented by the prayer for relief would seem to be a plain and simple one; and that is, whether the American Surety Company is entitled to occupy the position of co-surety with the two defendants, Sheehan and McLeod, by virtue of the alleged assignment from Gibson, or otherwise? In other words whether there be any ground shown for the claim made by the American Surety Company for contribution from the two defendants as sureties of Karl? If Gibson had no claim for contribution as against his two co-sureties for Karl, it is very clear that the American Surety Company can have none, as the latter company can only claim the rights that Gibson had to contribution.

The bond of indemnity furnished to Gibson

was the bond of Karl the principal debtor in the bond to the United States, and the American Surety Company became surety thereon at the instance and by the procurement of Karl, for a premium paid by him for becoming such surety. The bond of indemnity was for the full amount of the official bond executed to the United States by Karl and his sureties; and while this bond of indemnity was given to Gibson by Karl as one of the sureties on the official bond, it constituted a fund for the protection and indemnity of all three of the sureties on the official bond of Karl; Gibson receiving the bond as a trust fund placed in his hands by the principal debtor with which to discharge the principal debt that might be demandable and recovered by the United States, and as well for the relief of his co-sureties as for the relief of himself.

The principle is perfectly well settled both in the English and in the American courts of equity, that a surety is bound to bring into hotchpot for the benefit for his co-sureties a security given him by the principal debtor, although he only consented to become surety upon having such security given him, and although the other sureties were not consulted and not even aware of his having taken such security. *Steel v. Dixon*, L. R. 17 Ch. Div. 825; *Berridge v. Berridge*, L. R. 44 Ch. Div. 168.

In the note of Hare & Wallace to the leading case of *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. 8d Am. ed. pp. 162, 168, there is a full collection of the American cases, and the doctrine upon this subject is very full and clearly stated by the learned annotators. It is there laid down as a settled principle of equity that if one of several co-sureties subsequently take a security from the principal, for his own indemnity, it inures to the common benefit of all the sureties. If, therefore, the principal convey property by a deed of trust, expressly for the benefit of one of the sureties only, the others have an equity to come upon it to the same extent that he can. And again, quoting from the case of *Agnew v. Bell*, 4 Watts, 81, 88, it is said that, "when funds are placed by the principal in the hands of one surety to be applied either to the payment of the debt, or for the purpose of indemnifying him against any loss that may arise from the suretyship, he must be considered as holding them for the common benefit of all concerned. The giving of the funds was the act of the principal, who was equally bound to indemnify all his sureties alike, and upon him, as well as to all his means for that purpose, each of them had an equal and just claim. It is unjust and inequitable that one surety, without the consent of his co-sureties, should derive any exclusive benefit from the act of the principal in giving up what he might and ought to have applied for the common benefit of all." And in conclusion of the discussion of this particular principle, the editors say: "If the principal has given securities to one surety, the latter cannot in chancery recover contribution from his co-sureties, without accounting for the property, and either showing how much he

received upon it, and making a ratable allowance of the proceeds, or showing that he could not by reasonable diligence realize from it. Any loss which may arise from his neglect or misconduct, will be a defense to the extent of such loss. The surety receiving securities is a trustee for his co-sureties, and is bound to such discreet and reasonable use of them as would be required from a trustee, but no greater."

But irrespective of other authority, the question here involved would seem to be fully embraced and concluded by the decision of the Supreme Court of the United States in the case of *Hampton v. Phipps*, 108 U. S. 260, 264, 27 L. ed. 719, 721. The facts of that case were quite different from those of the present case, but the principles involved, and applied in the decision of that case, were substantially the same as those involved in this case. That was a case of bill in equity by a creditor to obtain the benefit of securities held by sureties of the principal debtor, and it involved the question of the rights of all the sureties to the fund. And in deciding the case the court said: "When a debtor, who has given personal guaranties for the performance of his obligation, has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement that the fund so appropriated shall be administered as a trust for all the purposes which a payment of the debt will accomplish; and a court of equity accordingly will give to it this effect. All this it is to be observed, as the rule verbally requires, presupposes that the fund specifically pledged and sought to be primarily applied, is the

property of the debtor, primarily liable for the payment of the debt; and it is because it is so, that equity impresses upon it the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication is, that a pledge made expressly to one is in trust for another, because the relation between the parties is such that that construction of the transaction best effectuates the express purpose for which it was made."

In this case, as we have seen, the bond of indemnity was furnished by Karl, the principal debtor. It was held by Gibson, one of the sureties, and the fund created by the bond was applied, as equity required it to be applied, to the extent necessary to pay off and discharge the debt for which Karl and all three of the sureties were liable. This was all in accordance with the trust impressed upon this indemnity fund by the well-established principles of equity; and Gibson, not having to pay the debt, had no right of contribution as against the other sureties, and therefore had nothing to assign to the American Surety Company. This latter company did not stand in the relation of co-surety with the defendants, and neither Gibson nor the surety company had any right of contribution as against the defendants.

It is unnecessary to refer to any other question, as to the sufficiency of the allegation of the bill, raised by the demurrer: and it follows from what we have said that the decree below sustaining the demurrer and dismissing the bill, must be affirmed; and it is so ordered.

Decree affirmed, with costs to appellees.

SOUTH CAROLINA SUPREME COURT.

David R. FLENNIKEN, *Appt.*,
c.

J. Q. MARSHALL *et al.*, *Respts.*

(.....S. C.....)

1. **Stockholders in a corporation cannot defeat all recovery** against them for an amount in addition to the value of their stock because the act providing for it does not fix the amount but simply fixes a limit beyond which it shall not extend, since the liability will be regarded as extending to such limit if necessary.
2. **A demand arising ex delicto may be enforced against the stockholders of a corporation under a constitutional provision that the dues from corporations shall be secured by individual liability of the stockholders.**

(January 19, 1895.)

NOTE.—The nature of a judgment as a contract is considered in a note to *Rockwell v. Butler* (Colo.) 17 L. R. A. 611.

The construction in the above case of the word "dues" is in accordance with the authority of *Rider v. Fritchey* (Ohio) 15 L. R. A. 512, and cases referred to in note.

82 L. R. A.

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Richland County in favor of defendants in an action brought to hold defendants as stockholders in the Columbia Street Railway Company liable for a proportionate part of a judgment rendered against the company for damages for personal injuries negligently inflicted by it upon plaintiff. *Reversed.*

The facts are stated in the opinion.

Messrs. J. S. Muller and Andrew Crawford, for appellant:

Rider v. Fritchey, 15 L. R. A. 512, 49 Ohio St. 285, holds that a claim for damages for a tort is included in the term "dues."

See also *Springsteen v. Samson*, 32 N. Y. 708; *Anderson v. Thompson*, 10 Bush, 132; *Cable v. McQuine*, 26 Mo. 871, 72 Am. Dec. 216.

Messrs. Lyles & Muller, for respondents:

The act being in derogation of the common law and imposing a liability not prescribed by it is subject to strict construction.

Terry v. Martin, 10 S. C. 285; *Carrol v. Green*, 92 U. S. 509, 23 L. ed. 738; *Hall v. Klinck*, 25 S. C. 351, 60 Am. Rep. 505; *Terry v. Little*, 101 U. S. 217, 25 L. ed. 864.

The liability of the stockholder is a liability for the original cause of action, not affected in any wise by the judgment recovered against the corporation.

Bird v. Calvert, 22 S. C. 297; *Thompson, Liability of Stockholders*, §§ 84, 202, 321; *Johnston v. South Western Railroad Bank*, 8 Strobb. Eq. 263; *Terry v. Martin*, *supra*; *Sullivan v. Sullivan Mfg. Co.* 14 S. C. 494, and 20 S. C. 79; *Planters Bank of Fairfield v. Bivingsville Cotton Mfg. Co.* 10 Rich. L. 100; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Moss v. Oakley*, 2 Hill, 265. See also *Terry v. Tubman*, 92 U. S. 156, 23 L. ed. 537.

This statute provides only for the creditors of the company, that is those holding debts against it; the plaintiff whose claim must be considered only as an action for unliquidated damages, for the negligence of the company, is not protected by these provisions.

Cooks v. Pearce, 23 S. C. 289. See also *Thompson, Liability of Stockholders*, §§ 53-59; *Taylor, Priv. Corp.* § 734; *Bohn v. Brown*, 83 Mich. 257; *Lockhart v. VanAlstyne*, 81 Mich. 76, 18 Am. Rep. 156; *Whitney Arms Co. v. Barlow*, 68 N. Y. 34; *Victory Webb Printing & Folding Mach. Mfg. Co. v. Beecher*, 26 Hun, 52; *Doulittle v. Marsh*, 11 Neb. 243; *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214; *Carver v. Braintree Mfg. Co.* 2 Story, C. C. 432; *Heacock v. Sherman*, 14 Wend. 58.

Gary, J., delivered the opinion of the court:

The questions submitted to the court below upon this case were as follows: (1) Are the said J. Q. Marshall, W. H. Lyles, W. G. Childs, W. A. Clark, and James Woodrow liable to the said David R. Flenniken, and, if so, to what extent? (2) What judgment or judgments, if any, should the said David R. Flenniken have against said parties? In other words, can the stockholders of the Columbia Street Railway Company be made liable for an assessment of 10 per cent or any other amount, upon their holdings of stock, in satisfaction of a claim against that company for damages for personal injury by the negligence of the employes of the company? This claim, of course, is founded upon a tort. The provisions of the constitution relative to the liability of stockholders of corporations are found in article 12, sections 4, 5. Section 4 is as follows: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law." Section 5 is as follows: "All general laws and special acts passed pursuant to this section shall make provisions therein for securing the personal liability of stockholders under proper limitations," etc. The reference in the act incorporating the Columbia Street Railway Company, to the liability of the stockholders, is found in section 4, which provides "that the personal liability of each stockholder shall not exceed 10 per cent, in addition to the amount of shares which he or she holds." Section 22 of the General Incorporation Act of 1886 (19 Stat. at L. 546) is as follows: "The following provisions shall constitute a part of the charter of every corporation, other than railroad and banking corporations, al-

ready in existence under act of the assembly of this state, either general or special, passed since the adoption of the present constitution, or which may be at any time hereafter created under or by virtue of any act of assembly, general or special to wit: (a) That each stockholder in any such corporation shall be jointly and severally liable to the creditors thereof in an amount, besides the value of his share or shares therein, not exceeding five per cent of the par value of the share or shares held by such stockholders, at the time the demand of the creditor was created . . . provided, further, that the liability enforced in this provision shall not apply to any corporation whatever in this state, in the charter of which a different liability shall have been, or shall be imposed." It will be observed that the constitution in section 4 says, "Dues from corporations shall be enforced;" and in section 5, "All general laws and special acts passed pursuant to this section shall make provision therein for fixing the personal liability of stockholders under proper limitations." These words are mandatory. It must be presumed that the legislature in passing the special act incorporating this company, and the General Act of Incorporation of 1886, intended to carry out the requirements of the constitution touching the liability of stockholders and that the language used is to be construed in connection with the words of the constitution bearing upon that subject.

It is argued on the part of the defendants that they are not liable under the act incorporating the company, because said act simply fixes a limitation beyond which the liability of the stockholders shall not extend, but does not make provision as to the amount for which they could be made liable. This objection, if tenable, would apply equally to the General Incorporation Act of 1886, because it provides that the stockholders shall be liable in an amount, "not exceeding five per cent of the par value," etc., but does not provide as to the amount for which they shall be made liable. In the case of *Bird v. Calvert*, 22 S. C. 297, the court decides that the provision in a special act of incorporation as to the liability, which is identical with that in the General Act of Incorporation of 1886, made the stockholders liable for the 5 per cent therein mentioned. The court said: "The individual liability of the stockholders is made as direct and unconditional for the 5 per cent as for the subscribed stock itself." In the case of *Hall v. Klinck*, 25 S. C. 351, 60 Am. Rep. 505, *Chief Justice McIver* quotes from the case of *Terry v. Little*, 101 U. S. 217, 25 L. ed. 864, as follows: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The first thing to be determined in all such cases is, therefore, What liability has been created? There will always be difficulty in attempting to reconcile cases of this class, in which the general question of remedy has arisen, unless special attention is given to the precise language of the statute under consideration. . . . The form and extent of a statutory liability of this kind depend upon the particular

phraseology of the statute which creates the liability. There is nothing in the constitution nor acts of the legislature making the liability of the stockholders of a penal nature, and therefore demanding a strict construction. They are to be interpreted by the ordinary rules of construction applicable to a remedial statute. In the case of *Sullivan v. Sullivan Mfg. Co.*, 14 S. C. 490, Chief Justice McIver, in behalf of the court, says: "They—both corporation and directors—have violated the same right of plaintiff to have payment of his debt, and the cause of action against both is, in fact, the same. The legal wrong done to the plaintiff is done alike by the directors and the corporation. The same remark will apply to the cause of action growing out of the account. It is urged, however, that the liability of the directors under the charter does not rest upon contract, but is for a tort, or in the nature of tort, while that of the corporation confessedly grows out of contract. We cannot concur in this view. The language of the act is that, on the contingencies named therein, the directors 'shall be jointly and severally liable for all debts,' etc. This language is not appropriate to the purpose of imposing a penalty, but rather conveys the idea that, on the contingencies mentioned, the directors shall be regarded as having assumed the payment of the debts of the company. It does not declare that they shall forfeit a certain sum of money, or the amount of their stock, or that they shall pay a certain penalty, but they shall become liable for the payment of the debts; that is, they shall assume the payment of them. When these defendants accepted the position of directors of a company organized under an act declaring that, in certain contingencies, they should become liable for the debts of the company, they must be regarded as having agreed that, if such contingencies should happen, they would pay the debts of the company." When the constitution and act incorporating the company are construed together, they impose a liability on the stockholders of 10 per cent in addition to the amount of the shares which they hold. Sutherland on Statutory Construction (page 422, § 834) says: "That which is implied in a statute is as much a part of it as that which is expressed."

This brings us to a consideration of the meaning of the word "dues." There is no case in our Reports directly in point. The constitution of Ohio has words identical with those in article 12, section 4, of our Constitution. This provision of the Ohio constitution was construed in 1892 by the supreme court of that state in the case of *Rider v. Fritchey*, 49 Ohio St. 295, 15 L. R. A. 518. The argument of the court is convincing, and we rely principally on that case for the conclusion reached by us as to the meaning of the word "dues." The court in that case says: "The provision (sec. 3, art. 13) is: 'Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to

a further sum, at least equal in amount to such stock.' The question turns upon the import of the word 'dues.' It has been contended that provisions creating individual liability on the part of the stockholders are in derogation of the common law, and are therefore to be construed strictly. Authorities in support of this rule are not wanting, and in so far as such liability is attached by way of penalty for the omission of some act required by the statute, as in some of the states, it is probable that the weight of authority favors the proposition. But all concede that this is a remedial provision, and to hold that there must be applied to it the same test as if it were a penal law is to hold that all remedial laws must be so construed; for every remedial law must, of necessity, be in derogation of the common law. Where the provision is simply remedial, though it does impose an obligation that did not attach at common law, we see no reason to insist upon what is called a 'strict construction,' but believe that the ordinary rule, which requires the court to inquire simply as to the intent of the lawmakers, reading the provisions as they were intended to be read, will best attain the ends of justice. This leads us to look to the intent of the section quoted. Speaking in general terms, it must be manifest that the intent was to provide that those who derive advantage from the authority of the state, given by our incorporation laws, shall, at the same time, assume responsibility for the acts of the artificial creature which they have called into legal being, affecting the rights of others. Having in mind this general intent, and the provision being remedial, it should, we think, be construed with a view to remove the evil and extend the benefit proposed. . . . It would seem to be the undoubted duty of the court to give the word 'dues,' as found in the section quoted, such construction as will secure the apparent object of the constitution makers in its adoption. Constitutions are necessarily couched in terse language, and we look there for the use of words in a board, comprehensive sense. . . . It is difficult to see any reason why the framers of the constitution should intend to afford one who gives credit for goods or money to a corporation a right to demand compensation of the stockholders in case of insolvency, and deny a like right to one who intrusts it with the care of his person, as in the case of a passenger, or to one, even a stranger, who, without fault on his part, is injured by the negligence of the corporation's agents. It may well be asked, Are the rights of things more sacred than the rights of person? Is there any rule of public policy which would justify the protection of rights arising *ex contractu* which would not equally call for protection of rights arising *ex delicto*, or any claim for unliquidated damages?" We are of the opinion that the word "dues" is comprehensive enough in its meaning to include a demand against the stockholders arising *ex delicto*, and that the defendant stockholders are personally liable to the amount of 10 per cent on the shares held by them.

It is the judgment of this court that the judg-

ment of the Circuit Court be reversed, and the cause remanded to the court of common pleas for Richland county for such further proceed-

ings as may be necessary to carry out the view herein announced.

WISCONSIN SUPREME COURT.

Henry G. CHAPMAN, *Resp't.*,
v.
ROCKFORD INS. CO., *Appl't.*
(And Six Other Cases.)

(.....Wis.....)

1. An appraisal or award on the question of the amount of loss or damage is made a condition precedent to suit upon a policy which provides that the loss shall not become due and payable until sixty days after an award by appraisers, when an appraisal is required.
2. Refusal to go on with an arbitration or procure the appointment of an umpire, so that there cannot be an agreement upon an appraisal as to the amount of an insurance loss, absolves the other party.
3. Insisting on the selection of an umpire from a distant city in another state, and arbitrarily refusing to agree on any one residing in the vicinity of the property insured, is such conduct on the part of an appraiser selected by an insurance company as to constitute an abandonment of the right to an arbitration which the company has demanded.
4. Arbitration as to the amount of a loss having failed in consequence of the perverse conduct and want of good faith of an insurance company represented by an adjuster and an appraiser, the insured is not bound to enter into a new one, or name another appraiser, even if the company is willing to name a new appraiser on its part.

(March 5, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Fond du Lac County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

Statement by Pinney, J.:

This action was brought to recover for loss sustained by the plaintiff under the standard insurance policy of Wisconsin, issued by the defendant on the plaintiff's stock of goods, which were wholly destroyed by fire at Oakfield, Wis., July 6, 1893, and claimed to be of the value of \$13,465.12. The plaintiff held policies with six other companies, upon the same goods, for various amounts, namely, Traders' Insurance Company, Hartford Fire Insurance Company, American Fire Insurance Company, Merchants' Insurance Company, Fireman's Insurance Association of Philadelphia, Liverpool, London & Globe Insurance Company, such insurance amounting in all to \$10,000. Actions were brought on each of the policies, October 8, 1893. It

NOTE.—For a parallel case as to rejection of umpire from locality of loss, see Brock v. Dwelling House Ins. Co. (Mich.) 26 L. R. A. 623.
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appeared that the plaintiff gave due notice of his loss, and proofs thereof were made and submitted to the respective companies, July 24, 1893, to which no objections have been made. By the terms of each of the policies it was provided that, "in the event of disagreement as to the amount of the loss, the same shall . . . be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage; and, failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of the loss; . . . and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proofs of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required." It was charged in the complaint that the companies conspired together to obtain an unjust and unwarranted rebate of the plaintiffs' loss, and on the 8th of August, 1893, demanded the right of appraisement of the goods destroyed, under the arbitration clauses in the policies, the validity of which the plaintiff denied; that on that day a written submission was executed for that purpose, each party selecting an appraiser, the insurer selecting a resident of Chicago, unacquainted with the value of the goods and the market and trade in the vicinage of the fire, namely, at Oakfield, Fond du Lac county, Wis.; that an effort was made by the appraiser selected by the plaintiff to select an umpire, but the appraiser selected on the part of the companies refused to select an umpire, and to enter upon an appraisement, until he could ascertain the wishes of the companies, and on the next day left Fond du Lac, and returned to Chicago, and had never since returned to the vicinage of the fire or to the state, and that all attempts thereafter to obtain the selection of an umpire had proved fruitless, by the refusal of the said appraiser for the companies to agree upon a proper and competent umpire, and would thereafter fail, unless the plaintiff would consent to an unjust rebate and compromise; that said appraiser appointed by the companies was wholly subservient to their wishes and interests, and had been selected to carry out the conspiracy of the companies by so refusing to appoint an umpire; that, having failed to get an umpire appointed, the plaintiff gave notice to the companies of revocation of the submission of August 8, and that by reason of the premises the companies had waived the benefit of said arbitration clause and sub-

mission. The defendant companies, respectively, each answered, in the actions against it, in substance setting up, by way of plea in abatement, the said arbitration clause, and the submission under it to arbitrate, of August 8, to wit, the selection of George Ferris and G. W. Weber as appraisers, and that they had taken and subscribed the proper oath, and that they were not able to agree upon the amount of loss or damage, and that no umpire had been chosen; that the amount of loss due the plaintiff had never been ascertained, proposed, or awarded or returned under the respective policies; that said arbitration proceedings were valid, in full force, and undetermined when each of the actions was brought, and that, therefore, they were each premature; that said stipulation and submission had not been waived, and nothing was due the plaintiff under the terms of the respective policies. The actions were all tried before the court at the same time, and submitted on the same evidence. The court found in each case, in substance, among other things: (1) That the demand for an appraisal was not made in good faith, because of any real and substantial difference between the respective companies and the plaintiff, but to prolong and postpone the adjustment and payment of plaintiff's loss, and to coerce him to make rebate from his claim, which could not otherwise be obtained. (2) That the defendants, respectively, through their appraiser, and with their approval, wantonly and unreasonably suspended the plaintiff's claim, and refused and neglected to appraise the loss, or make any attempt to do so, but hung the same up indefinitely, to prolong and postpone the adjustment and payment of the plaintiff's loss and damages until he should be coerced into allowing an unjust rebate. (3) That no action was taken by the companies, respectively, within 60 days after receiving proofs of the plaintiff's loss, nor prior to the commencement of the actions, tending towards an appraisal and adjustment of plaintiff's loss, by arbitration or otherwise, or showing any purpose or intent to do so; that the plaintiff for that reason, October 8, 1893, revoked the agreement to arbitrate, signed August 8, 1893, and gave notice thereof to the respective companies before bringing the actions. (4) That the cash value of the plaintiff's property covered by the policies at the time of the fire was \$13,465.12. Judgment was given against each of the defendants for the amount of its policy, with interest from the date of the action, and each of them appealed from the judgment against it, and the appeals were heard together upon the same record.

Messrs. Barbers & Beglinger for appellants.

Messrs. Duffy & McCrory and **E. S. Bragg** for respondent.

Pinney, J., delivered the opinion of the court:

1. These appeals involve questions of considerable importance in respect to the construction and effect to be given to the ap-
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praisal clause in the standard policies now in use in this state. The policies in question provide that loss or damage shall be ascertained or estimated by the assured and the company, or, in case of difference between them, then by appraisers as therein provided, and that "the loss shall not become due and payable until sixty days . . . after an award by appraisers, when appraisal has been required." This provision furnishes a speedy, convenient, and inexpensive mode of ascertaining the loss or damages of the assured, if he is entitled to recover, and does not appear to be obnoxious to the objection that it is void as ousting the courts of their rightful jurisdiction. Under it the right of recovery is left open, and the appraisal serves only to liquidate and determine the amount of the loss or damage. The validity of such stipulations appears to be beyond doubt. We think that the question is perfectly well settled, and that it has been so considered ever since the case of *Scott v. Avery*, 5 H. L. Cas. 811; and that when parties to a contract agree that money shall be paid when something else happens, and that something else is that a third person named in it, or persons to be named as therein provided, shall determine the amount, then the cause of action does not arise until the amount has been so ascertained or determined, unless something has occurred which may operate as a waiver of such precedent condition, or to dispense with its performance, or that with fair and reasonable effort performance of it cannot be obtained. The rule is stated by Jessel, *M. R.*, in *Dawson v. Fitzgerald*, L. R. 1 Exch. Div. 257, 260, in brief, to be this: "There are two cases where such a plea as the present is successful: First, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought until there has been an arbitration, or that the arbitration shall be a condition precedent to the right of action. In all other cases where there is—First, a covenant to pay; and, secondly, a covenant to refer,—the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to bring an action for not referring," etc. Here the covenant to pay is, by necessary implication, conditioned upon the appraisal, if properly claimed, and the plaintiff is in no position to claim anything until an appraisal has been made, waived, or in some manner legally dispensed with. *Elliott v. Royal Exchange Assur. Co. of London*, L. R. 2 Exch. 240. The questions to be considered are "whether an arbitration or award is necessary before a complete cause of action arises, or is made a condition precedent to an action, or whether the agreement to refer disputes is a collateral and independent one." *Collins v. Locke*, 4 App. Cas. 689; *Edwards v. Aberayron Mut. Ship Ins. Soc.* L. R. 1 Q. B. Div. 592, 598. We think that the stipulation in question is a valid and reasonable one, and not open to the objection urged against it that it ousts the jurisdiction of the courts, as it leaves the general question of liability, if any exists, to be judicially determined. The case-

of *Hamilton v. Liverpool & L. & G. Ins. Co. of Great Britain*, 136 U. S. 242, 254, 34 L. ed. 419, 423, seems decisive. *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250; *Reed v. Washington Fire & Marine Ins. Co.* 138 Mass. 572, 576; *Hudson v. McCartney*, 33 Wis. 331. In such cases a party may not of his own mere option or volition revoke the arbitration or submission clause, any more than any other provision of the contract. A contrary view, however, obtains in Pennsylvania, in cases where the person or persons who are to make the appraisal or award are not named in the contract, but are to be chosen thereafter by the parties. *Mentz v. Armenia F. Ins. Co.* 79 Pa. 478, 21 Am. Rep. 80; *Commercial Union Assur. Co. of London v. Hocking*, 115 Pa. 414. But we are unable to see any substantial ground for the distinction. Upon the other hand, the case of *Hamilton v. Home Ins. Co. of New York*, 137 U. S. 370, 34 L. ed. 708, is one where the provision that an appraisal should be made was not either expressly or by necessary implication a condition precedent to the obligation to pay, but where the stipulation for an appraisal was held to be independent and collateral, and the assured entitled to sue without an appraisal; and the principal cases on this point are here collected. The cases relied on by the respondent's counsel fall within the category of *Hamilton v. Liverpool & L. & G. Ins. Co. of Great Britain*, and *Reed v. Washington Fire & Marine Ins. Co.*, *supra*; *Rowe v. Williams*, 97 Mass. 165; *Hood v. Hartshorn*, 100 Mass. 121, 1 Am. Rep. 69; *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 181; *Stephenson v. Piscataqua Fire & Marine Ins. Co.* 54 Me. 70. The doctrine laid down in this state in *Hudson v. McCartney* has not been departed from or materially qualified. In *Phoenix Ins. Co. v. Badger*, 53 Wis. 283, and *Vangindertaelen v. Phoenix Ins. Co. of Brooklyn*, 82 Wis. 112, where there were provisions, in substance, as in these cases, no arbitration was demanded. In *Canfield v. Watertown F. Ins. Co.*, 55 Wis. 419, the policy did not provide, either expressly or by necessary implication, that an award should be a condition to the right to sue; and the same is true of the contract in *Oakwood Retreat Assn. v. Rathborne*, 65 Wis. 177. We hold, therefore, that, where an appraisal has been properly demanded, an appraisal or award on the question of the amount of loss or damage is made by these policies, by necessary implication, a condition precedent to the right of the assured to sue, and he cannot maintain his action unless the condition is waived or in some way dispensed with; and that he has in such case no right, at his mere option or volition, to revoke the arbitration clause in the policy or a submission under it.

2. About two weeks after the fire, July 20th, a Mr. Berne, adjuster for the Traders' Insurance Company, and then representing some of the other companies, called on the plaintiff, and examined his books and papers, and made inquiries in regard to the loss, and he soon afterwards came to represent the other companies. The plaintiff had

purchased the stock, that of a variety store in a country village, about six months before, of one Russell, and had paid a considerable, indeed the greater, part of the price in Iowa lands. He had been allowed quite a considerable discount on the goods, because some were shew worn, and a further discount of about \$1,100 was insisted on and obtained by the plaintiff. Berne, the adjuster, insisted on a considerable discount on the goods because they had been paid for by the plaintiff in land; and under this claim the difference on insured value, at the outside, amounted to about \$700, and upon a fair computation did not seem to be more than \$400. Berne testified that "the difference was as to the value of the stock of goods paid for by real-estate trade,—that was the point;" that they had not been bought for cash. The plaintiff claimed the full face of the policies, and he testified that Berne told him, on this occasion, that "the only way he could get anything out of me was to attack the original invoices; that he traded land for it, and did not pay cash, and he was not going to allow cash price for it." Berne denies the particular form of expression, "make anything out of you," but admits that he might have said the only way he could get along with him was to attack the inventory of Russell. Berne then notified the plaintiff he should demand an appraisal. August 8 the parties met at Fond du Lac, by appointment, Berne bringing with him from Chicago one Weber, of that city, whom he named as appraiser on behalf of the companies, the plaintiff naming one Ferris, who acted as appraiser when he purchased of Russell, and the submission was signed. The evidence is clear that no attempt was ever made by the appraisers to agree on an award; that they at once failed to agree in the choice of an umpire. Ferris proposed the names of six business men, conceded to be competent and of good character, residing in Fond du Lac county. Weber did not name any one, except three parties living in Chicago. He said he wanted to go to Chicago, though he stated that, if Ferris desired, he would stay and get through with the matter; and that about that time a boy came to the door, and called out: "Mr. Berne says, if you are going to take that train, you will have to start now;" and he took the list of names, and never returned again to meet Ferris in relation to the business. Weber testified that he thought the parties named by Ferris "too much befriended" to the plaintiff, but "did not find in looking them up that which indicated friendship;" that he made up his mind "that they were not the men we wanted;" that he did not find out anything against their integrity; that he "objected to these six men all on general principles;" "I rejected all of them;" that he "did not offer to name any one in Fond du Lac, nor any country merchant; . . . I stayed by Chicago." After Berne and Weber left Fond du Lac, correspondence occurred between Ferris and Weber, and between the plaintiff and Berne. Ferris declined to accept either of the three Chicago parties named by Weber, August 15th, and

on the 25th Weber asked him to submit other names, which he did, and on the 28th Weber refused to accept any of them, and suggested that Ferris visit him in Chicago, and "we can possibly agree on the proper party." This Ferris declined to do, and, on the 5th of September, Weber refused to consent to any one Ferris had named, saying, "I do not think there is any occasion to name specific reasons for objection," and asking Ferris to submit other names. On the 16th he sent the names of three other parties in Fond du Lac county, and on the 30th Weber promised he should hear from him in a few days. Finally, on the 5th of October, he proposed one Kroeger, of Milwaukee, but in the meantime notice of revocation had been served. On the 2d of September the plaintiff wrote Berne that if he wished to proceed with the arbitration he must come to Oakfield (the place of loss) or Fond du Lac. On the 8th of September, Berne wrote the plaintiff that the appraisers had, in his opinion, "spent quite sufficient time over it to enable them to select some good man, but neither you nor I can interfere, as the matter is left to them," but proposed to select other appraisers; to which the plaintiff responded that Weber's "reasons for not agreeing on an umpire are simply frivolous;" that in his opinion he would "reject any proposed by Mr. Ferris;" that he was "willing to do anything reasonable to get this matter settled, but to continue it in the way it has been I object." This was one month before the actions were brought, and nothing further appears to have been done by Berne, except to inform the plaintiff that he declined "to enter into any discussion of the reasons either of your or our appraisers in declining the parties proposed by each," and that he had "neither the right nor the inclination to interfere in any way with them." On the 16th the plaintiff wrote Berne asking that he and Weber come to Fond du Lac, and agree upon some qualified business man acquainted with the business and that part of the state; but on the 2d he wrote the plaintiff that a representative of Walker & Co. had called to learn about his claim, and that he had explained the situation, and "again urged Mr. Weber, in so far as I could, to try and meet Mr. Ferris with some one on whom they could agree;" and finally suggesting that he intrust his matters to Walker & Co., "and we might agree in that way, and settle everything." Both Berne and Weber were examined at considerable length at the trial, as well as the plaintiff. The uncontradicted evidence was that the goods were worth \$13,465.12, and there was no claim of any defense to the actions except the one insisted on by the plea in abatement. An examination of the evidence leaves no doubt as to the correctness of the finding of the circuit court. It shows that unfair and perverse practices were resorted to, to compel the plaintiff to abate what appears to have been a just and valid claim for an honest loss. The circuit court having heard the evidence, and observed the manner of testifying of the plaintiff, Berne, the adjuster, and Weber, could not easily be misled as to the purposes and the complicity

found between the two latter. We cannot say that the finding was not in accordance with the evidence. It seems evident that there was no fair bona fide difference between the parties as to the amount of the loss. It was of no importance what the plaintiff paid for the goods, or whether in money or property, or whether they had been given to him. In either event, he would be entitled to the benefit of his bargain or gift. The only question was as to the fair cash value of the goods destroyed. By signing the submission, probably the plaintiff waived the right to object that there was no bona fide disagreement, but the facts remain in their bearing upon what ensued in the way of attempting to get an adjustment of his loss. We think he used all fair and reasonable efforts to that end, and that he did not succeed was solely the fault of Weber and the adjuster, Berne. The whole transaction is quite transparent. Weber was "standing by Chicago," and by Berne as well, and objecting, "on general principles," to any one proposed as an umpire by Ferris, arbitrarily and without any attempt to assign reasonable ground or explanation. There does not seem to be any fair criticism made or attempted against the conduct of Ferris. The plaintiff was entitled to have his goods appraised at their value in the market where they were destroyed, and not at Chicago rates on broken or bankrupt stocks. The policy of our law is in favor of the adjustment of such losses where they occur, and it is unreasonable and unfair to expect that the assured will follow up his claim into another state, or accept the arbitration of appraisers selected from Chicago, nearly 200 miles distant; or, if from Chicago, why not from Cincinnati, New York, or Boston? We do not say that such parties are incompetent, but, in view of the effect of the submission, we do hold that the parties are bound to exercise towards each other the utmost good faith, and proceed with all reasonable diligence to procure an adjustment according to the letter and spirit of the contract. It is not permissible for the insurers, under the provisions of the standard policy, to arbitrarily or capriciously demand an appraisal, simply to suspend a claim for a loss, and select an appraiser who will perversely refuse to concur in the appointment of an umpire unless he resides in Chicago, or is the kind of man the insurers want. Such a course, if tolerated, places the assured very largely at the mercy of the insurers. Any attempt on the part of either party to misuse or pervert the provisions of the standard policy for an appraisal, so as to unreasonably delay an adjustment, or to secure an unjust abatement of an honest loss, is a breach of good faith, and should be treated as a waiver of the condition, and dispensing with the necessity of an appraisal, or warranting a resort to an action without one, if the party thus prejudiced has used all fair and reasonable means and diligence on his part to secure it. To hold otherwise would be to permit the party in fault to profit by his own wrong. The result reached in this case is in accordance with a recent case quite in point,—*McCullough v. Phoenix*

Ins. Co. 118 Mo. 606. In *Uhrig v. Williamsburgh City F. Ins. Co.*, 101 N. Y. 862, it was laid down that "under the arbitration clause, it was the duty of each party to act in good faith to accomplish the appraisal in the way provided in the policy. If either party acted in bad faith, so as to defeat the real object of the clause, it absolved the other party from compliance therewith; and if either refuse to go on with the arbitration, or to procure the appointment of an umpire, so that there could be an agreement upon an appraisal, the other party is absolved; that a claimant cannot be tied up forever without his fault, and against his will, by an ineffectual arbitration." *Bishop v. Agricult-*

ural Ins. Co., 180 N. Y. 488, is, in substance, to the same effect. And the arbitration having failed, in consequence of the perverse conduct and want of good faith of the insurance companies, represented by their adjuster and the appraiser, Weber, the plaintiff was not bound to enter into a new one, or name another appraiser, even if the companies were willing to name a new one on their part. *Uhrig v. Williamsburgh City F. Ins. Co. supra.* And this is in harmony with what was said in *Davenport v. Long Island Ins. Co.* 10 Daly, 588, 589. The judgments appealed from were rightly given for the plaintiff.

The judgments appealed from are affirmed.

OHIO SUPREME COURT.

STATE, *ex rel.* Emerson E. WHITE *et al.*,
Pigs. in Err.,

v.

William Howard NEFF *et al.*

(38 Ohio St. —)

"The property of a private eleemosynary corporation, although charged with the maintenance of a college or other "public charity," is private property, within the meaning and protection of that clause of section 19 of article 1 of the Constitution of this state, which declares "that private property shall ever be held inviolate."

2. The result of the statute passed April 15, 1892, 89 Ohio Laws, 647, relating to the Cincinnati College, which in terms gives absolute control and management of the affairs and property of the Cincinnati College to the directors of the University of Cincinnati, is to take the property of the former and donate it to the latter institution. The statute, therefore, conflicts with section 19 of article 1 of the Constitution of this state, and is void.

(March 12, 1895.)

ERROR to the Circuit Court for Hamilton County to review a judgment in favor of defendants in a quo warranto proceeding instituted to oust defendants from the position of trustees of the Cincinnati College. *Affirmed.*

Statement by Bradbury, J.:

The plaintiffs in error, the directors of the Cincinnati University, instituted in the circuit court of Hamilton county proceedings in quo warranto to oust the defendants in error from the positions heretofore held by them, of trustees of the Cincinnati College. The circuit court denied the relief sought and dismissed the petition of the relators, whereupon they

*Headnotes by the COURT.

NOTE.—The doctrine of the leading case of Dartmouth College Trustees v. Woodward, 17 U. S. 4 Wheat. 512, 4 L. ed. 639, has a clear illustration in the above case. Involving as it does the vested rights of a college sharply recalls that great case which so fully established the right of such institutions to protection. The case very fully presents the pertinent authorities.
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brought the record to this court to be reviewed on error.

Messrs. J. B. Foraker, Wilby & Wald, and Matthews & Cleveland, for plaintiffs in error:

The Cincinnati College, though a private corporation, is a public charity.

Church of Jesus Christ of Latter-Day Saints v. United States, 136 U. S. 47, 34 L. ed. 492; *Gerke v. Purcell*, 25 Ohio St. 239; *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201; *Cleveland Library Assn. v. Pelton*, 86 Ohio St. 253; *Mannix v. Purcell*, 2 L. R. A. 753, 46 Ohio St. 102; *Girard v. Philadelphia*, 74 U. S. 7 Wall. 1, 19 L. ed. 53.

Defendants' charter was completely in the power of the legislature, and could be modified at pleasure or wholly repealed.

State v. Cincinnati Gas-Light & Coke Co. 18 Ohio St. 263; *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 454, 21 L. ed. 204; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Com. v. Bonsall*, 3 Whart. 559; *Pennsylvania College Cases*, 80 U. S. 18 Wall. 190, 20 L. ed. 550; *Bryan v. Kentucky Annual Conference of M. E. Church, South Board of Education*, 151 U. S. 639, 38 L. ed. 297; *Miller v. New York*, 82 U. S. 15 Wall. 478, 21 L. ed. 98; *Spring Valley Water Works v. Schottler*, 110 U. S. 847, 28 L. ed. 178; *Gloss v. Glenwood Cemetery*, 107 U. S. 466, 27 L. ed. 403; *Jackson v. Walsh*, 75 Md. 804.

We have never contended that the power to alter a thing was a power to destroy it, and substitute something else. Nothing of the kind is attempted in the case at bar.

Atty-Gen. v. Chicago & N. W. R. Co. 85 Wis. 425.

Messrs. E. W. Kittredge, John F. Follett, and J. W. Warrington, for defendants in error:

A college organized with private capital, under a charter, as a private corporation, to be controlled and administered by the shareholders, although the object is charitable, and in one sense therefore it is a public charity, is quite distinct in its character from a corporation created by the state, with public funds, for a charitable object. Its property is private

property, and as such, it is protected by the Constitution.

2 Kent, Com. 276.

A private eleemosynary corporation, though organized for the purpose of administering a public charity, holds its title to property acquired as much exempt from legislative control as any other private corporation.

Vincennes University Trustees v. Indiana, 55 U. S. 14 How. 268, 14 L. ed. 416; *Regents of University of Maryland v. Williams*, 9 Gill & J. 865, 81 Am. Dec. 72; *New Gloucester School Fund Trustees v. Bradbury*, 11 Me. 118, 26 Am. Dec. 515; *Montpelier Academy Trustees v. George*, 14 La. 395, 83 Am. Dec. 585; *Yarmouth v. North Yarmouth*, 84 Me. 411, 56 Am. Dec. 666; *Den v. Foy*, 5 N. C. 58; *State v. Adams*, 44 Mo. 570; *Illinois Board of Education v. Greenebaum*, 39 Ill. 610; *Bakewell v. Illinois Board of Education* (Ill.) Jan 18, 1893; *Illinois Board of Education v. Bakewell*, 122 Ill. 339; *Downing v. Indiana State Board of Agriculture*, 12 L. R. A. 64, 129 Ind. 443; *Territt v. Taylor*, 18 U. S. 9 Cranch, 43, 3 L. ed. 650.

The legislature, under its reserved power to alter this charter, cannot take away from this corporation, nor yet from its stockholders, the right to control, manage, and dispose of the property which it has acquired.

People v. O'Brien, 2 L. R. A. 255, 111 N. Y. 48; *Ashuelot R. Co. v. Elliot*, 58 N. H. 457; *Allen v. McKean*, 1 Sumn. 276; *Sage v. Dillard*, 15 B. Mon. 359; *Orr v. Bracken County*, 81 Ky. 598; *Shields v. Ohio*, 95 U. S. 324, 24 L. ed. 359; *Detroit v. Detroit & H. Pl. Road Co.*, 43 Mich. 140; *Reagan v. Farmers Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014.

Bradbury, J., delivered the opinion of the court:

In 1814, the Cincinnati Lancaster Seminary was incorporated, chiefly, for the purpose of instructing youth on a plan devised in England, late in the preceding century by Joseph Lancaster; the most characteristic feature of which consisted in employing the more advanced pupils to impart instruction to those of a lower grade. The scheme was not successful, and in the year 1818, the institution being in a languishing condition, application was made to the legislature for a new incorporating act, which was passed on the 22d day of January, 1819, and reads as follows:

"SECTION 1. Be it enacted by the general assembly of the state of Ohio, that Jacob Burnett, Francis Dunlavy, Samuel Johnson, William Lytle, Zaccheus Biggs, Joshua L. Wilson, O. M. Spencer, John Thompson, W. H. Harrison, Joseph H. Crane, Joshua Collett, Samuel W. Davis, Daniel Drake, William Corry, Jesse Hunt, Samuel Burr, John Reynolds, James Galloway, Martin Baum and Levi James, and their associates, be, and they are hereby created and made a body corporate and politic, with perpetual succession, who shall be known and distinguished by the name and style of 'The President, Trustees, and Faculty of The Cincinnati College;' and by that name and style, they and their successors shall be a body in law, capable of contracting and being con-

tracted with, suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, as natural persons are or may be, in all courts and places, and in all manner of suits, complaints, bills, causes, and matters whatsoever. They shall have and use a common seal; they shall be capable of purchasing, receiving, holding, and enjoying, and of granting, selling, and conveying any estate or property, real or personal, necessary for promoting the object of this act of incorporation; which object is hereby declared to be the erection and maintenance of a college; *provided*, that the annual income, rents or receipts arising therefrom shall not exceed eleven thousand dollars.

"SEC. 2. Be it further enacted, that the funds or stock of said college shall consist of five thousand shares, of twenty-five dollars each; which funds or stock shall be subscribed for in such manner and paid in at such times, in such proportions and under such regulations as may be prescribed by the by-laws and rules of said company.

"SEC. 3. Be it further enacted, that the affairs of said Cincinnati College shall be under the management of a board of trustees, which board shall consist of not less than thirteen, nor more than twenty members, to be elected by the shareholders on the last Friday of March, annually, between two and six o'clock in the afternoon, at the college edifice; and it shall be lawful for the trustees to continue in office, and to discharge the duties appertaining thereto, until their successors are elected and qualified.

"SEC. 4. Be it further enacted, that all elections shall be by ballot; at every election, each shareholder shall be entitled to one vote for every share of twenty-five dollars, until the number of shares shall amount to five, and one vote for every five shares above five he or she may hold at the time of the election; but no trustee of the Miami University shall discharge the duties of trustee of the Cincinnati College.

"SEC. 5. Be it further enacted, that the board of trustees shall, at their first meeting after their election, elect a president and secretary of the board from their own body; they shall have the power of filling vacancies that may happen in the board during the period of their own appointment; they shall appoint a treasurer, who shall give bond and security for the faithful performance of his duty; they may elect a president and vice-president of the college, and may appoint such professors and tutors as they shall think necessary; which president, vice-president, professors, and tutors may be removed at the pleasure of the board; they may, from time to time, make and enforce such rules, regulations and by-laws for the government and well-being of the college as may seem to them proper; *provided, they be consistent with the laws of the United States*, and of this state; they may appoint a faculty to consist of the president, vice-president, professors, and such other persons as they may judge necessary, and may vest in the faculty so appointed such powers as they may think expedient for the preservation of good order,

and for enforcing obedience to the rules, regulations and by-laws of the institution; they may cause the principles of morality and of the Christian religion to be included, but the religious tenets that may be peculiar to any particular sect or denomination, shall never be taught or enforced in the college; they may hold their meetings at such times and places as they may designate and appoint; the president of the board may call a meeting at any time, when, in his opinion, it may be expedient; at any stated or special meeting of the board, seven members shall constitute a quorum for transacting business; the property and funds of the college shall be under the management and at the disposal of the board of trustees, by whom or by whose authority all contracts, purchases, and sales shall be made; and, generally, the said board of trustees shall have power to do and perform all such matters and things as they may judge necessary for the benefit of said college; *provided*, that the funds of the institution shall not be applied to any use or for any purpose not herein expressed or intended.

"Sec. 6. Be it further enacted, that the board of trustees of the said college, may grant and confer on any candidate in such form as they may direct, all or any of the degrees that are usually conferred in any college or university within the United States.

"Sec. 7. Be it further enacted, that so much of the act entitled, 'An act to incorporate the Cincinnati Lancaster Seminary,' as requires the appointment of a board of directors be, and the same is hereby repealed; and that the board of trustees of the Cincinnati College shall be, and they are hereby authorized to exercise all the powers granted by that act to the directors of the Cincinnati Lancaster Seminary; and it shall be lawful for the trustees of the Cincinnati College to apply the surplus funds of the Cincinnati Lancaster Seminary to the use of the Cincinnati College; and in all respects to manage the affairs of the said seminary in the same manner as the board of directors are by law authorized to do.

"Sec. 8. And be it further enacted that Jacob Burnett, Joshua L. Wilson, Oliver M. Spencer, Daniel Drake, Levi James, Samuel W. Davis, William Corry, Francis Dunlavy, Samuel Johnson, William Lytle, Zaccheus Biggs, John Thompson, William H. Harrison, Joseph H. Crane, Joshua Collett, Jesse Hunt, Samuel Burr, John Reynolds, James Galloway and Martin Baum, shall be, and they are hereby appointed trustees of the Cincinnati College, who shall continue in office until the last Friday in March, next, and from thence until their successors are chosen.

"This act shall be subject to such alterations as the general assembly may from time to time see proper to make."

One effect of this act was to vest in the corporation created by it, the property rights of the Cincinnati Lancaster Seminary which rights ever since have been, and now in fact are, enjoyed by the body thus created. The object of this body, the Cincinnati College, as expressly declared by the first section of 28 L. R. A.

the incorporating act, is "the erection and maintenance of a college," the act nowhere designating the nature of the instruction to be given, or the method by which it was to be imparted. The early transactions of the institution, from the date of the incorporation of the Cincinnati Lancaster Seminary in 1814, until its merger in the Cincinnati College in 1819, are buried in obscurity, and but little more has been satisfactorily ascertained respecting its affairs after the Incorporating Act of 1819 was passed, until about the year 1845. However, it may be gathered from the record, that soon after the Cincinnati Lancaster Seminary was incorporated, it established, and for a time maintained, a school wherein both primary and academic instruction was given; that the school was not successful and soon began to languish. That in 1819, the Cincinnati Lancaster Seminary was superseded by the Cincinnati College, and the property of the former of the value of about ten thousand dollars, transferred to the latter corporation, and by the same act, the stock of the last named corporation was fixed at five thousand shares, of twenty-five dollars each, a sufficient number of which were subscribed to add about forty thousand dollars to the fund received from the Cincinnati Lancaster Seminary.

Schools were maintained by the new institution until about the year 1825. After this date, for eight or ten years, whatever educational processes, if any, that may have been continued, were desultory and unsystematic. In 1835 additional shares of stock were subscribed, amounting in the aggregate to about four thousand dollars, primary and academical education established, and a medical school established. About the same time, instruction in law was also begun. After a year or two, the medical school was discontinued, and as early as 1845 or 1846, all attempts to impart primary or academical instruction was abandoned, since which time a law school only has been maintained, except a course of philosophical lectures continued during a few years at a latter period, and since abandoned. The date when the law school was established is left uncertain, but probably it was in 1832; if not quite so early as that, yet it had had an uninterrupted existence of more than fifty years, when in the year 1892, the following statute was passed by the general assembly:

"An act to amend sections 3, 4, and 5 of an act entitled 'An act to incorporate the Cincinnati College,' passed January 22, A. D. 1819 (17 Ohio L. J. chap. 20, p. 46).

"Whereas, in the act entitled 'An act to incorporate the Cincinnati College,' enacted by the general assembly of the state of Ohio, January 22, A. D. 1819, by the eighth section thereof it was provided as follows, to wit:

"This act shall be subject to such alterations as the general assembly may, from time to time, see proper to make; and,

"Whereas, the endowment of the Cincinnati College, as at present invested and managed is not sufficient to enable it to carry out the purposes of its charter; and,

"Whereas, in the opinion of the general assembly, it would be advantageous to the

Cincinnati College and to the University of Cincinnati, and to the public generally, that the government of the two institutions should be joined and consolidated; therefore,

"SECTION 1. Be it enacted by the general assembly of the state of Ohio, that sections 8, 4, and 5 of the act entitled 'An act to incorporate the Cincinnati College,' passed the 22d day of January, A. D. 1819, be amended so as to read as follows:

"SEC. 8. The affairs of the said Cincinnati College shall hereafter be under the management of the directors, for the time being, of the University of Cincinnati, which directors shall be, and they are hereby constituted the board of trustees of the Cincinnati College, and they are hereby authorized to exercise all the powers granted by law to the board of trustees of the Cincinnati College.

"SEC. 4. Be it further enacted, that the management of the funds, and of other matters belonging to or connected with the said Cincinnati College, shall be solely in the hands of the board of trustees aforesaid, and the said funds shall be administered for the purpose of carrying out the objects of the charter of the Cincinnati College, in connection with the funds and administration of the University of Cincinnati.

"SEC. 5. The board of trustees shall appoint a treasurer, who shall give bond and security for the faithful performance of his duty; they may elect a president and vice-president of the college, and may appoint such professors and tutors as they shall think necessary; which president and vice-president, professors and tutors, may be removed at the pleasure of the board; they may, from time to time, make and enforce such rules, regulations, and by-laws for the government and well being of the college, as may seem to them proper; *provided they be consistent with the laws of the United States* and this state; they may appoint a faculty to consist of the president, vice-president, professors and such other persons as they may judge necessary, and may vest in the faculty so appointed such powers as they may think expedient for the preservation of good order, and for enforcing obedience to the rules, regulations, and by-laws of the institution they may cause the principles of morality and of the Christian religion to be included, but the religious tenets that may be peculiar to any particular sect or denomination, shall never be taught or be enforced in the college; they may hold their meetings at such times and places as they may designate and appoint; the president of the board may call a meeting at any time, when in his opinion it may be expedient; at any stated or special meeting of the board, a majority of the members shall constitute a quorum for the transaction of business; the property and funds of the college shall be under the management and at the disposal of the board of trustees, by whom, or by whose authority all contracts, purchases, and sales shall be made; and generally, the said board of trustees shall have power to do and perform all such matters and things as they may judge necessary for the benefit of the said college; *provided*, that the funds of the institution shall not be applied

to any use, or for any purpose not herein expressed or intended.

"SEC. 2. Be it further enacted that sections 8, 4, and 5 of the said act of January 22, 1819, entitled "An act to incorporate the Cincinnati College," be, and the same are hereby repealed.

"SEC. 8. This act shall take effect and be in force from and after its passage."

The constitutionality of this statute is assailed on a number of grounds, one of which is that it violates that provision of the nineteenth section of article 1 of the Constitution of Ohio, which asserts that "private property shall ever be held inviolate."

Whether the statute is obnoxious to that constitutional provision depends (1) whether it violates the property rights of the Cincinnati College, and (2) if it does so, whether that corporation is entitled to the protection secured by the constitution of this state, above quoted.

No refined process of reason or unusual keenness of perception is required to ascertain the effect of this statute upon the property rights of the Cincinnati College. It simply, and in unambiguous terms, abrogates those rights by transferring them to a body of strangers. No language that the court might use can make this result more clear than does the concise language employed by the general assembly. The expressly declared reason for this legislative action is the assumed insufficiency of the property of the Cincinnati College, as managed by the present directory, to "carry out the purposes of its charter," and assuming further, that: "It would be advantageous to the Cincinnati College and to the University of Cincinnati, and the public generally that the government of the two institutions should be joined and consolidated," it seizes the entire property of the one and hands it over to the other of the two bodies. It is no answer to this, to assert that the new directory represents the old corporation, or that the legal title to the property still remains in the Cincinnati College. The mere naked legal title to property has no value, when that title is absolutely severed from its control and beneficial enjoyment. It is the province and the duty of courts to look at the substance of transactions, and to ignore refined and unsubstantial distinctions. And we can see no substantial difference between a statute which expressly creates a new corporation and endows it with the property of another body corporate, and a statute, like the one under consideration, which, finding a corporation already existing, vests in the directory of the latter all the powers and rights of property which had belonged to another corporate body. And whether we regard the corporation as the actual and potential proprietor of the property in contention, or whether we consider those who contributed to or created this fund or property as such proprietors, and the corporation a mere agency, created to represent them and carry their will into execution is immaterial in this connection. For, if the corporation is the real owner, it has been deprived of its use and enjoyment of its property, while if those who originally cre-

ated the fund are the real owners, then without their consent and against their will, it has been taken from their chosen agents, and placed in the custody and management of others, whom they did not appoint and over whom they have no control. Property in the hands of an agent is just as inviolate as that in the custody of the owner himself. As long as the principal may choose and control his agent, his dominion of the property confided to the agent continues, but this dominion, or proprietorship, is at once destroyed the moment that his property is forcibly, and against his will, seized, and absolutely and irrevocably transferred to another agent, selected not by the owner, but by some other person or authority.

We have seen that the statute under consideration has taken from the control and management of the Cincinnati College all of its property and placed it under the control and management of the University of Cincinnati. One ground, as we understand the argument of counsel, upon which this result is maintained to be lawful, is that the purpose to which this property was devoted by its original donors is a public purpose, and that that circumstance alone is sufficient to impress upon the property a public character; but if that is not so, yet as the purpose of the donors was not private gain, but public charity, and as the property under the new corporation would be applied to the same purpose to which the Cincinnati College would have applied it, had the latter continued its administration, that therefore no substantial right, either of the original donors or of the corporation, was violated by the law. That in fact the only rights the original donors had, as the result of their contribution to the funds of the Cincinnati College, was that of voting for directors of the concern, which was "no more property than the privilege and duty of a citizen to vote for a governor of a state, or presidential electors, are property."

The results of establishing this doctrine would be to place every eleemosynary corporation within the state, whether religious, educational, or created to administer to the wants of the suffering or needy, beyond the limits of constitutional protection. Whenever, in the opinion of a majority of the general assembly, the public interest, or the interest of two or more colleges, or churches, or other private eleemosynary corporations, required them to be united, the property of one or more of them could be seized and transferred to another. The doctrine finds no support in any treatise or adjudication within our knowledge, nor by reason or justice. There are two classes of public charities, one where the institutions are public in the broadest sense of that term, that is, they are owned by the state, or some subdivision thereof created for governmental purposes, and maintained at the public expense. These institutions are absolutely under the control and management of the public through its proper representatives. As respects them no vested or private rights pertain. It does not follow, however, that because this class of public charitable institutions are the subjects

of absolute public control, that another class, whose property consists of private donations and to which the organized public has contributed nothing, shall also be subjected to such absolute governmental control because the charity they administer has been christened a "public charity" in legal nomenclature. In common acceptation, colleges are not "charitable institutions," although in law they administer a public charity. This means no more than that the public are incidentally benefited by the education of some of its members, the immediate advantage accruing to the individual members who have received instruction.

The unbroken current of authority declares that the property of such institutions is private property, and the corporations themselves private corporations. *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *Vincennes University Trustees v. Indiana*, 55 U. S. 14 How. 269, 14 L. ed. 416; *Yarmouth v. North Yarmouth*, 84 Me. 411, 56 Am. Dec. 686; *Belfast Academy Trustees v. Salmond*, 11 Me. 114; *Den v. Foy*, 5 N. C. 58; *State v. Adams*, 44 Mo. 570; *Downing v. Indiana State Board of Agriculture*, 129 Ind. 448; *Illinois Board of Education v. Greenebaum*, 89 Ill. 609; *Illinois Board of Education v. Bakewell*, 123 Ill. 389; *Montpelier Academy Trustees v. George*, 14 La. 395.

When the donors of property devote it to a charitable purpose and choose an existing or create a new corporation as an instrument by which this purpose is to be effected, they make this instrument their perpetual representative for that purpose. "These gifts were made, not indeed to make a profit for the donors, or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stand in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal." *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 642, 4 L. ed. 660.

Whether the Cincinnati College is regarded as the owner in its own right of the property donated to it, or as the representative of the donors, charged with the execution of their purpose, is not material; in either view the property is private as contradistinguished from public, and as such is within the protection of that provision of the constitution which declares private property to be inviolate.

We now come to the consideration of the provision in the charter of the Cincinnati College, which reserves to the general assembly the right of amendment. This reservation would be wholly unnecessary if the Cincinnati College had no rights of property

which the general assembly was bound to respect. If the legislature, at its will, could divest this corporation of its property, the legislative control of the institution would be absolute, for by taking away its entire property rights all effectual corporate action would be at once paralyzed. Thenceforward it would be powerless to advance the purposes of its creation.

The authorities agree in holding that the legislative power of amendment and alteration thus reserved in charters is not absolute, although its boundaries are not yet established. In Kentucky this power of amendment seems to be limited to those matters which concern the relations established by the charter between the corporation and the state.

"The power to alter or amend the contract, in our conception, is to change it *as between the original parties, and such others only, as have been permitted, by their mutual consent, to come into the enjoyment of its benefits and privileges*; not to compel one of the parties to operate in conjunction with others, and share with them the privileges and benefits of the contract." *Sage v. Dillard*, 15 B. Mon. 359.

Whatever difficulties have been encountered by the courts in ascertaining the limits of this reserved legislative power, they concur in denying that under it the legislature can strip a corporation of its rights of property.

"The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of an amendment or alteration. Beyond the sphere of the reserved powers, the *vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases.*" *Shields v. Ohio*, 95 U. S. 824, 24 L. ed. 359; *Detroit v. Detroit Ft. Road Co.* 43 Mich. 140; *Orr v. Bracken County*, 81 Ky. 598.

The Cincinnati College was the lawful owner of the property in its possession, it is immaterial whether it was acquired from the Cincinnati Lancaster Seminary that it succeeded, or by subscriptions and donations subsequently made. This property had been intrusted to it for the purposes of establishing and maintaining a "college." No specific branches of learning were prescribed, or method of instruction commended. Primary, academical, medical, legal and philosophical courses were from time to time attempted. All of them except the law school proved unsuccessful and were abandoned; the latter has been continuously and successfully maintained for nearly sixty years, and substantially the entire income of the institution during that period has been devoted to its maintenance and improvement, without material objection appearing to have been made by any one of the donors. The facts that such donors of the property, to this institution gave it with knowledge that no specific branches of learning or method of instruction were prescribed by its charter, together with the brief history of its various educational attempts and failures just adverted to, and the acquiescence of such donors therein, tend to show that these donors entrusted to this chosen instrument of their will, a wide discretion respecting the course and method of instruction to which their donations were to be devoted, and if good faith is to be kept with these donors, we must deny to the legislature the power to seize the fund thus raised, and transfer it from these chosen agents to others, in whose discretion they did not confide. This power, we think is prohibited by section 19 of article 1 of the Constitution of 1852, which declares the inviolability of private property. This conclusion makes unnecessary the consideration of the other questions raised in argument.

Judgment affirmed.

CALIFORNIA SUPREME COURT.

Re ESTATE OF Clara G. COMASSI,
Deceased.

(.....Cal.....)

1. A will made by a married woman is not revoked by her subsequent marriage after becoming a widow, under Civ. Code, § 1300, making subsequent marriage operate to revoke "a will executed by an unmarried woman."

2. The adoption of a stranger in blood is not equivalent to having issue of a marriage within the meaning of the civil code respecting the effect of issue to make a revocation of a will.

NOTE.—On the subject of revocation of will by marriage, see *Roane v. Hollingshead* (Md.) 17 L. R. A. 592; *Stewart v. Powell* (Ky.) 10 L. R. A. 57, and note; also cases cited in note to *Davis v. Fogle* (Ind.) 7 L. R. A. 465.

See case last referred to and note thereto on subject of revocation of will by adoption or birth of child.

28 L. R. A.

(April 2, 1895.)

APPEAL from an order of the Superior Court for Sacramento County denying an application for probate of the will of Clara G. Comassi, deceased. *Reversed.*

The facts are stated in the opinion.

Mr. A. C. Searle for appellant.
Messrs. Armstrong, Bruner & Plattner for respondent.

Harrison, J., delivered the opinion of the court:

Clara G. Comassi died in the city of Sacramento July 31, 1892, and thereafter a document bearing date June 23, 1877, purporting to be her last will and testament, was presented to the superior court for probate. The probate was contested by Mabel Delphina Comassi, formerly Mabel Delphina Eric, claiming as heir to the deceased, by virtue of an adoption; and upon the hearing of the

contest the court found that in May, 1886, upon proceedings had in the superior court for Yuba county, that court made an order declaring that Mabel should thenceforth be regarded as the child of said Clara G. Comassi, and that the said Mabel and the said Clara should sustain towards each other the legal relation of parent and child. The court also found that the will was properly executed, and that at the time of its execution the deceased was in all respects competent to make a will; that she was at that time a married woman, the wife of one G. Comassi; that her husband died on the 26th of December, 1878, and that on the 25th of August, 1886, she was again married to Joseph O. Barbeau, from whom she was subsequently divorced. The court held that her marriage subsequent to the execution of the will had the effect to revoke it, and denied the application for its probate. From this order the petitioner has appealed.

The right of any person to execute a will, as well as the form in which the will must be executed, or the manner in which it may be revoked, are matters entirely of statutory regulation. The power of the legislature to limit the class of persons who shall be competent to make a will, or to declare that a change in the personal status of such persons after its execution shall operate as a revocation of the will, or be a sufficient reason for denying it probate, is unquestioned. "The Civil Code establishes the law of this state upon the subjects to which it relates" (sec. 4); and in order to determine whether a will has been properly executed or revoked, or whether, after its execution, there has been such a change in the status or personal relations of the testator as in law will effect its revocation, we have only to determine whether, in the one case, there has been a compliance with the requirements of the statute, or, in the other case, whether the changed condition of the testator is within the conditions named in the statute. By the common law a married woman had no power to make a will, and the marriage of a woman revoked any will that she had previously made. In this state, however, there is no restriction upon the power of a married woman to make a will, and upon proof of its execution it is entitled to probate, the same as the will of any other person, unless it is shown to have been revoked in one of the modes prescribed by the statute. Section 1292 of the Civil Code declares: "Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than: (1) By a written will or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or, (2) by being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence, and by his direction." And section 1970, Code Civ. Proc., declares: "A written will cannot be revoked or altered otherwise than as provided in the Civil Code." The effect of these provisions is to do away with

the doctrine of implied revocation, which was for so many years a subject of controversy in the English courts, and which, in many of the states of this country, is still permitted, under a clause in their statutes authorizing a revocation to be "implied by law from subsequent changes in the condition or circumstances of the testator."

The respondent does not controvert the effect of these provisions, but contends that, under the provisions of section 1800 of the Civil Code, the subsequent marriage of the testatrix had the effect to revoke her will. That section is as follows: "A will executed by an unmarried woman is revoked by her subsequent marriage, and is not revived by the death of her husband." By its own terms, this section is applicable only to a will "executed by an unmarried woman," and can have no application to the present case, for the reason that at the time of the execution of her will the testatrix was a married woman, whose husband was at that time living. The argument of the respondent that this section controls the present case, for the reason that at the time of her subsequent marriage her will was the will of an unmarried woman, fails to cover all the conditions which the section prescribes as essential to the revocation of a will previously executed. The section does not declare that every will of an unmarried woman shall be revoked by her subsequent marriage, but, by its terms, limits such revocation to "a will executed by an unmarried woman;" and, unless she was unmarried at the time she executed her will, the section has no application. A will is "executed" when it is signed and attested in the manner prescribed by section 1276, and the will in the present case was so executed in 1877, at a time when Mrs. Comassi was a married woman. The code is silent respecting the effect of a subsequent marriage upon a will executed by a married woman; and, as the present will is not within any of the cases named in the chapter on "Wills," it is not excepted from the provisions of section 1292, and could be revoked only in one of the modes therein specified. In many states it has been held that the statutes which enable a married woman to execute a will have taken away the reason for the common-law rule which held that the marriage of a woman revoked a will previously made by her, and that consequently the rule itself is no longer applicable. *Webb v. Jones*, 36 N. J. Eq. 163; *Ward's Will*, 70 Wis. 251; *Roane v. Hollingshead*, 76 Md. 369, 17 L. R. A. 592; *Emery, Appellant (Re Hunt's Will)*, 81 Me. 275. In Ohio it is expressly declared by statute that such marriage shall not revoke her will. In this state the legislature has seen fit to adopt a different policy, but has limited the effect of marriage to a will executed by an unmarried woman. It is as useless to conjecture the motives that may have governed the legislature in singling out an unmarried woman as the only person whose will shall be affected by her subsequent marriage, as it is to conjecture why there should be a difference in the effect of a subsequent marriage upon a will executed by an unmarried man and upon one

executed by an unmarried woman. It has conferred upon each the same ability to make a will after marriage as before, and a woman can, immediately after her marriage, make a will identical with the one made by her before her marriage. The legislature has, however, made these distinctions, and courts have no alternative except to give effect to them. If it had been the purpose of the legislature that the will of any woman should be revoked by her subsequent marriage, it could have readily expressed that purpose in apt words, as has been done by the Wills Act of England (1 Vict. chap. 26), the eighteenth section of which provides that "every will made by a man or woman shall be revoked by his or her marriage." The same provision is found in the statutes of many states in this country. Instead of so doing, however, the legislature of this state has limited this result to a will executed by an unmarried woman, in language which gives no opportunity for construction. To hold that a will executed by a married woman will, upon her subsequent marriage, be attended with the same result as that executed by an unmarried woman, would be to interpolate into the statute words that the legis-

lature has industriously omitted. The provision of section 1800 is the same as section 18 of the Wills Act of 1850 (Stat. 1850, p. 178), and was evidently taken from the revised statutes of New York, and in that state the precise question here presented has been determined in accordance with this opinion. *Re Burton's Will*, 4 Misc. 512. See also, *Re Kaufman's Will*, 181 N. Y. 620, 15 L. R. A. 292.

Section 1298 of the Civil Code has no application. The conditions required by this section are that the testator shall not only have married, but shall also have issue of such marriage, in order to a revocation of his will. The adoption of a stranger in blood is not the issue of the marriage, and cannot be treated as its equivalent. *Davis v. Fogie*, 124 Ind. 41, 7 L. R. A. 435. Section 1299 is, by its terms, limited to a survival of the testator by the "wife," whereas in the present case it is the wife who has died.

The judgment denying probate to the will is reversed.

We concur: **Garoutte, J.; Van Fleet, J.; McFarland, J.**

WEST VIRGINIA SUPREME COURT OF APPEALS.

Henry H. HORN BROOK *et al.*, *Appts.*,

v.

Town of ELM GROVE *et al.*

(.....W. Va.....)

(April 18, 1906.)

*1. A forfeiture of the charter of a municipal corporation cannot be enforced or taken advantage of in any legal proceeding collaterally or incidentally. That forfeiture must be declared in a proper, direct way. The state can only enforce such forfeiture, as it alone has the right to waive or enforce it.

2. The forfeiture of charters of towns for the causes defined in Code, chap. 47, § 44, must be governed by the principles above stated. *Quere*, can such forfeiture be declared by any judicial proceeding?

3. A suit to enjoin the collection of municipal taxes, on the ground that they were illegally imposed by reason of want of authority to impose them from forfeiture of the municipal charter, is not wrongly brought, from the mere fact that the town is sued in its corporate name. So bringing the suit does not admit its continued existence.

*Headnotes by BRANNON, J.

A PPEAL by complainants from a decree of the Circuit Court for Ohio County in favor of defendants in an action brought to enjoin the collection of certain taxes on the ground that the defendant corporation had forfeited its charter and was not entitled to levy them. *Affirmed*.

The facts are stated in the opinion.

Messrs. Erskine & Allison and W. P. Hubbard, for appellants:

The legislature not having power to act specially, and the courts having no power to interfere, the provisions of section 44 must be a dead letter, unless when the fact of failure appears in any proceeding or in any way, it also appears that thereby the charter is forfeited.

The wide distinction between a private corporation and a municipal corporation must be borne in mind.

Greenbrier Lumber Co. v. Ward, 80 W. Va. 43; *Childs v. Hurd*, 33 W. Va. 98.

No case can be found which applies the rule applicable to judicial corporations to the forfeiture of the charter of a municipal cor-

NOTE.—The concession, or rather the contention, that no direct judicial proceeding to forfeit the charter of a municipal corporation will lie is made the basis of argument in favor of a collateral attack on its corporate existence as a remedy by necessity. The decision is an important if not an entirely novel one on this point. The cases referred to in the opinion of the court as holding that the power judicially to declare a forfeiture of a municipal charter exists should be carefully distinguished from cases of forfeiture. The California and Iowa cases cited were not cases of for-

feiture but of ineffectual attempts to become incorporated, and the Illinois case seems to be precisely similar although the facts do not fully appear in the report. The exercise by the court of the power to declare that a municipality had not been created is manifestly a different matter from the declaration of a forfeiture of its franchise. The present case is believed to be fully in accord with accepted doctrine in this country denying judicial power to declare a municipal charter forfeited unless such power is expressly conferred by law.

poration, which is a public instrumentality formed for public purposes and with respect to which there is no question of private right, and the will of the legislature (manifested, with us, by general law) is uncontrolled and supreme.

Meriwether v. Garrett, 102 U. S. 511, 26 L. ed. 204; 1 Black, Pub. Corp. §§ 68, 425, note.

Even in the case of private corporations if the privilege in question is not a grant in the nature of a contract it may be forfeited without a judicial declaration.

Galveston City R. Co. v. Galveston City S. R. Co. 68 Tex. 329; *Atchison Street R. Co. v. Nave*, 88 Kan. 744.

The charter of a municipal corporation cannot be forfeited by judicial action.

1 Black, Pub. Corp. §§ 118, 119; 2 Dill. Mun. Corp. § 896.

The land of an individual may be forfeited for the non-payment of taxes without any inquest.

Leusser v. Washburn, 11 Gratt. 572.

Even as to private corporations the legislature may so express its purpose as to make the charter determine on the happening of some designated contingency and without any judicial proceeding.

Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524; *Re Brooklyn, W. & N. R. Co.* 72 N. Y. 245; *Sturges v. Vanderbilt*, 78 N. Y. 389; *Dane v. Young*, 61 Me. 160.

There are many cases holding that upon such default as is mentioned in the statute, the charter is forfeited without judicial action.

New York, H. & N. R. Co. v. Boston, H. & E. R. Co. 86 Conn. 196; *Com. v. Lykens Water Co.* 110 Pa. 391; *Bywaters v. Paris & G. N. R. Co.* 78 Tex. 624; *Green v. Green*, 84 Ill. 320; *Farnham v. Benedict*, 107 N. Y. 159; *Oakland R. Co. v. Oakland, B. & F. V. R. Co.* 45 Cal. 365, 18 Am. Rep. 181; *United States v. Grundy*, 7 U. S. 8 Cranch, 388, 2 L. ed. 459; *Upham v. Hoeking*, 62 Cal. 251; *Craig v. Grant*, 6 Mich. 447; *Rice v. Ruddiman*, 10 Mich. 125; *Barkley v. Leves Comrs.* 98 U. S. 258, 23 L. ed. 893; *Lea v. Hernandez*, 10 Tex. 187; *People v. Gladwin County Suprs.* 41 Mich. 647.

The fact being admitted that the town of Elm Grove has not kept its roads in repair for more than a year and the legal consequence being the forfeiture of its charter without any judicial proceeding to ascertain that forfeiture, the town and its officers have no legal right to impose the taxes of which plaintiffs complain, and injunction as prayed by the bill in this cause is the proper remedy to prevent the collection of such taxes.

Christie v. Malden, 28 W. Va. 667; *Crim v. Philippi*, 88 W. Va. 122; *Tygart's Valley Bank v. Philippi*, Id. 219.

Mr. Henry M. Russell, for appellees:

Plaintiffs have filed their bill against the town of Elm Grove as a municipal corporation. Even if this were a direct proceeding to forfeit the charter, this method of suing the town was a conclusive admission of the town's existence.

People v. Spring Valley, 129 Ill. 160.

Equity never enforces a penalty or forfeiture.

Craig v. Hukill, 87 W. Va. 520.

These plaintiffs have no such interest in the

matters suggested in this suit as to entitle them to institute a private remedy for the redress of the grievances of which they complain.

24 Am. & Eng. Encyclop. Law, p. 83; *Talbot v. King*, 82 W. Va. 6.

The question arises whether the plaintiffs or the court, or only the town itself, subject to the control of the legislature, is to be the judge when repairs are needed, what repairs should be made what their extent and thoroughness should be, and how much money should be expended upon them.

The town is not required to open or to keep in repair all of its streets.

Chapman v. Milton, 81 W. Va. 384.

Not only will its discretion not be controlled when it fails to go as far as some of its citizens may deem expedient, but it may also use its own judgment in going farther than they may think right, and in making more extensive repairs than they may deem judicious.

Kitchel v. Union County Comrs. 123 Ind. 540; *Swamp Land Dist. No 160 v. Silver*, 98 Cal. 51.

A cause of forfeiture cannot be taken advantage of or enforced against a private corporation collaterally or incidentally.

Greenbrier Lumber Co. v. Ward, 80 W. Va. 48.

It would be inconceivable that the law could be in such a shape that whenever a town should proceed against an offender for the breach of an ordinance, should send its collector to its citizens for taxes, or should bring a suit to enforce a contract, the defendants in the proceedings could institute an inquiry into the condition of the town's roads or streets, and the length of time during which there might have been a failure to repair. If a town cannot collect its taxes because it has forfeited its charter, for the like reason it could not enforce its ordinances.

Norton v. Shelby County, 118 U. S. 444, 80 L. ed. 187.

Judge Cooley, speaking of municipal corporations, says their corporate character cannot be questioned collaterally.

Cooley, Const. Lim. 809, 810; 15 Am. & Eng. Encyclop. Law, p. 964; 1 Beach, Pub. Corp. § 55; *Geneva v. Cole*, 61 Ill. 397; *State v. Westport*, 116 Mo. 582; *People v. Maynard*, 15 Mich. 468; *Baltimore & O. R. Co. v. Marshall County Suprs.* 8 W. Va. 819; *Moore v. Schoppert*, 23 W. Va. 282.

Municipal charters are at all times subject to the will of the legislature, unless there be some constitutional restraint.

Barker Dist. Board of Education v. Valley Dist. Board of Education, 80 W. Va. 430; *Mount Pleasant v. Beckwith*, 100 U. S. 525, 25 L. ed. 701.

The constitution of New Jersey prohibited the passing of local or special laws regulating the internal affairs of towns. Yet the supreme court of that state held that a special law was valid which repealed a city charter.

State v. Steen, 48 N. J. L. 542; *Boyd v. Chambers*, 78 Ky. 140.

Brannon, J., delivered the opinion of the court:

Henry H. Hornbrook and others, for themselves and all other tax-payers of the town

of Elm Grove, filed a bill in equity in the circuit court of Ohio county against that town and its officers, praying that the collection of taxes imposed on them by the town might be enjoined, and an injunction which was granted was afterwards dissolved, and the plaintiffs appeal. The single ground on which the counsel for the plaintiffs in this court seek to rest their case is that the town has for more than one year failed to keep its streets, alleys, walks, and gutters in good repair, and has thereby forfeited its charter, and become extinct, and therefore has no power to impose taxes. This position rests on section 44, chapter 47, Code, reading: "Any city, town or village which shall fail for one year to keep its roads, streets, alleys, sidewalks and gutters in good order and repair, or which shall fail for one year to exercise its corporate powers and privileges, shall thereby forfeit its charter, and all the rights, powers and privileges conferred thereby."

It will be seen at once that this suit is not one having for its purpose to ascertain and declare the fact working the forfeiture of the town's charter, but that it seeks to do this collaterally, and thus make the forfeiture effectual, without any direct judicial declaration of the forfeiture. It is said the very letter of the code above quoted says that, because of certain defaults, the town shall "thereby forfeit its charter" *ipso facto*; that, if that default be found, no matter about the form of proceeding, it paralyzes the acts of the town. It is true that that omission is made by the code a cause of forfeiture; but is that to be inquired into, and, if found, to be enforced, in a purely collateral proceeding? Or must there be some judicial inquiry in a proceeding proper to ascertain and declare the cause of forfeiture? Must there not be a direct judgment of death upon the municipal corporation? The general rule is well established that the corporate existence of a municipal corporation cannot be questioned collaterally. Beach, Pub. Corp. § 55; Cooley, Const. Lim. 254; 15 Am. & Eng. Encyclop. Law, p. 964; 2 Kent, Com. 812. "An incorporated town retains its corporate capacity until its charter is declared forfeited in a direct judicial proceeding. It cannot be held, in any collateral proceeding, to have forfeited its charter by nonuser." *Harris v. Nesbit*, 24 Ala. 898. In an action by a town to collect taxes, it was held that the legal existence of the corporation could not be tested in such action. *Geneva v. Cole*, 61 Ill. 397. Of course, this rule will apply whether the existence of the town depends on invalidity of its charter in the start or subsequent forfeiture. Suppose this were not the rule. Chaos would reign. Whenever the town would proceed to punish one for any offense against its order and peace, or enforce its taxes, or sue to enforce its rights, or take any step under color of its charter, there must be an investigation before every court, high or low, as to whether it had kept its streets, alleys, walks, and gutters in order, and minute inquiries would be made into the sufficiency of their order, and in some instances the mayor or alder-

man, if he thought the streets were not in proper order, would have to abdicate his seat, because of the forfeiture of the town's life. Where would be the end of the confusion? What towns would it afflict? What towns would it not afflict? Is it possible that our legislature has changed this salutary rule by the section of the code quoted? We are under that principle, unless by reason of it. And what is there peculiar in it,—so peculiar as to revolutionize the rule in West Virginia? It merely declares that for nonuser and misuser it shall forfeit its charter. The words "thereby forfeit" in the statute are not unusual in such cases where the purpose is to declare a certain fact a cause of forfeiture, fine, or other legal result. It means only that "by reason of" or "because of" such and such facts the charter shall be forfeited. It is only equivalent to the word "because," in the language, "shall because of such failure forfeit its charter to the state." *Greenbrier Lumber Co. v. Ward*, 80 W. Va. 43. It states the cause of forfeiture, and states that such cause shall of itself work a forfeiture. But why not in this as well as in other instances apply the rule that there must be a direct proceeding to ascertain and adjudge that fact? There is no reason why this instance is out of the general rule, and every reason why it is within it. We must have a clearer expression than is here found of a legislative purpose to specify a cause of forfeiture, and dispense with direct judicial inquiry as to the existence of that fact, and an affirmative judgment of the forfeiture of the charter. We are referred to our statutes forfeiting lands for omission of assessment or nonpayment of taxes as instances of forfeiture by statute, *proprio vigore*, without judicial sentence; but that legislation was declared by the court in *Lexasser v. Washburn*, 11 Gratt. 572, as having a certain public policy "to remedy certain evils for which prompt, summary, and decisive measures were indispensable," as stated in that case. That legislation specified the cause of forfeiture, declared that cause should forfeit the lands, and gave the land at once by legislative grant to certain persons, thus evincing an intent to dispense with any inquest upon the facts producing forfeiture. That decision depended on that particular legislation, which to answer a certain public policy, plainly evinced, for reasons stated in that case, a design to at once forfeit the titles of certain persons, and at once give them to others. No such policy or necessity here exists. There is no analogy of force between legislation to forfeit lands of private individuals for neglect of public duty and legislation forfeiting the very existence and cutting short the functions of public corporations constituting a part of the machinery of governmental administration. Even as to private corporations, our rule is, as it is everywhere, that there must be direct judicial adjudication of the fact causing the forfeiture and of that forfeiture, and I think the reasons for requiring it in the case of towns are tenfold stronger than in cases of private corporations. In *Baltimore & O. R. Co. v. Marshall County Supra.*, 8 W. Va. 323, the court declared the principle that a for-

feiture of a corporate charter must be judicially declared before its forfeiture could be recognized in any court. The charter act provided that, if the road should not be completed by a certain date, "then this act shall be null and void;" thus abrogating the very act giving corporate life,—a stronger case for forfeiture without judicial sentence than this. Could there be a stronger? The court said the question of forfeiture could not be raised except by a proceeding in the name of the state against the company to declare and determine judicially the forfeiture and annul the charter. As regards the language of the act, that was as strong an instance of legislative intent to at once forfeit as this, if not stronger. So in *Greenbrier Lumber Co. v. Ward*, 80 W. Va. 48, it was held that "a cause of forfeiture cannot be taken advantage of or enforced against a private corporation collaterally or incidentally, or in any other manner than by direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer; and the state can alone institute such a proceeding, since it may waive a broken condition of a compact with it as well as an individual can."

But it is said that the reason of such decisions, as to private corporations, is that they are contracts with the state, and can only be forfeited by due process of law, by judicial hearing, as mere laws cannot impair the obligation of contracts. I fail to be impressed that this draws a substantial difference. In both cases the state created or granted the franchise. It is with it to enforce or condone the forfeiture as much in the one as in the other case, contract or no contract. Indeed, it is more necessary to vest this right of enforcement or condonation of the forfeiture in the state in case of a town than in case of private corporations, because a town is a part of the government, delegated as the agent of the state to administer government in its stead in a given locality and in certain respects; and, the powers of government being vested in the state, it ought to be left to it to say whether the interests of the people to be affected will be better promoted by the abolition or continuance of the municipal charter. If the idea is that the power to end the charter being with the legislature, it has in advance provided that in a certain event it shall *ipso facto* instantly cease, it is plain that the theory of contract is not an element of this proposition, and cannot be used as a reason why we should dispense with the rule requiring a direct declaration of forfeiture. As stated above, I do not think the words "thereby forfeited" amount to a legislative forfeiture in advance, without sentence. The statute merely specifies a cause of forfeiture, leaving its ascertainment to be governed by the general law on the subject.

The case of *Oakland R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 865, 18 Am. Rep. 181, is specially called to our attention. It was an injunction to restrain a company from building a railroad because the charter limited its construction to certain time, and provided, in case of failure, the franchise should "utterly cease and be forfeited," and it was

held it was a forfeiture by the act without judicial declaration. Variant decisions, as confusing as an Egyptian labyrinth, can be found in the vast number of decisions in different national and state courts in the endless series of reports. We must select those most persuasive to us. But we must follow our own reports. Shall we leave the cases of *Baltimore & O. R. Co. v. Marshall County Suprs.*, and *Greenbrier Lumber Co. v. Ward*, *supra*, and follow the California case? *Upham v. Hosking*, 62 Cal. 250, followed the case just cited. It was a franchise granted to individuals, not a corporation. The remarks of Marshall, *Ch. J.*, in *United States v. Grundy*, 7 U. S. 3 Cranch, 337, 2 L. ed. 459, that where the forfeiture is by common law nothing vests in the government until some legal step has been taken to assert the right, but a statutory forfeiture is different, were made as to a statute declaring a vessel forfeited if a false oath were taken to procure a register. It was a forfeiture by a private individual of private property, not like the government's solemn grant of incorporation for municipal purposes, or a private corporation. *Per contra* the California case. I may cite the case of *Atchafalaya Bank v. Dawson*, 13 La. 497. The statute enacted that, if a bank suspend specie payment for more than ninety days, "the charter shall be *ipso facto* forfeited and void." Here was a much stronger statutory declaration of forfeiture than in this case. It was held that a cause of forfeiture cannot be taken advantage of or enforced against a corporation incidentally, or in any other mode than by a direct proceeding instituted by the government, because it may waive a broken condition of a contract or charter, as well as an individual, and that it continued to exist as long as the state did not claim the forfeiture. I think this decision supported abundantly by authority almost universal.

But it is argued that no proceeding in any court by quo warranto or other process lies to declare the forfeiture of a municipal corporation, and therefore the section of the code declaring that for certain causes the charter shall be forfeited would be a dead letter, and not enforceable, unless it may be enforced in a collateral way, such as is proposed in this suit. This is not a quo warranto or other such direct proceeding, and we are not called upon to decide whether quo warranto or other judicial process would lie, and it would be perhaps *obiter dictum* to decide it in this case. Speaking for myself, I do not think quo warranto or any other judicial process lies to forfeit the charter of a municipal corporation, and this because it is a part of the government itself, and it lies only with the legislature to take away its charter. Think of a court declaring the charter of the city of New York forfeited. "Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies, and repeated by text-

writers. There is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control." *Meriwether v. Garrett*, 102 U. S. 511, 20 L. ed. 204. So has said this court in *Probasco v. Moundsville*, 11 W. Va. 501, and *Barker Dist. Board of Education v. Valley Dist. Board of Education*, 30 W. Va. 424, 430; 1 Beach, Pub. Corp. § 63. Such a corporation being thus a part of the very government itself, its agent by it constituted to perform certain functions, even legislative functions, which belong exclusively to the legislature as a separate department of the government, if the judiciary can annul the charter, it invades the domain of the lawmaking department by abolishing the agency, and its power to administer government as directed by the legislature, in opposition to its will that such functions shall be administered by its own chosen agent. The very power to constitute the agent is here a legislative prerogative, and that power is nullified by a court, and the powers committed to that agent, confessedly pertaining to the legislature, can no longer be exercised as commanded and deemed wise by the legislature, and its powers to that extent thwarted and crippled. In England the power is exercised by quo warranto and *scire facias*. The charters of London and of the colonies of Massachusetts, Rhode Island, and Connecticut were thus abrogated. Mr. Beach expresses the opinion, as also Judge Dillon, that the judiciary cannot here exercise this power, since these corporations being purely public corporations, composed of citizens, formed only for local government by the legislative department, to give the judiciary the power of dissolution would make it co-ordinate with the legislative power in control of local government and local legislation, and the power over municipal corporations vested in the legislature is limited only by the constitution, and in it the legislature can have no rival, and neither the judiciary nor the executive can create or destroy a municipality, which is but a subdivision of the state government. Dill. Mun. Corp. §§ 112, 168, 720, 896; Beach, Pub. Corp. §§ 118, 119. There are cases, however, holding that the power to declare a forfeiture exists. *People v. Riverside*, 66 Cal. 288; *State v. Independent School Dist. of Carbondale*, 29 Iowa, 264; *Dodge v. People*, 118 Ill. 491.

But grant that there is no judicial process directly to declare the forfeiture. Does that compel us to say that it can be enforced judicially in collateral proceedings? By no means; but the legitimate, logical conclusion therefrom would be that, as there is no direct, there can be no indirect, process; that, if you cannot accomplish the result directly, you cannot collaterally. It is enough for us to say that, in the indirect way proposed in this suit, the power of taxation essential to the exercise of the powers of a town, and which is lawful unless the corporation is defunct, cannot be denied. But there is a remedy, and in my judgment the only remedy, and that is with the legislature. It gave; it alone can take away. It is with it, as it ought to be, to say whether the public interest in-

volved will be better promoted by looking over the misuser of the corporate powers, and trusting for better things from the present or another set of officers, or to blot out the municipality. The fact that our Constitution in article 6, section 39, provides that the legislature shall not pass local or special laws incorporating cities, towns, or villages, or amending the charter of any city, town, or village containing a population of less than 2,000, but it shall provide by general law for those cases, does not take away that power residing in that body to repeal or declare forfeited a charter of a town. The legislature can do anything not prohibited. The object of the provision was to prevent multitudinous special acts creating or amending municipal charters consuming the time of the legislature; but this limits only the power to create or amend charters, and it does not prohibit the repeal of a charter by special act, or anything trenching on the power of the legislature over municipal corporations existing. See *State v. Steen*, 43 N. J. L. 542. Were this a proceeding directly assaulting the corporation, I should say private individuals could not maintain it, but only the state. There would be more reason for confining this power to the state's election than in cases of private corporations. It ought not to lie with individuals, from mere personal interest, caprice, or impulse of prejudice, to make suggestions of misuser, and make the existence of towns the football of litigation. Cooley, Const. Lim. 254.

Counsel for appellees suggests that this suit is wrongly brought against the town, and should be only against its officers, and that in suing the town its continued existence is admitted. *People v. Spring Valley*, 129 Ill. 169, supports this contention. But reputable authorities cited in it say that there is a distinction between private and municipal corporations in this respect, and that an information against a municipal corporation by its corporate name, even where its corporate existence is challenged, is rightly brought as a corporation *de facto*, though not *de jure*. *State v. Bradford*, 32 Vt. 50; *People v. Riverside*, 66 Cal. 288. In the latter case other California cases are cited justifying that rule. In *State v. Brown*, 81 N. J. L. 355, an action to have it adjudged that a corporation was never legally constituted, it was held that the proceeding must be one that will bring the corporation itself directly before the court. It occurs to me that, even in a proceeding to directly test the existence of a corporation, it ought to be a party by its assumed corporate name, as its existence as such is the very thing to be tried,—its right to live and act in that name,—and that its lawful existence is not admitted simply by impleading it in that name, when the pleading denies it. If so, a suit like this to enjoin taxes assessed in the name of a corporation is more properly brought against it as a party, and it does not estop the plaintiff from contesting its validity, so far as this objection goes.

For reasons stated above, the decree is affirmed.

TENNESSEE SUPREME COURT.

W. S. NUNNELLY
v.
SOUTHERN IRON CO. *et al.*

(24 Tenn. 397.)

1. A license cannot operate as an estoppel against the licensor in favor of a grantee of the licensee because an estoppel must be mutual.
2. The privilege to discharge water from ore washers into a stream given without words of grant by a lower proprietor to an iron company as long as it "may wish to run or have run" said washers, with an agreement to accept a certain sum as the full amount of damages done by such water, is a license not an easement and does not extend to the grantees of such iron company.
3. An instrument creating an easement is within the operation of the statute of frauds.
4. The president and general manager of a corporation are personally liable for damages caused to a riparian proprietor by the long-continued discharge of muddy water into a stream from ore washers operated by the company with their sanction and their knowledge of the damage caused thereby.

(February 9, 1896.)

CROSS-WRITS of error to the Circuit Court for Hickman County to review a judgment granting plaintiff a part of the relief demanded in an action brought to enjoin

NOTE.—*Personal liability of officers of a corporation for its torts or negligence.*

- I. In general.
- II. Fraud.
- III. Conversion.
- IV. Trespass.
- V. Infringement.
 - a. Of patent.
 - b. Of trade-mark.
 - c. Of copyright.
- VI. Injury to persons generally.
- VII. Injury to property.
- VIII. Libel.
- IX. Negligence.

I. In general.

One of the least developed branches of the law of corporations is that respecting the personal liability of officers and directors of a company for its wrongful or negligent acts. Most treatises on the subject of corporations are almost if not entirely barren on this subject; nevertheless in a considerable number of cases the question in some of its phases has been presented and the general tendency is to support the doctrine of the court in the above case of *NUNNELLY v. SOUTHERN IRON CO.*, as well as in *Mayer v. Thompson-Hutchison Bldg. Co.* post, 483, in holding that managing officers of the corporation may be personally liable in addition to the liability of the corporation itself, for wrongful corporate acts done under their direction.

Where an ordinance makes it unlawful for any person or firm as well as for any corporation to engage in certain occupations or classes of business without procuring a license and paying a tax, it would seem clear that a person could not escape liability for violating the ordinance by

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defendants from fouling a certain stream of water which ran through plaintiff's property. *Reversed in part; affirmed in part.*

The facts are stated in the opinion.

Messrs. Pitts & Meeks, for plaintiff.

Defendants J. C. and Percy Warner are liable as joint tortfeasors, with defendant companies.

Mechem, Agency, § 182; 1 *Morawetz, Priv. Corp.* § 569; *Thompson, Liability of Officers*, pp. 351-355; 1 *Sutherland, Damages*, §§ 140-142, and *notes*; *Wood, Nuisances*, §§ 824, 834; *Rains v. McNairy*, 4 *Humph.* 356, 40 *Am. Dec.* 651; *Perminster v. Kelly*, 8 *Ala.* 716, 54 *Am. Dec.* 177.

The lease contract of L. H. Nunnally to L. S. Goodrich of 1880 does not license injuries complained of.

Wood, Nuisances, § 358.

The license of L. H. Nunnally to Warner Iron Company, of February 19, 1894, is unavailable to defendants, because: (1) it was personal between the parties, and was revoked by the death of Nunnally, in 1885; (2) as a contract, being unilateral, it was not enforceable for want of mutuality; (3) it is not pleaded as a contract, but as a mere written permission, which it is.

The contract of July, 1887, between W. S. Nunnally and Warner Iron Company, is not available to Warner Iron Company, as to damages on the river (which alone were recovered), nor to Southern Iron Company, assignee, for any purpose, because—

claiming to act on behalf of a corporation. Such is the decision in *Wyandotte v. Corrigan*, 35 *Kan.* 21, in which the court says: "It is immaterial whether the appellant was acting for himself or for the company."

In the absence of any express provisions of statutes or ordinances on the subject, the liability of an officer or director of a corporation for any wrongful act of the corporation itself may be fairly said to depend on their personal participation therein. This will sufficiently appear in the cases following.

One who was a director and the president of a corporation was held personally liable, in *Chenango Bridge Co. v. Paige*, 38 *N. Y.* 178, 38 *Am. Rep.* 407, for the wrongful use by the company of its bridge as a toll bridge, whereby business was improperly diverted from another bridge. In this case he actively participated in the wrongful acts of the corporation.

But the president of a corporation who was not shown to have advised or approved of its wrongful use of a street for a private railroad of a corporation was held not personally liable therefor. *Fanning v. Osborne*, 123 *N. Y.* 441.

The same distinction clearly appears in the other cases, which follow under the various sub-heads.

II. Fraud.

In respect to the liability of directors of a corporation for fraud against persons of the corporation or its members, to the injury of strangers to the company, the cases agree that the official character of the director or officer is not enough to make him liable without some personal connection with or participation in the fraud. Thus in *Arthur v. Griswold*, 55 *N. Y.* 400, it is said: "The

1. As to Warner Iron Company, it was shown by this company, that it was not intended to apply to the river, and the final clause was added for the purpose of expressing that intention, without which plaintiff would not have signed it; and this clause does so expressly provide.

2. It shows upon its face that it was only intended to apply between the immediate parties, and to exist only so long as the Warner Iron Company, should wish to run or have run the washers; and that company was neither running nor having run the washers after its sale to the Southern Iron Company in December, 1889.

3. As to Southern Iron Company, assignee of Warner Iron Company, it was not available because it was a mere license, personal between the parties, and did not pass to the assignee of the licensee.

1 Washb. Real Prop. *398, 399; Cooley, Torts, *804; 8 Kent, Com. *452; Tiedeman, Real Prop. § 651; 1 Hilliard, Torts, 8d ed. § 30, p. 169; *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Ricker v. Kelly*, 1 Me. 117, 10 Am. Dec. 40; *Emerson v. Fisk*, 6 Me. 200, 19 Am. Dec. 206; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Jackson v. Babcock*, 4 Johns 419.

A license made under seal provided it be a mere license is as revocable as a license by parol.

1 Washb. Real Prop. *399; *Wood v. Leadbitter*, 13 Mees. & W. 845.

Where one gives to another authority to en-

ter upon his lands to do a certain act or succession of acts, without at the same time granting to him any interest in the land itself, this is a license, whether given by parol or in writing.

Cooley, Torts, *804; 1 Washb. Real Prop. *398; 8 Kent, Com. *452; Tiedeman, Real Prop. § 651.

A license is generally so much a matter of personal trust and confidence that it does not extend to any one but the licensee.

1 Washb. Real Prop. *399; Tiedeman, Real Prop. § 651; Cooley, Torts, *804; 1 Hilliard, Torts, 8d ed. § 30, p. 169; 8 Kent, Com. *453, and notes.

A lease is no protection to a lessee creating a nuisance unless it expressly authorizes the doing of the act in the manner in which it is done.

Wood, Nuisances, § 358.

Measars, W. P. Clark, Steger, Washington & Jackson, and Jacob Leech for defendants.

Hatcher, Special Judge, delivered the opinion of the court:

The plaintiff, W. S. Nunnally, sued the defendants, the Southern Iron Company, the Warner Iron Company, J. C. Warner, and Percy Warner, in the circuit court of Hickman county, for \$5,000, as damages alleged to have resulted to the plaintiff by reason of certain nuisances alleged to have been maintained by the defendants. The declaration, and as amended, contains three several counts. In the first it is alleged that the defendants, for several years prior to the bringing of this

mere fact of being a director and stockholder is not *per se* sufficient to hold a party liable for the frauds and misrepresentations of the active managers of the corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged."

So in *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551, it is held that a director is not chargeable with fraud on account of misrepresentations in published reports and statements of the company, merely because he was a director, unless he knew of the falsehood or intended to deceive.

And false statements in a publication, made by brokers employed by the directors of a corporation to place debentures, do not make a director liable, if he was not aware of the falsehood. *Weir v. Bell*, L. R. 3 Exch. Div. 238, affirming *Weir v. Bennett*, L. R. 3 Exch. Div. 32.

But for knowingly false statements in such a case they are liable. *Edginton v. Fitzmaurice*, 53 L. T. N. S. 399, 22 Cent. L. J. 61.

The liability of officers and directors for their own false statements or other fraud is so clearly within the general principles that make persons liable for their own wrongs that no attempt will be made here to follow out that line of cases. The matter here considered is the liability of officers and directors of a corporation, by virtue of their official relations alone, for the torts or negligence of the corporation as distinguished from their own personal torts or negligence. In numerous cases their personal liability for their own frauds has been enforced.

Thus the liability to a stockholder of the vice-president and cashier of a corporation for fraud and collusion which they practiced upon him is not defeated by their official character. *Hempfling v. Burr*, 60 Mich. 294.

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This is the doctrine of all this class of cases. The liability is the same as if no official relation existed.

III. Conversion.

Bank directors sued for conversion of a special deposit by officers of the bank who sold the deposit with the knowledge of the directors, were held liable for conversion to the owner of such special deposit, in *United Soc. of Shakers v. Underwood*, 9 Bush, 609, 15 Am. Rep. 731. The court said, "Having notice it was their duty, and they had full power in the premises to prevent the sale," but it was further considered that the directors had ratified the transaction by appropriating the proceeds of the sale.

IV. Trespass.

The fact that a person is president of an incorporate irrigation company does not relieve him from liability for damage to land caused by ditches which he, as president, has ordered to be dug for the company across such land. *Bates v. Van Pelt*, 1 Tex. Civ. App. 185.

But in *Bath v. Caton*, 37 Mich. 199, it was held that the managing agent of a corporation is not necessarily liable for trespass on land in the course of business by a servant or agent whom he hired and who is under his control. This decision, strictly considered with reference to the case in hand, is not in conflict with the other authorities; but the court in its opinion said that to apply against the agent the doctrine of *respondet superior* "would imply that the company could not be held liable," and this reasoning can hardly be regarded as sound in the light of the other authorities on this subject. It may be said to be the doctrine of almost all the cases, that both officer and corporation may be liable for a wrongful act of the corporation provided the officer participated therein.

suit, and at the time thereof, were operating, just east of and near to the premises of plaintiff, an establishment for mining iron ores, which are cleansed by means of certain machines, into which large quantities of water were conveyed through pipes from mill creek; that the clay and dirt thus separated from the ores were carried off with the water in an artificial stream through the premises of plaintiff, near by and past his residence, storehouse, and springs, into Piney river, and thence on through said premises, polluting the waters of the river and of the springs, depositing large quantities of barren clay and mud in the bed of the river, filling up the fords thereof so as to render them impassable during the seasons of high water, preventing the customers of plaintiff from coming to his mercantile store, and thus damaging his trade; that when said river overflows its banks this sterile dirt and clay are carried out and distributed over the alluvial lands of the plaintiff adjacent to the river, lessening its productiveness, and otherwise injuring it; that the cattle of plaintiff were killed by getting mired up in this sticky deposit, and that the fish in said stream were destroyed by means of the flow of said waste matter therein, etc. The second count seeks to recover for alleged damages resulting from defendants' operating alcohol works on Birds' creek, near to and east of the farm of plaintiff, which creek flows across the southern end of said farm into Piney river, and from the waste materials and noxious odors from these alcohol works being discharged

into said creek, and thence into Piney river, polluting these streams as well as his spring. The third count seeks to recover for an alleged nuisance of a similar kind, situated on Mill creek, which flows into Piney river north of and above the farm of plaintiff, into which creek, as it is alleged, are discharged similar waste products and foul odors from alcohol works on Mill creek, which floats these noxious materials and odors into Piney river, through the premises of plaintiff; it being averred that these alleged odors and waste products corrupted the waters of Piney river, destroyed the fish therein, and ruined plaintiff's spring. To the declaration the defendants jointly filed four pleas,—the first being the general issue; the second was one of accord and satisfaction as of July 30, 1887; and the third of an accord and satisfaction as of February 25, 1887, by the Standard Charcoal Company, which, it was averred, operated as an easement, and that this easement was assigned by the Standard Charcoal Company to the Warner Iron Company. The fourth plea sets up an estoppel by virtue of a certain written instrument executed by the plaintiff on the 30th of July, 1887, the tenor of which will be noticed hereafter. Issue was joined upon the first, second, and third pleas, but the fourth plea was demurred to by the plaintiff for the reasons which will be discussed later on. His honor, the circuit judge, sustained this demurrer, and ordered this fourth plea to be stricken out. The Warner Company and the Southern Iron Company each filed an additional separate plea.

As another ground of the decision, held that if the manager was merely negligent the remedy could not be trespass *quare clausum*, which was the form of remedy attempted in that case.

V. Infringement.

a. Of patent.

It may be regarded as fairly established by the decisions that officers of a corporation may, under some circumstances, be personally liable either in law or equity for participation in the infringement of a patent by the corporation. Yet one decision was expressly to the contrary.

In *United Nickel Co. v. Worthington*, 18 Fed. Rep. 882, it declared that an action at law cannot be maintained against the directors, shareholders, or workmen of a corporation which infringes a patented improvement. The court says it was conceded, but not really decided, in *Lightner v. Brooks*, 3 Cliff. 287, and *Lightner v. Kimball*, 1 Low. Dec. 311, that a director might be liable in such a case, if he had acted affirmatively; but declares that on further examination, it thinks the law is not so.

But this decision is of doubtful authority in view of the numerous cases to the contrary. In *National Car-Brake Shoe Co. v. Terre Haute Car & Mfg. Co.*, 19 Fed. Rep. 514, an action in trespass on the case was sustained against officers of a car company together with the corporation itself, for infringement of a patent on car-brakes; and the court said: "A man cannot retreat behind a corporation and escape liability for a tort in which he actively participated."

In *Lightner v. Brooks*, *supra*, action for infringement was brought against the chairman of the board of directors of a corporation, who in his official capacity had signed a contract to procure the manufacture of cars for the company, but the action failed on the ground that he did not authorize

any infringement of any patent and the court did not discuss the question whether or not he would be liable if he had authorized the infringement.

In *Lightner v. Kimball*, *supra*, the general manager of a transit company was held not liable for infringement by the use of axle-boxes on cars, in which shipments were made. The court said: "His defense is not that he is the servant of the transit company in doing the work, but that he is a stranger to the wrong done."

But in *Goodyear & N. E. Car Spring Co. v. Phelps*, 3 Blatchf. 81, an injunction was ordered against the infringement of a patent by directors, who had the management and superintendence of the business of a corporation and under whose direction the infringing articles were manufactured and sold.

So the president of a corporation has been held personally liable to account for the profits of an infringement of a patent by the corporation on proof that he was the sole owner of its capital stock. *Smith v. Standard Laundry Mach. Co.* 19 Fed. Rep. 826; *Lewis v. Standard Laundry Mach. Co.* 21 Blatchf. 184.

Although the president was not served with a subpoena in the case, having personally answered the bill, he was held in *Smith v. Standard Laundry Mach. Co.*, *supra*, to be thereby properly in court as a defendant. The court said that the pretext of doing business in the name of the corporation was too flimsy to shield him from an accounting for profits and he was also charged with the profits of infringement in business carried in his individual name while the corporation was subject to an injunction.

It is also declared in *St. Louis Stamping Co. v. Quimby*, 18 Pat. Off. Gas. 571, 5 Bann. & Ard. 275, that persons cannot escape individual liability for infringement in the manufacture of articles by

That of the Warner Company avers that L. H. Nunnally, plaintiff's ancestor, in December, 1880, leased to one Goodrich, for a period of sixteen years, the ore banks described in the declaration, for the purpose both of mining and of washing ores, and that on the 19th day of February, 1884, said L. H. Nunnally signed a written permission to flow mud, water, and dirt through his lands in question; that Goodrich conveyed this lease to the Warner Iron Company before this suit; that since the execution of said lease plaintiff inherited said premises by the death of said L. H. Nunnally, and that on July 30, 1887, plaintiff, by written instrument, gave to the Warner Company the right to flow muddy water from the washing of said ores, which written instrument, it is averred, was to be in full satisfaction of all damages complained of in the declaration. The additional or fifth plea of the Southern Iron Company alleges that on December 26, 1889, G. M. Fogg and others, as trustees of the Warner Iron Company, sold to the Southern Iron Company all of its property, franchises, easements, licenses, and contract rights in Hickman county, among which was the written agreement referred to in the foregoing plea of the Warner Iron Company, and that this contract was executed as full satisfaction of the injuries complained of. There was replication to these two pleas, and issues thereon.

The cause was heard by the circuit judge without the intervention of a jury, and, after examination of plaintiff as a witness had be-

gun, and more than sixteen months after the filing of the first four pleas, counsel for defendants presented a sworn plea of the statute of limitations of three years, and in an affidavit assigned his reasons for not sooner presenting said plea. Upon objection from plaintiff's counsel, the circuit judge declined to permit this plea to be filed, because no sufficient excuse was given for the delay, to which action of his honor defendants' counsel excepted. The record discloses the following undisputed facts: The plaintiff is the owner of a valuable farm of about 1,800 acres in Hickman county, which he cultivates, and on which he has a mercantile store, and through which farm flow three streams,—Piney river, Tanyard branch, and Birds' creek. Piney river flows through the entire width of this farm from north to south; Tanyard branch and Birds' creek are both tributary to Piney river from the east, and flow through a portion of this farm,—the former through the northern, or upper, and the latter through the southern, or lower, part thereof. On the farm, and near these streams, are several valuable springs of clear, pure water. Plaintiff and his sister jointly inherited this farm upon the death of their father, L. H. Nunnally, and plaintiff bought his sister's interest therein. In 1880, L. H. Nunnally, plaintiff's father, leased to one Goodrich fifty acres of this farm, lying on the east margin thereof, and near to Tanyard branch, for the purpose of mining iron ore and other minerals therefrom, with the exclusive right of so doing for a period of six-

forming a corporation, the business of which is to manufacture articles which necessarily infringe a patent.

Where the vice-president of a corporation on its behalf had executed an agreement to furnish, let, and rent certain infringing machines, the court held that he was a proper party defendant to the suit for the purpose of a perpetual injunction against his further participation in furnishing the machines, but that his liability for any part of the profits derived from the use of the machines would depend on the testimony which would be taken on a reference as to the accounting. *Nichols v. Pearce*, 7 Blatchf. 8.

An injunction was held to be properly awarded against the managing officers of a corporation as well as against the corporation itself, in order to prevent an infringement of a patent in the case of *Iowa Barb Steel Wire Co. v. Southern Barbed-Wire Co.*, 30 Fed. Rep. 123, although the court said it might be proper to confine an accounting to the company if the officers had profited from the infringement only in the shape of dividends on their stock.

The president of a corporation and the general supervisor of a department in which an infringing device was used, as well as a foreman, were all held liable for an infringement known and assented to by them, in the case of *Cahoone Barnett Mfg. Co. v. Rubber & Celluloid Harness Co.*, 45 Fed. Rep. 682. The court said: "The infringing acts are, indeed, the acts of the defendant corporation; but as well are they the acts of individual defendants by whose authority, direction, and assistance the corporation are enabled to and did infringe." In this case an injunction granted against the officers and corporation was dissolved on the merits on the ground that there was no infringement of any valid patent.

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The fact that defendants were connected as between themselves in a corporation is also declared in *Poppenhusen v. Falke*, 4 Blatchf. 495, to be insufficient to exempt them from the restraints of an injunction.

Directors of a defendant corporation were held to be properly joined as parties defendant with the corporation in a bill in equity for an injunction against infringement, in the case of *Armstrong v. Savannah Soap Works*, 53 Fed. Rep. 124, in which the court reviewed other authorities as to joining directors with the corporation where they were joined for the purpose of discovery only. But that is a matter not included in this note.

Even if a corporation infringing a patent is beyond the reach of the jurisdiction of the court relief may be granted against its officers, agents, and stockholders to the extent of suppressing the infringement by an injunction. *Edison Electric Light Co. v. Packard Electric Co.* 61 Fed. Rep. 1002.

The court said: "A wrong is being committed daily to the complainants in this jurisdiction by at least two defendants, who are infringers, who are served with process, and who are now before the court. This court, in my judgment, has the right and power to restrain that wrong, no matter in what character or representative capacity it is done. The refusal to grant relief would work great and irreparable injury to the complainants. The allowance of the injunction will stop the wrongful acts, and the wrongdoers cannot complain because it deals with them as individuals when they are in fact agents and stockholders."

On a bill for a preliminary injunction against the infringement of a patent it was held in *Consolidated Safety Valve Co. v. Ashton Valve Co.*, 26 Fed. Rep. 319, that a demurrer by officers of a corporation with which they were joined as defend-

teen years. This lease was signed by the plaintiff also, and was duly registered. The consideration for the lease was that the lessor was to receive one tenth of the ores and minerals taken from the land, or the cost of mining and delivering the same at the shaft in shipping condition. Goodrich transferred this lease to the Warner Iron Company, who began mining operations about 1882 or 1883. The Warner Iron Company owned lands adjoining this fifty acre tract thus leased from plaintiff's father, and most of the iron ore mined came from about ten acres of this land belonging to said company. At first the ores were separated from the clay and dirt by screens and sieves, and these waste materials were not carried off; but about 1884 the Warner Iron Company laid pipes, by means of which water was conveyed from Mill creek to these mines, a distance of about 1½ miles. Washing machines were then put up on the lands of the Warner Iron Company, into which the ores were placed, and then separated from the dirt and clay by the water from said pipes. This water, after thus washing the ores, was discharged, with the mud and clay, into Tanyard branch, from whence it flowed, through plaintiff's premises, into Piney river, and on down the river through said premises. Tanyard branch is the only natural outlet by which this muddy water and waste materials can be flowed from these mines at Nunnelly ore banks. The muddy water, dirt, and clay which were carried from the washing machines caused heavy deposits of mud and sticky clay to

settle in the beds of the branch and river, and in seasons of high water, when the streams overflowed their banks, this mud and clay were washed out over upon the adjacent alluvial land of plaintiff, and deposited thereon, as well as upon the road leading through his farm, by means of which road some of his customers usually came to his store to trade. Plaintiff's stock frequently mired up in this sticky deposit on his lands, and some of said stock were thus lost, though the value thereof is not shown. Some of this muddy water and waste matter inundated his springs. After the Warner Iron Company had thus operated its washing machines from five to seven years, said company erected dams across the hollow near said machines, which dams intercepted the mud and clay washed from the ores, and thus permitted only clear water to flow through plaintiff's premises. As long as these dams were kept in good repair, no injury was caused from the washing of the ores. The Warner Iron Company owned and operated certain alcohol works on Mill creek for the manufacture of wood alcohol. Mill creek flows into Piney river about two miles north of and above said farm of plaintiff. The waste matter and disagreeable odors from these alcohol works were discharged into Mill creek, which carried them into Piney river, and through said farm, impregnating the waters of the river and spring of plaintiff with said odors and waste products. In 1881 the Standard Charcoal Company (not sued herein) erected similar alcohol works on Birds' creek just east

ants must be overruled, and the court said, "It is clear that they are proper parties to the bill."

A bill for an injunction and accounting charging that the defendant corporation and its president while knowing complainant's rights under the patent have willfully and intentionally infringed, is held to be sufficient against demurrer to show actual infringement by the president and that the fact that he is shown to be an officer of the corporation does not require any different or more specific words to be used to charge him than if he were not such officer. *Cleveland Forge & Bolt Co. v. United States Rolling-Stock Co.* 41 Fed. Rep. 478.

The carrying on steamers belonging to a corporation of cotton ties, which infringed a patent, for shippers unknown to the patentee and whose names the officers of the steamship company refused to disclose, being held to be an infringement by the carrier, it was held in *American Cotton Tie Supply Co. v. McCreedy*, 17 Blatchf. 221, that officers of the steamship company could be restrained by injunction from aiding the infringement by such transportation. The court said: "It would seem on principle that there ought to be no difficulty in restraining by injunction all persons, whether officers of the corporation or not, who are aiding in the promotion of the infringing sale and use, whether such persons would be liable for profits or damages, or not."

But in a few cases an injunction against officers of a corporation has been denied. This seems to have been done chiefly on the ground that the injunction against them as individuals was unnecessary and that it would be unjust to subject them unnecessarily to personal liability for the costs of an injunction when they had not infringed the patent except by carrying on corporate business.

Thus it is held in the absence of evidence that a defendant corporation in a bill for infringement

of a patent is insolvent, or that a decree against it will not fully protect the complainant so far as that object can be obtained by the suit, or that an officer of the company has violated any rights of the complainant and an injunction against the company would bind him, the bill as to him should be dismissed. *Boston Woven Hose Co. v. Star Rubber Co.* 40 Fed. Rep. 167.

So where it is not proved, in a bill for infringement of a patent brought against a corporation and its officers, that the corporation is insolvent or that the officers as individuals have violated any rights under the patent, or that they have themselves reaped any profits from the infringement by the corporation, and all the acts charged against them have been done in carrying on the business of the company for the benefit of the corporation and its stockholders, and no reason appears why a decree either for an accounting or for an injunction should be rendered against them as individuals, or why a decree against the corporation alone will not fully protect the rights of the complainants, the court may dismiss the bill as to such officers and refuse any decree against them either for an injunction or an accounting. *Howard v. St. Paul Plow Works*, 35 Fed. Rep. 743.

Again where a defendant corporation charged with infringement in a suit for injunction and accounting was doing business within the jurisdiction and could be served with process, and it does not appear that it is insolvent, or that there is any obstacle in the way of obtaining full relief against it, its managers and controllers cannot be ordered to account as individuals, neither should an injunction be granted against them, at least after they have ceased to be the officers or agents of the company and are not shown to have an intention to infringe. *Mergenthaler Linotype Co. v. Ridder*, 65 Fed. Rep. 853.

of and above plaintiff's farm, from which works similar waste products and odors were discharged into said creek, which floated them along the creek and into Piney river, and through plaintiff's farm, and impregnated these streams and a spring on said farm with said odors and waste matter. In the latter part of 1888, the Standard Charcoal Company sold these last-named alcohol works to the Warner Iron Company, which latter company operated them until December, 1889, at which time the Warner Iron Company conveyed all of its property, franchises, licenses, easements, etc., in Hickman county to G. M. Fogg *et al.*, trustees, which trustees sold the same, in January, 1890, to the Southern Iron Company. There is considerable conflict in the proof as to the effect of the waste matter and deposits upon the waters of the streams and springs, and upon the fertility of the soil, and whether the fish in the streams were or were not driven therefrom by the discharge from the ore washers and alcohol works; and in fact there was conflict in the proof as to nearly every element of alleged damage. His honor, the circuit judge, after hearing the evidence, rendered judgment in favor of plaintiff and against the two

defendant corporations, as follows: That the Warner Iron Company, by reason of the flow of the refuse and offensive matter down Bird's creek and into plaintiff's spring, drinking and stock water, is liable to him in the sum of \$100, and in the further sum of \$500 as damages caused to plaintiff by the deposit of red mud upon his bottom lands. His honor further adjudged that the Southern Iron Company was liable to plaintiff in the sum of \$1,000 as damages resulting from the deposit of mud from the washers upon plaintiff's bottom lands and in the fords of the creek. He held that the proof failed to show that J. C. and Percy Warner were active participants in the nuisances in such a manner as to render them personally liable, and he therefore dismissed the suit as to them. He further held that the various written instruments pleaded and relied on by defendants as defenses to this suit were mere licenses, which could afford no protection to the transferees thereof, but expired at the several dates of their respective transfers. The plaintiff and defendants both appealed in error, and both parties have assigned errors. Passing by the probably improper joinder of the two defendant corporations for torts which the proof

And an injunction against one who was the president as well as a director of a foreign corporation on account of an infringement of a patent by the corporation in another state was denied, where he was the only director or officer before the court, while there were several others and it did not appear that he could control or direct the disuse of the infringing apparatus. *Jones v. Osgood*, 6 Blatchf. 435.

The president of a corporation was held not to be subject to punishment personally for the violation of an injunction against infringement of a patent although he ordered the acts which constituted the infringement to be done, where the court found that he did not intend to have the injunction violated. *McCauley v. White Sewing Mach. Co.* 9 Fed. Rep. 608.

A suit in equity by an inventor to establish title to an invention for which patents had been obtained by another in fraud of his rights and had been transferred to a corporation, is held in *Ambler v. Choteau*, 107 U. S. 586, 27 L. ed. 322, to be improperly brought against a part only of the stockholders and directors of such corporation. The court said that if an account of profits and an injunction were wanted the suit should be against the corporation in its corporate capacity. This is clearly distinguishable from a suit for infringement as the corporation had the title to the patent and the suit was in effect to establish a trust.

The case of *Kane v. Huggins Cracker & Candy Co.*, 44 Fed. Rep. 237, has been sometimes cited on this question but it did not strictly involve the right to grant an injunction against an officer of a corporation but did involve the question of an injunction against one who had been president of a corporation which had sold out its business, and who was retained as an employé by a different corporation.

A motion to amend a bill for infringement of a patent by individuals who were directors of an unincorporated association, so as to charge them as president, secretary, and directors thereof, was denied in *Tyler v. Galloway*, 13 Fed. Rep. 477, as it was unnecessary if intended to aid the suit against them as individuals and could not be allowed to change the suit into one against the association as a whole. But this case is clearly distinct from 38 L. R. A.

those respecting corporate officers, since the association was in reality a partnership.

b. Of trade-mark.

An injunction against the infringement of a trade-mark by an individual defendant and a corporation alleged to be "mainly belonging to him," is sustained, but without discussing the question of individual liability, in *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. Rep. 205.

So where individuals are alleged to be substantially a corporation and to be using it as a means of infringing a trade-mark, they may be joined with it in a suit for the infringement. *California Fig Syrup Co. v. Improved Fig Syrup Co.* 51 Fed. Rep. 296.

c. Of copyright.

The president and general manager of a corporation cannot in equity be held personally liable as sole defendant for infringement of a copyright by the corporation. *Stewart v. Smith*, 68 Fed. Rep. 189.

The court says it would be contrary to the well-settled rules of equity to hold this defendant alone personally liable for such wrongful acts merely because he was an officer of said corporation. See generally as to patent cases *supra*.

VI. Injury to persons generally.

The president of a railroad corporation is not personally liable for transmitting orders from the company to an agent in accordance with which the agent wrongfully ejects a person from a depot of the company, although it is said that he would be liable, if the order was that of the president personally. *Hewett v. Swift*, 3 Allen, 420.

The president of an omnibus line, who ordered a driver to exclude colored persons, was held individually liable to a suit for damages on account of such exclusion. *Peck v. Cooper*, 113 Ill. 122, 54 Am. Rep. 231.

An action for false imprisonment against the president of a corporation failed in *Rives v. Wood*, 12 Ky. L. Rep. 691, because there was probable cause for the action complained of, but the court did not discuss the question as to the personal liability of the officer in such case if there had been no probable cause.

disclosed to be separate and independent of each other, such supposed misjoinder not being raised by counsel, we pass to the consideration of the questions raised by the pleadings and the assignments of error.

The verdict of the circuit judge is abundantly sustained by the evidence in so far as the amount of damages awarded is concerned; and under the rule of this court the judgment will not be disturbed, unless there be some error in the record. The filing of the plea of the statute of limitations by defendants was in the sound discretion of the circuit judge, and the record fails to show that this discretion was improperly exercised. It was therefore not error to refuse to permit this plea to be filed.

The plaintiff was permitted to testify, over objection of defendants' counsel, as to his estimate of the value of the fishing privilege to his farm. Even if this were error, it was entirely harmless, for the reason that the damage to the fishing privilege formed no part of the recovery against defendants.

To the question, urged with so much earnestness and ability by counsel for defendants, that there was an easement of necessity to flow these waste materials from the mining

products, growing out of the original lease, and out of the fact that Tanyard branch was the only natural outlet by which these waste materials could be flowed from the mines, it is sufficient to say that neither the pleadings nor the assignment of errors raise this question. Besides, it is in proof, and undisputed, that when the lease was executed, and for a year or two thereafter, the dirt and waste materials were not separated from the ores by the washing or hydraulic process, but by means of screens and sieves; and the waste was then left on the grounds. His honor might therefore have been warranted in the conclusion that the parties did not contemplate the necessity of flowing these waste materials through the premises in question at the time the lease was executed.

Counsel for defendants insist also in argument upon an equitable estoppel, created, as they insist, by the conduct of plaintiff and his ancestor in encouraging a large expenditure of money in the erection of the plant and laying of pipes to convey water with which to wash the ores. But, as before stated, there is evidence, undisputed, tending to show that the parties did not contemplate, at the time of the lease, that the ores would be

VII. Injury to employé.

An officer of a corporation engaged in the manufacture of firewood, who was its general manager, was held jointly liable with the corporation for his own act in putting a workman at a defective and dangerous machine. *Greenberg v. Whitcomb Lumber Co. (Wis.) post, 439.*

The court holds that this was misfeasance and not merely nonfeasance on the part of such management, and distinguishes the cases which deny the liability of an agent or servant to third persons for his mere nonfeasance, although it speaks of the doctrine of those cases as well settled. See *Mayer v. Thompson-Hutchison Bldg. Co. (Ala.) post, 433, and note*, on the question of an agent's or servant's liability to third persons for mere nonfeasance or negligence.

VIII. Libel.

The liability of members of a corporation which publishes a newspaper for a libel published therein does not grow out of the fact that they are stockholders or members of a corporation, but springs from their active agency in producing or circulating the libel. Therefore it is not enough to show that defendants are stockholders and officers of such corporation unless they aided, assisted, or advised its publication or circulation. *Belo v. Fuller, 64 Tex. 450.*

The officer of a corporation publishing a newspaper, who has the general management of the paper, is liable for the publication of a libel therein, although the mere fact of being an officer of the company will not make him liable. *Nevin v. Speckemann, 34 Alb. L. J. 55.*

The secretary and treasurer of a joint stock association printing a newspaper, although he owns a majority of its stock and has a kind of supervision of articles published therein, but no controlling influence in the matter, is not liable for the publication of a libel therein, without any participation on his part. *Mecabe v. Jones, 10 Daly, 222.*

So the directors of a company publishing a newspaper were held on a prosecution not to be liable for the publication of a libel of which they knew nothing, if they did not sell or deliver the paper. *Reg. v. Judd, 37 Week. Rep. 143.*

The criminal liability of directors of a corpora-

tion for acts done by them on behalf of the company is a subject which will be considered in a separate note. As an instance of such liability in case of a nuisance, see *People v. Detroit White Lead Works, 9 L. R. A. 722, 32 Mich. 471.*

IX. Negligence.

The personal liability of officers or directors of a corporation for mere negligence resulting in injury to third persons is a question almost without precedent.

But there ought to be no more exemption from liability for personal negligence by reason of acting in a representative capacity than there is for active or aggressive personal torts.

Such a liability of an officer to an injured employé of a corporation is sustained in the case of *Greenberg v. Whitcomb Lumber Co. (Wis.) post, 439*, on the ground that it amounted to a misfeasance and not merely a nonfeasance. The court seems to regard mere nonfeasance insufficient to make an agent liable to third persons; but as to this, see *Mayer v. Thompson-Hutchison Bldg. Co. (Ala.) post, 433, and note.*

In the Alabama case just mentioned the court squarely decides that an officer of a corporation is personally liable for a third person injured by his negligence and this is the reasonable doctrine.

It seems to be assumed in *Thorburn v. Smith (Wash.) 39 Pac. Rep. 124*, that liability would exist if fault were shown. Therefore the accidental shooting, of a person during an affray between striking miners on the one hand and new employes and guards under control of a deputy sheriff on the other hand, the officers of the mining company carrying on the business were held not to be liable where they had done all they reasonably could to prevent any such outbreak.

An attempt was made to hold them liable also on the ground that they had recklessly furnished arms to the new workmen, but this was disproved.

In *Jenne v. Sutton, 43 N. J. L. 257, 39 Am. Rep. 578*, it was held that the fact that a person was acting in his official capacity as the president of a corporation when participating in making a display of fireworks in a public street does not prevent him from being personally liable for injuries thereby caused.

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separated from the dirt and clay by means of water, which would have to flow through said natural outlet; nor is there any proof whatever that plaintiff or his ancestor ever encouraged, directly or indirectly, the investment of money in providing means by which to cleanse the ores by the washing or hydraulic process. Nor, indeed, do either the pleadings or the assignment of errors rely upon such an equitable estoppel.

This brings us to the remaining and vital questions involved in this law suit: (1) Were the several written instruments pleaded and relied on by defendants mere licenses, personal to the licensees, and not assignable, but revoked or expired when transferred by the licensees? Or did they create such essential and permanent rights as to be in the nature of easements running with the realty, and assignable so as to operate as a protection to the assignees thereof? (2) Did the several instruments offered in evidence sustain the pleas of accord and satisfaction? (3) Are J. C. and Percy Warner liable in this action?

The distinction between an easement and a license is often so metaphysical, subtle, and shadowy as to elude analysis. As said by the vice-chancellor in *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 254: "The adjudications upon this subject are numerous and discordant. Taken in their aggregate, they cannot be reconciled; and, if an attempt should be made to arrange them into harmonious groups, some of them would be found to be so eccentric in their application of legal principles, as well as in their logical deductions, as to be impossible of classification." But there are certain fundamental principles underlying most of the cases which enable courts to distinguish an easement from a license, when construed—as all instruments must be—in the light of surrounding circumstances. Mr. Washburn defines a license as "an authority to do a particular act or series of acts upon another's land, without possessing any estate therein." He defines an easement as follows: "An easement implies an interest in the land which can only be created by writing, or constructively its equivalent,—prescription. A license may be created by parol. . . .

It matters not whether the license be oral or in writing, in respect to its being parol, if the paper giving it have no requisites of a grant. 1 Washb. Real Prop. p. 629 (398). Again, he says: "So long as a license is executory, it may be revoked at the pleasure of the licensee." To the same effect are Washb. Easem. p. 6; *De Haro v. United States*, 72 U. S. 5 Wall. 599, 18 L. ed. 681; 3 Kent, Com. *458; Gould, Waters, §§ 323, 328; 1 Warvelle, Vendors, pp. 48, 44; 1 Sugden, Vendors, p. 177. The discussion of licenses, in a large number of the cases and authorities, grows out of licenses created by parol. Some of them hold such licenses to be revocable, even when a consideration is paid therefor; otherwise, it is said, they would defeat the operation of the statute of frauds. See *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60; *Prince v. Case*, 10 Conn. 875, 27 Am. Dec. 675; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287. But there are 38 L. R. A.

other cases which hold that even parol licenses without consideration are not revocable when executed, and some of these authorities go to the extent of holding that such executed licenses are assignable. All of such authorities as hold such licenses irrevocable and assignable treat them as in the nature of equitable estoppels. See the extensive notes to *Rerick v. Kern*, 2 Am. Lead. Cas. Hare & W's notes, p. 546, where the subject is exhaustively treated. It is universal, however, both upon principle and authority, that, it requires words of grant to create an easement or a permanent interest in realty. And it is equally obvious that in construing instruments of all kinds the object of the court should be to ascertain the purpose and meaning of the parties thereto.

With the above definitions and principles in view, let us examine the written instruments relied upon by defendants to defeat this action. All of them were properly acknowledged, and duly registered. The first is the one executed July 30, 1887, by the plaintiff alone, and is relied upon in defendants' fourth plea as an estoppel, and it is copied in full in the plea. It recites that for the sum of \$500, "I, W. S. Nunnally have bargained and agreed, and do hereby bind myself, to allow the Warner Iron Company to pass the muddy water from their washers at Nunnally ore banks by and through my farm and premises, as long as said Warner Iron Co. may wish to run or have run said washers. I further agree and bind myself to accept \$500 as full amount of damages done or that may hereafter be done, except in the case of a large spring at lower end of said Nunnally's farm should be damaged by the settlings of and mud from said washers, then said Warner Iron Company agree and bind themselves to remedy such damages by building a stone or brick wall so as to protect said spring from the settlings of mud from the washers. It is further agreed by the Warner Iron Company that if any of Nunnally's stock should get mired in the mud settlings on the river or sloughs passing through Nunnally's farm, and should be a loss to him, then the Warner Iron Company is to be responsible for such loss. It is fully agreed and understood that the above \$500 is for damages to the branch that passes my farm, and not for damage done in the river, except the above-named damage." This plea was demurred to because the instrument relied on was insufficient as an estoppel because it shows upon its face that it applies to the damages in the branch, and not to Piney river, and does not protect the assignees or the other defendants. The court sustained this demurrer, and, we think, properly. The instrument contains no words of grant, and by the express terms thereof it is limited to the Warner Iron Company only so long as said company shall run or have run the washers in question; so that, by the very terms of the instrument, the license would terminate whenever the Warner Iron Company placed it beyond its power to further operate these washers, or to have them operated. Nor could this instrument operate as an estoppel. It is a cardinal principle of the law of es-

toppels that they must be mutual to be effective for any purpose. 2 Herman, Estoppel, §§ 798, 889. At section 772 it is said: "The rule requiring reciprocity in cases of estoppel necessarily requires that a lease shall be by indenture, and not by deed poll; for both the lessor and lessee must be bound, or neither." See also the cases cited in 2 Milliken, Dig. 1848. Nor do we think that the damages which were paid for, as recited in this instrument, covered or referred to those sued for in the declaration, and therefore did not operate as an accord and satisfaction thereof, as relied upon in the third and fifth pleas. Counsel for defendants earnestly insist that this instrument created an easement. In this view we cannot concur. An easement is an interest in land,—an incorporeal interest, it is true, but an interest, nevertheless,—and is within the operation of the statute of frauds. 8 King, Dig. 2d ed. § 27, p. 1848, and cases cited. There is no description whatever in this instrument of any realty; not even the state or county of its location is given, no metes or bounds or limits.

The next instrument relied upon by defendants to defeat this action is also one set up in the fifth plea of the Warner Iron Company, to wit, the one executed by L. H. Nunnelly on February 19, 1884. This instrument was signed by L. H. Nunnelly alone, and stipulated that for certain considerations the Warner Iron Company was to have a water way for flowing off the mud, etc., through Nunnelly's lands, and provides for arriving at the measure of any damage to his land by arbitration. This instrument is called in the fifth plea "a written permission to flow muddy water and dirt" through Nunnelly's land; yet by a fair construction of the whole plea, it sufficiently relies upon this instrument as conferring an easement to the Warner Iron Company to flow the muddy water and dirt through Nunnelly's farm. But it is ineffectual as a bar to this suit for several reasons. As a conveyance of an easement in realty, it contains no description whatever of the land upon which the easement is to be fastened; as an agreement to submit to arbitration the measure of damages, it is not sufficient, for the reason that it does not bind the Warner Iron Company, nor was it relied upon in the pleadings for this latter purpose: We are of opinion that the instrument of February 25, 1887, executed by W. S. Nunnelly to the Standard Charcoal Company, is sufficient to create an easement. It locates the realty as being in Hickman county, Tenn., adjacent to the works of the Standard Charcoal Company. It identifies the easement granted by limiting it to the channel of Birds' creek. It contains express words of grant, and grants the easement; "for all future time," and is supported by a valuable consideration. This instrument was relied on in the third plea as an accord and satisfaction, and also as an easement passing by transfer from the Standard Charcoal Company to the Southern Iron Company, and is, we think, a sufficient bar to any recovery for the injuries resulting from the alcohol works on Birds' creek, and which

injuries the circuit judge found to amount to \$100.

The circuit judge held that defendants J. C. and Percy Warner were not active personal participants in the nuisances, so as to make them personally liable. The only proof in the record as to the connection of these defendants with the wrongs complained of is to be found in the testimony of plaintiff and J. B. Thompson, a witness called by plaintiff. Plaintiff testified that J. C. Warner was president of the Warner Iron Company, and also of the Southern Iron Company for a short while after the latter company had purchased the properties of the former company. Mr. Thompson also testified that J. C. Warner was the president of the Warner Iron Company; and the plaintiff understood that J. C. Warner was a director, and one of the largest stockholders, of the Southern Iron Company. He testified that Percy Warner was the general manager of both companies; that he was frequently at the washer plant at Nunnelly ore banks, and took an active part in the operation of said washer. He further testified that both J. C. and Percy Warner—father and son—knew these works were going on, and that he, the plaintiff, frequently talked with both of them about these works, and urged them to put in the dams, before they were in fact put in, and offered to give, without charge, the privilege of erecting them across the hollow on his land, if they would put them in, and stop the flow of mud onto his farm. It was also in proof, as already shown, that these washers were operated from five to seven years before any dams were built, and that the dams, when built and in repair, prevented the mud and waste products from flowing down upon plaintiff's farm. J. B. Thompson, on cross-examination, says: "The Warners only acted as officers. I never knew them to do anything as individuals."

When a person enters into a contract with a corporation, through its agents or officers, fairly and in good faith, there can, under no circumstances, any liability attach to such agents or officers in respect to the contract, unless so stipulated. In such a case the person gets just what he bargained for,—a liability against or a contract with a corporation alone. But the torts or wrongs of corporations through its agents or officers are governed by an entirely different principle of law. If the agent of a corporation or of an individual commits a tort, the agent is clearly liable for the same; and it matters not what liability may attach to the principal for the tort, the agent must respond in damages if called upon to do so. This principle is absolutely without exception, is founded upon the soundest legal analogies, and the wisest public policy. It is sanctioned by both reason and justice, and commends itself to every enlightened conscience. To permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others, and then shield himself from liability behind his vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and ir-

responsible corporations. It would serve to stimulate the zeal of responsible and solvent agents of irresponsible and insolvent corporations in their efforts to repair the shattered fortunes of their failing principals upon the ruins of the rights of others. Says Mr. Morawetz: "The agents of a corporation are clearly liable for their tortious acts. They are therefore liable for any injury to the property of others, . . . and the liability is entirely independent of any liability which the company may have incurred." 1 Morawetz, Priv. Corp. § 569. To the same effect is 1 Waterman on Corporations, p. 415, where it is said: "The directors of a gas company were held liable for a nuisance created by the superintendent and engineer under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which the directors had no reason to suppose had been discontinued." In Wood on Nuisances (sec. 824) it is said: "If the nuisance complained of is created by a corporation the corporation, and such of its officers as have the direction and control of its business, as well as its agents or servants who contributed to the nuisance, may be jointly sued or indicted therefor." It will be seen that this author predicates the liability of the officers who have the direction and control of its business upon the presumption alone that such officers know of and sanction the nuisance, whereas the liability of the inferior agents or servants is founded upon their participation in the acts creating the nuisance. See also 1 Beach, Priv. Corp. § 266; Thompson, Liability of Officers, pp. 351-355; Mechem, Agency, § 182; *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 221. The proof is uncontra-

dicted that J. C. and Percy Warner, the president and general manager of these defendant companies, knew of the operation of these works. One of them took an active part in the operation of the washer at Nunnely's. Plaintiff talked to these gentlemen frequently about the matter, and urged them to put in dams to protect his property from the flow of these noxious deposits. In examining the question of the liability of J. C. and Percy Warner, we do not find a case of a single and isolated act of negligence or misfeasance. The rights of this plaintiff were continuously ignored for years. We cannot doubt from the proof in this record that both these gentlemen knew for a long time that the operation of these works was continually causing injury to plaintiff's property, and that for years they permitted this injury to go on without any effort to provide means to avoid it. It is true, Mr. Thompson says they acted only as officers, and not as individuals. This was but the mere statement of a legal conclusion, and, even if it were literally true, it would not serve to protect them from liability for torts committed by them as such officers.

The court is therefore of opinion that there is no evidence in the record to sustain the finding of his honor, the circuit judge, in favor of the defendants J. C. and Percy Warner. The court therefore holds that these gentlemen are liable to the plaintiff, jointly with the Warner Iron Company, for the sum of \$500 in respect to the damages awarded by his honor, the circuit judge, against the Warner Iron Company, for the deposit of mud upon plaintiff's bottom lands; and that they are liable jointly with the Southern Iron Company, in the sum of \$1,000 in respect to the damages awarded against the Southern Iron Company.

MICHIGAN SUPREME COURT.

S. H. SEAMANS, Receiver of Wisconsin
Mutual Fire Insurance Co., *Plff. in Err.*,

v.

TEMPLE CO.

(.....Mich.....)

1. A contract of insurance made through the mails by a corporation of another state will not sustain an action against the insured for an assessment where the company has not obtained the right to do business in the state and the statute prohibits insurance by unauthorized companies upon property in the state, since the contract is in contravention of the policy of the state even if it evades the statute.

NOTE.—For a Wisconsin decision to similar effect, see *Rose v. Kimberly & Co.*, 27 L. R. A. 566. But that statutes against business by foreign companies do not apply to contracts made by mail with a company outside the state, see *note to Cone Export & Commission Co. v. Poole* (S. C.) 24 L. R. A. 280, beginning on this point at p. 295; also *Seamans v. Knapp, Stout & Co. Co.* (Wis.) 27 L. R. A. 362, 28 L. R. A.

2. The doctrine of state comity will not be applied in behalf of a corporation seeking to recover upon a claim on a contract expressly prohibited by law, or which is clearly at variance with the settled policy of the state.

(May 21, 1896.)

ERROR to the Circuit Court for Muskegon County to review a judgment in favor of defendant in an action brought to recover an assessment upon a policy of fire insurance issued by a foreign corporation having no authority to do business within the state. *Affirmed.*

The facts are stated in the opinion.

Mr. George E. Sutherland, with *Messrs. Turner, Turner & Turner*, for plaintiff in error:

Whether or not the Wisconsin Mutual Fire Insurance Company had obtained license to do business in Michigan, its policies issued to residents of Michigan upon property located in Michigan were valid.

Leonard v. Washburn, 100 Mass. 251; *Hart-*

ford Live Stock Ins. Co. v. Matthews, 103 Mass. 921; *Clark v. Middleton*, 19 Mo. 58; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67; *Connecticut River Mut. F. Ins. Co. v. Whipple*, 61 N. H. 61; *Connecticut River Mut. F. Ins. Co. v. Way*, 62 N. H. 622; *Elhrman v. Union Ins. Co.* 9 Ins. L. J. 847; *Watertown F. Ins. Co. v. Simons*, 96 Pa. 520; *American Ins. Co. v. Wellman*, 69 Ind. 418; *Behler v. German Mut. F. Ins. Co.* 68 Ind. 347; *Atlantic Mut. F. Ins. Co. v. Concklin*, 6 Gray, 73; *Provincial Ins. Co. v. Lapeley*, 15 Gray, 262; *Ganser v. Firemen's Fund Ins. Co.* 34 Minn. 372.

The policy being valid, the insurance company has a right to recover the consideration for such insurance, and the statute which provides a penalty for doing business without license may be enforced, but does not prevent recovery by the insurance company.

Union Mut. L. Ins. Co. v. McMillen, *supra*; *Lamb v. Bowser*, 7 Biss. 372; *Whitcomb v. Insurance Co.* 7 Ins. L. J. 937; *Provincial Ins. Co. v. Lapeley*, *Connecticut River Mut. F. Ins. Co. v. Whipple*, *Connecticut River Mut. F. Ins. Co. v. Way*, *Clark v. Middleton* and *Columbus Ins. Co. v. Walsh*, *supra*.

But our contention is that both are valid under the laws of Wisconsin, and the note sued upon is a Wisconsin contract, which the courts of this state will enforce under the application of the principle of comity.

Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co. 31 Mich. 346; *Voorheis v. People's Mut. Ben. Soc. of Elkhart*, Ind. 91 Mich. 469; *New Orleans v. Virginia Fire & Marine Ins. Co.* 33 La. Ann. 10; *Thornton v. Western Reserve Farmers Ins. Co.* 31 Pa. 529; *Columbus Ins. Co. v. Walsh*, *supra*; *Columbia F. Ins. Co. v. Kinyon*, 37 N. J. L. 39; *Marden v. Hotel Owners Ins. Co.* 85 Iowa, 584; *Lamb v. Bowser*, *supra*; *Huntley v. Merrill*, 32 Barb. 626; *Hyde v. Goodnow*, 3 N. Y. 266; *Western v. Genesee Mut. Ins. Co.* 12 N. Y. 258; *Provincial Ins. Co. v. Lapeley*, *Connecticut River Mut. F. Ins. Co. v. Way*, *Connecticut River Mut. F. Ins. Co. v. Whipple*, *Clark v. Middleton* and *Whitcomb v. Insurance Co.* *supra*; *Criswell v. Riley*, 5 Ind. App. 503.

Where a resident of Michigan goes abroad for insurance and in his written application expressly stipulates that the secretary of the company at the home office may complete his application and note, and the application is completed and accepted at the home office and the policy issued at the home office, it becomes a contract of the foreign state and not a contract of the state of Michigan.

Columbia F. Ins. Co. v. Kinyon, *supra*.

The contract sued upon was a Wisconsin contract, to be construed according to the Wisconsin law, and being valid under the laws of Wisconsin, was valid everywhere.

Seamans v. Knapp, Stout & Co. Co. 37 L. R. A. 363, 89 Wis. 171; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Greenwood v. Curtis*, 6 Mass. 358, 4 Am. Dec. 145; *M'Intyre v. Parks*, 3 Met. 207; *Tanner v. Clark*, 13 Ky. L. Rep. 922; *First Nat. Bank of Chicago v. Dean*, 44 N. Y. S. R. 208; *Harrison v. Baldwin*, 5 Ohio C. Ct. Rep. 310; *Fonseca v. Cunnard S. S. Co.* 12 L. R. A. 340, 153 Mass. 553; *Story*, Conf. L. § 242 *et seq.*; *Cooley*, Const. 28 L. R. A.

Lim. 286; *Cox v. United States*, 31 U. S. 6 Pet. 203, 3 L. ed. 370; *Hyde v. Goodnow*, 3 N. Y. 269.

Messrs. Bunker & Carpenter, for defendant in error:

The receiver, standing in the shoes of the defunct corporation, cannot bring an action which that corporation could not bring, and the Wisconsin Mutual Fire Insurance Company, being a foreign corporation and not having complied with the laws of this state so as to entitle it to do business in this state, was therefore not entitled to maintain this action on this contract.

American Ins. Co. v. Stoy, 41 Mich. 385; *Stamm v. Northwestern Mut. Ben. Assn.* 65 Mich. 317; *Chapman v. Colby Bros.* 47 Mich. 46; *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485; *Seamans v. Zimmerman* (Iowa) 59 N. W. Rep. 290.

Hooker, J., delivered the opinion of the court:

The plaintiff is receiver of a mutual fire insurance company, organized and doing business at Milwaukee, under a statute of Wisconsin which authorizes such companies to do business in that state and elsewhere. This company has never complied with the statutes of Michigan by filing the prescribed statement and obtaining the requisite authority to do business here. How. Anno. Stat. § 4331 *et seq.* It appears, however, that it has done business in most, if not all, of the states, their laws to the contrary notwithstanding; and, although its officers testify that it has had no agents, it is shown that prospective risks have been examined by persons called "inspectors," who ordinarily carried applications, and, as stated by a witness for the plaintiff, "filled them out whenever he and the applicant could agree upon the question of taking insurance;" and "that he had authority to take applications to submit to the office." The witness was asked if the company had any other agents than the inspectors, to which he answered: "They were not agents. They merely examined risks, suggested improvements, filled out and submitted applications, and recommended the application, if favorable, for us to write." The application and premium notes being signed by the applicant and received at the home office in Wisconsin, a policy would be forwarded by mail, and assessments would be demanded and paid in the same way. That such inspectors were agents of the company, within the statute cited, is plain, and the whole scheme is a flagrant attempt to evade the provisions of the laws of the several states which are intended to restrict the insurance business. The testimony in this case shows that the defendant company succeeded a partnership named Ames & Frost, and that insurance upon the property now owned by the defendant was obtained in the method described. The record fails to show (or, if it does, we have overlooked it) whether the defendant's policy was given by way of renewal at the expiration of the Ames & Frost policy or upon a transfer of the business to the defendant. Perhaps it is not important. For some reason a new policy was issued, the

application and so-called "note" being filled out at the plaintiff's office in Milwaukee, and sent to defendant by mail, who signed and returned the same by mail. It does not appear that any inspector took part in this particular transaction. A receiver, being appointed in Wisconsin, took charge of the affairs of the insurance company, and made an assessment upon the members, and this action is brought for such assessment. Counsel for plaintiff contends that the insurance company has not done business in this state, but that the contract is one made in Wisconsin, to be performed there, and that it is therefore valid, and, that being so, the plaintiff may sue and recover upon it in the courts of this state under the rule of comity between states. This rule applies to corporations as well as to natural persons. How. Anno. Stat., § 8135. But the right of a foreign corporation to sue in our courts is limited—First, by statute (sec. 8136), and, second, by the general rule that the doctrine of state comity will not be applied in behalf of a corporation seeking to recover upon a claim or contract expressly prohibited by law, or one which is clearly at variance with the settled policy of the state. *Thompson v. Waters*, 25 Mich. 214, 13 Am. Rep. 248; *American & Foreign Christian Union v. Yount*, 101 U. S. 356, 25 L. ed. 890. It is the policy of this state to limit the business of insurance to such corporations, domestic and foreign, as shall be authorized by the commissioner of insurance to do business, after compliance with certain regulations and conditions prescribed by law; and all fire insurance companies are expressly forbidden to transact any business of insurance within this state without the requisite authority. How. Anno. Stat., § 4277, applies to domestic corporations, and prescribes what shall be "their authority to commence business and issue policies." How. Anno. Stat., § 4331, applies to foreign corporations, and provides: "That it shall not be lawful for any person or persons to act within this state, as agent or otherwise, in prosecuting or receiving applications for insurance or in any manner to aid in transacting the business of fire or marine insurance for any company, . . . not incorporated in this state, without first procuring a certificate of authority," etc. The section also provides: "And no insurance company, or officer, or agent or agents of any insurance company, unincorporated or incorporated in any other state, shall transact any business or insurance in this state, unless. . . . And upon the filing . . . it shall be the duty of the insurance commissioner to issue a certificate thereof with authority to transact business," etc. How. Anno. Stat., § 4354, contains a still more pointed prohibition as to foreign companies, declaring it "unlawful for any person . . .

33 L. R. A.

in any capacity to transact or aid in any manner, directly or indirectly, in transacting or soliciting within this state business for any insurance company . . . or in any capacity to procure or assist to procure a fire or marine policy on property situated within this state" without procuring the certificate of authority before provided for. Subsequent sections provide a penalty, and a method of enforcing it. Section 4359 imposes a penalty of \$250 upon any company which shall issue or permit to be issued upon any property in this state a policy of insurance without having the authority to do so, and provides that no such company shall thereafter be authorized to do business in this state until all such penalties shall be paid.

If it be conceded that the contract was made in Wisconsin, and that the premiums and loss, if any, are payable there, it is as much in contravention of the policy of this state as though it had been made and was to be performed here. It cannot be supposed that the statutes cited were intended merely to prevent the act of making the contract in this state. The object is to protect the citizens of this state against irresponsible companies, and to prevent insurance by unauthorized companies upon property in this state. *American Ins. Co. v. Stoy*, 41 Mich. 401; *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 501. The argument of counsel for plaintiff is substantially this: "We know that the laws of Michigan are designed to prevent our insuring Michigan property, but we have done so in a way that does not contravene the letter of the Michigan statute. We have made our contract through the mail, and we have committed no violation of the Michigan statute, because we have done nothing upon Michigan soil. We have evaded your law, and obtained a contract which you have sought to prohibit, and now we ask you to enforce it for us under the doctrine of state comity." Under such circumstances the courts of the state are not open to the offending company, and the rule of state comity cannot be invoked in its behalf. See *Thompson v. Waters* and *American & Foreign Christian Union v. Yount*, *supra*.

Again, the statute (sec. 8136) has application. These statutes prohibit all insurance companies, domestic as well as foreign, from issuing policies upon property in this state without express authority. This was an act "forbidden to be done by any corporation [domestic or foreign] without express authority by law," and no action can be maintained upon any contract arising out of it. *Seamans v. Zimmerman* (Iowa) 59 N. W. Rep. 290, and cases cited.

The judgment of the Circuit Court will be affirmed.

The other Justices concur.

ALABAMA SUPREME COURT.

Albert MAYER, by Next Friend,
v.
THOMPSON - HUTCHISON BUILDING
CO.

(.....Ala.....)

1. **An employe or laborer on a building** who either negligently or intentionally pushes a brick from the top of the completed wall which he had no business to touch, although it is done before the workmen have left the top of the building, is not acting within the scope of his employment so as to make the master liable for resulting injury.
2. **A servant or agent is liable** for a negligent omission or nonfeasance causing injury to a third person where he would be liable if acting as principal.
3. **The manager of a corporation in charge of its work in constructing a building is personally liable** for negligent failure to erect a scaffold which was needed to protect persons near the walls.
4. **Custom cannot excuse a failure to make a scaffold** or other safeguard on the side of a brick wall which is being built within a few feet of the entrance to a schoolhouse then in use.

NOTE.—*Liability of an agent or servant to third persons for his own negligence or non-feasance.*

I. To people generally.

- a. *Dicta.*
- b. *Decisions against liability.*
- c. *Liability sustained.*

II. To fellow servants.

III. Joint liability of master and servant.

As to liability of officers of corporation for negligence and torts, see *note* to *Nunually v. Southern Iron Co.* (Tenn.) *ante*, 421.

I. To people generally.

a. *Dicta.*

There are many incorrect, or at least very misleading, *dicta* to the effect that non-feasance of a servant causing injury to third persons is not generally a ground for an action in their favor against the servant. Such a *dictum* is made in *Murray v. Usher*, 117 N. Y. 542, but the question was not decided because it had not been properly raised in the case.

So in *Colvin v. Holbrook*, 2 N. Y. 139 (which was a case against a deputy sheriff for money in his hands), it is said superfluously and erroneously that "it is also settled if anything can be established by authority that an agent is not liable to third persons for any omissions or neglect of duty in the matter of his agency, but that the principal is alone responsible." These are samples of many others, yet with all deference to the judges who wrote them it must be declared by any one who fully examines the subject that these statements are not the law of the subject. Still more plainly wrong is the test of Wharton on Agency, § 533, where he says: "By Anglo-American law a servant who by negligence in the discharge of his duties injures a third person is not personally liable to such person." Story on Agency, § 308; Dunlap's Paley's Agency, 304, and Evans on Agency, 385,—use somewhat similar language and are the intermediate source of the erroneous *dicta* by the courts.

Fully realizing the responsibility of declaring all these *dicta* of judges and writers to be wrong, we

5. Failure to construct a scaffold is not the proximate cause of injury caused by a brick intentionally or heedlessly pushed from the top of a wall after its completion although before the workmen had left the top of the building.

(November 27, 1894.)

CROSS APPEALS from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence; the defendant appealing from so much of the judgment as went against it, and plaintiff appealing from so much as refused to hold the officers of defendant personally liable. *Reversed on both appeals.*

The Thompson-Hutchison Building Company had contracted to erect a brick schoolhouse on public property. A frame structure occupying the site was moved back so that the space between the two buildings was seven feet two inches. A fence was erected between them and the entrance to the wooden building was on the side nearest to the brick one. Plaintiff was twelve years old and attended the school. While the pupils were standing in line preparatory to entering the old building,

regard that fact as fully demonstrated by a full review of the actual decisions on the subject.

Following back the trail of these *dicta*, they can all be traced to a *dictum* in a dissenting opinion in *Lane v. Cotton*, 12 Mod. 488, 1 Ld. Raym. 845. That case was one in which the actual decision was that the postmaster general was not liable for the loss of a letter delivered to a post-office clerk. The question of a servant's liability for his own negligence was therefore not in the case. Yet in a dissenting opinion it is said that "a servant or deputy *quatenus* such cannot be charged for neglect," and as authority for this is cited, *Stone v. Cartwright*, 6 T. R. 411, which, again, was not the case of an attempt to hold a servant or agent liable for his own negligence, but to hold a superintendent or manager of a mine liable for the negligence of a workman employed by him.

On the strength of these cases and others which do not at all establish the doctrine, Story on Agency, § 308, makes the statement that an agent is not generally liable to third persons for his own non-feasance or omissions of duty in the course of his employment. The same *dicta* are the source of similar statements in Dunlap's Paley's Agency, 304; Evans on Agency, 385; and in some other text-books, but have not misled Mr. Mechem in his admirable work on that subject. These *dicta* and text-book statements based upon them have had the pernicious effect of confusing the subject, because they do not distinguish between the direct liability of an agent or servant to third persons for breach of his own duty toward them, and an indirect liability to them for breach of duty to his own employer, and fail to recognize or indicate the fact that an agent or servant may owe duties to third persons at the same time that he owes service to his employer, and that the common duty to regard the rights of our fellowmen is none the less binding upon a person because he happens to be at the time an agent or servant.

An analysis of all the cases on the subject shows that in almost every instance negligence of an agent or servant has been held to make him liable

a cry came from the top of the new structure and several bricks fell from the top of the wall. One struck plaintiff on the head inflicting the injuries for which suit was brought. At the time the bricks fell it appeared that the wall at that place had been finished and the only persons near it were the masons who were gathering their tools together to go to another part of the building.

Further facts appear in the opinion.

Messrs. Ward & John for plaintiff.

Messrs. Hewitt, Walker & Porter for defendant, Thompson-Hutchison Building Co.

Coleman, J., delivered the opinion of the court:

The Thompson-Hutchison Building Company, a corporation, contracted to erect a brick building in the city of Birmingham. Thompson, a corporator, and president of the corporation, as its agent and officer, controlled and directed the workmen in its construction. A brick, either without the application of force, or by force, fell from the top of the wall, which, in falling, struck the plaintiff below on the head, and greatly injured him. Thompson was not present when the injury occurred, and was not otherwise liable than as an agent or officer of the company in charge. The first count of the complaint charges that the defendants "did erect and build a certain building . . . in so careless, negligent, and improper manner that by reason thereof certain brick fell from

said building," etc. In the second count it is charged that the defendants "did erect and build a certain four-story brick building, . . . to the height of sixty feet, without any scaffold, barrier, and safeguard, to protect persons . . . from brick falling from said building, when it was their duty to do so," etc. The corporation and Thompson and the other corporators were jointly sued. The jury, under the instruction of the court, returned a verdict against the corporation, and in favor of Thompson. This statement of the case we deem sufficient to bring up the material questions involved.

The first we will consider is, conceding that the facts tend to show negligence and a liability on the part of the contractor corporation, as averred in the complaint, is one who acts merely as an agent of the corporation, though he may be also in fact an officer of the corporation, in superintending and controlling the erection of the building for the contractor, jointly liable with the contractor in an action on the case for such negligence? If the proof had shown that the injury resulted from culpable negligence in the construction of the wall, the agent in control, by whose orders it was thus constructed, would be guilty of misfeasance, and jointly liable with the contractor. We think all the authorities are to this effect. The court instructed the jury to find the issue in favor of the defendant Thompson. We will first consider the correctness of this charge, as applied to the first count. All the wit-

to a third person injured thereby, provided he would have been liable if acting on his own behalf under circumstances otherwise unchanged. The difficulty seems to vanish almost if not entirely when the test of the liability of an agent or servant to third persons on account of his non-feasance or negligence is taken to be his non-performance of a duty toward them. Where such duty and neglect thereof appear it seems utterly unreasonable to say that the negligent person shall not be liable merely because he was the agent or servant of some other person to whom he might also be liable. To say that liability for failure to perform a duty toward a person who is injured in consequence shall not exist because the guilty person is in the same transaction also guilty of a breach of another and a distinct duty to a different person, is to state a proposition condemned by the analogies of the law as well as by reason.

The doctrine asserted in *MAYER v. THOMPSON-HUTCHISON BUILDING CO.* is supported by most of the cases which really decided the question, but the admission therein that numerous decisions fully sustain the opposite doctrine admits too much, as the authorities on the other side when carefully sifted reduce themselves into little more than dicta.

b. Decisions against liability.

In *Carey v. Rochereau*, 16 Fed. Rep. 87, the court says: "An agent is liable only to his principal for non-feasance," and, as the case arose in Louisiana, bases the decision upon that rendered in *Delaney v. Rochereau*, 84 La. Ann. 1123, 44 Am. Rep. 456. The case does not show what the facts were out of which it arose and it does not appear whether the case involved any disregard of any duty by the agent, or not. The court adds: "It is very doubtful if an agent *per se* is liable to third persons on any account. A person acting as agent for another is liable for his own misfeasance, but this results

not from the agency but in spite of it." The obvious comment on this is that exactly the same reasoning applies to a case in which the agent is guilty of mere negligence with respect to the rights of a third person.

Agents in possession and control of a building owned by a nonresident were held in *Delaney v. Rochereau*, *supra*, not to be liable for injuries causing the death of a boy resulting from the fall of a balcony in front of the building, although the agents knew it to be in a defective condition. But in this case the boy with eleven or twelve other persons rushed out on the balcony while attending an entertainment which was being given in an unoccupied portion of the building, without the authority or knowledge of the agents by a person who had procured a key from a neighbor and taken possession of the premises, although the agents had on two or more occasions permitted a similar use of the vacant premises. The court says: "The theory on which the suit rests is that agents are liable to third parties injured, for their non-feasance," but this theory the court refuses to adopt, declaring that an agent is personally responsible to his principal only for not doing something which he ought to have done. Yet with admirable clearness the court defines the liability of agents in such cases as follows: "Every one, whether he is principal or agent, is responsible directly to the persons injured by his own negligence in fulfilling obligations resting upon him in his individual character and which the law imposes upon him independently of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If in the course of his agency he comes in contact with the person or property of a stranger he is liable for any injury he may do to either by his negligence in respect to duties imposed by law upon him in common with all other men." The true distinction between this case and those which sustain

nesses who had knowledge of the facts testified that the wall was constructed in a workmanlike manner, and these witnesses and others, who gave expert testimony, swore that the bricks could not have fallen from any defect or imperfection in the wall or cornice. Nevertheless, the bricks did fall. A person was seen standing at the top of the wall, near the place from which they fell, and was heard to say, "Look out!" The evidence does not show who this person was, and it seems he was not discovered, or, if so, he was not examined. Precisely what caused the bricks to fall is not positively shown. The defendants contend that the person seen near the place from where they fell must have pushed them off the top of the wall. This may be true, and it may be that the weight of the evidence tends to this conclusion; but, in the absence of some affirmative evidence that the bricks were pushed over, is not the admitted fact that the bricks fell a circumstance or fact which the jury had the right to consider in determining the weight and credibility of the defendants' testimony that they could not have fallen without some external force? The general affirmative charge should not be given in any case where there is conflict in the evidence as to material facts. We are of opinion the charge given was an invasion of the province of the jury. If the bricks were pushed over by some person, and did not fall in consequence of a defect in the wall, the defendants were not liable, under the first count of

the complaint. This conclusion is based upon the assumption, which we think clearly established in the present record, that the brick work on the wall had been completed, and that no person in the employ of the contractor, or under the control of Thompson, had any business at the time near the place of the wall from which the bricks fell. We think it clearly shown that if an employé or laborer pushed the bricks over after the completion of the wall, whether done intentionally or negligently, it was an act not within the scope of his employment, nor was it done in the performance of any duty. Wood, Mast. & S. p. 535.

The second count charges the defendants with neglect, in their failure or omission to erect scaffold or guards so as to prevent brick from falling to the ground. On this proposition the defendant Thompson invokes the doctrine that an agent or servant is not liable for a mere omission or non-feasance. The rule is stated as contended for in *Story on Agency*, § 808, and in *Story on Contracts*, § 171, and there are numerous decisions which fully sustain the text. There are courts of high authority which hold differently. Our attention has not been called to any decision of the question in this state, and, in declaring the law which shall govern, we have carefully considered both lines of decisions. The principle upon which the rule is founded, as declared by Story, is that there is no privity between the servant or agent and third persons, but the privity exists only between him

an agent's liability appears, in the light of the language last quoted from the opinion, to be in the fact that the person injured was on the premises without any right to be there and was consequently one to whom the agents owed no duty whatever in respect to the condition of the property.

Negligence of an agent in charge of a plantation in failing to open a drain through the lands which served to drain an adjoining plantation also, whereby the adjoining premises were damaged by water, is held in *Feltus v. Swan*, 62 Miss. 415, to be an omission of duty to his principal only and not to make the agent liable personally to the adjoining owner. The court also refused to permit a proposed amendment charging that his neglect and refusal to open the drain "was malicious and with the intention of injuring the plaintiff's aforesaid lands," saying that it would not make the declaration good "for whatever motive operated on the agent the charge against him was only that he had failed to do, and not that he had done anything maliciously, and for non-feasance or omission to act at all the agent is answerable only to his employer." It is very doubtful if this decision is a sound one, at least so far as it denies the agent's personal liability for malicious refusal to open the drain. The court bases it on the authority of *Story on Agency*, §§ 808, 809; *Dunlap's Paley's Agency*, § 306, and *Wharton on Agency*, §§ 535, 536. Here we see the direct effect of the perpetuation in textbooks as authority of a purely *obiter* statement from a dissenting opinion.

The same effect to mislead the court of such worthless *dicta* thus cited as authority by text-writers appears in *Henshaw v. Noble*, 7 Ohio St. 220. There in an action against the owners of premises and contractors to erect a building thereon and also a person employed to excavate the same, claiming damages for negligence in such excavation whereby an adjoining building was injured, an in-

struction that "where there was negligence or improper conduct in the doing of an act and injury was thereby done to another, that an action could be sustained against the agent," was held erroneous and prejudicial. The court said that the instruction was calculated to mislead the jury and to convey the idea that negligence is always to be regarded as a misfeasance or positive wrong which will subject the agent equally with his principal to liability. The court, citing *Story on Agency*, § 808, also declared the rule to be that an agent is not in general liable to third persons for his own non-feasance or omissions of duty in the course of his employment, and in applying this rule seems to have regarded it as applicable even if the agent's negligence was not merely with respect to his duty to his employer, but also to third persons who were injured thereby.

A peculiar result of this supposed rule as to non-feasance appears in *Erwin v. Davenport*, 9 Heisk. 44, in which a receiver of a railroad who is a public agent of the state is held not liable for negligence, even if gross, in respect to the cars used, whereby an employé is injured, although it is held that if he had knowledge of defects his negligence might be misfeasance and positive wrong for which he would be liable. This subject of a receiver's liability is not within the scope of this note; but this decision which is not in harmony with the current of authorities on this subject illustrates the misleading effect of the *dictum* above mentioned. The court says of the distinction between misfeasance and non-feasance in such a case: "Though it may seem nice and artificial yet it is said by Mr. Story to be well established." We have already seen that it was "established" by a *dictum* in a dissenting opinion. The court also with an utter misconception of the character of this *dictum* in the dissenting opinion says it "was determined by Lord Holt in *Lane v. Cotton*, 12 Mod. 488, 1 Id. Raym. 644, that

and the master or principal. This relation of privity is that from which arises the maxim *respondet superior*. The liability of the principal or master to third persons does not depend upon any privity between him and such third persons. It is the privity between the master and servant that creates the liability of the master for injuries sustained by third persons on account of misfeasance and non-feasance of the servant or agent. It is difficult to apply the same principles which govern in matters of contract between an agent and third persons to the torts of an agent which inflict injury on third persons, whether they be of misfeasance or non-feasance, or to give a sound reason why a person who, acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty because he was acting as servant or agent. The tort is none the less a tort to the third person, whether suffered from one acting as principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the injury. We think the better rule declared in *Baird v. Shipman*, 22 Am. St. Rep. 504, 132 Ill. 16, 7 L. R. A. 128, in which it is held that "an agent of the owner of property, who has the complete control and management of the premises, and who is bound to keep them in repair, is liable to third persons for injuries resulting to the latter, while using the premises in an ordinary and appropriate manner, through the

neglect of such agent. And the agent cannot excuse himself on the plea that his principal is liable. It is not his contract that exposes him to liability to third persons, but his common-law obligation to so use that which he controls as not to injure another." See notes to this case in 22 Am. St. Rep. 504. In *Ellis v. McNaughton*, 76 Mich. 237, we find this language: "Misfeasance may involve the omission to do something which ought to be done, as when an agent engaged in the performance of his undertaking omits to do something which it is his duty to do under the circumstances; as that when he does not exercise that degree of care which due regard for the rights of others requires." In *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503, it is said: "It is the actual, personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation; and, when their acts or neglects result in injury to third persons, they are equally responsible with their principal." The rule is broadly stated in 14 Am. & Eng. Encyclop. Law, p. 814. We might cite other decisions, if deemed necessary. We hold that the mere relation of agency does not exempt a person from liability for any injury to third persons, resulting from his neglect of duty, for which he would otherwise be liable.

It is contended by the defendants, (1) that they were under no duty to erect scaffolding

for neglect in an agent there is no remedy against him."

The other cases in which agents or servants have been held not to be liable to third persons for their own alleged negligence show other grounds for the decision, such as a lack of negligence in facts or a lack of any duty to the person injured.

Thus a contractor or hired man employed by and acting under direction of another person in digging a tunnel through an embankment with which he has nothing further to do, is not liable for mere consequential injuries to third persons as to whom he committed no direct trespass, where the injury results more than a year afterwards from water flowing through such tunnel because it was the maintenance and not the digging of the tunnel that caused the injury. *Chapel v. Smith*, 80 Mich. 100.

So an agent in charge of a dam who is under contract to follow directions of the owner in everything relating to the stoppage or flowage of the water cannot be held personally liable for damages to lower proprietors caused by the breaking away of the dam, although it may have been imprudent and improper to raise such a head of water with such a dam, and he shut the gate and left it shut till the dam gave way, as it was the business of the owner and not of the agent to have raised the gate sooner if that should have been done and he had no authority to raise it except when directed so to do. *Hill v. Caverly*, 7 N. H. 215, 28 Am. Dec. 735.

And for injury to mills caused by the backwater of a dam on lower premises a defendant carrying on the lower mill for which the dam was used under a power of attorney from the owners, is not liable where he had nothing to do with the construction of the dam and had made no change in its height or structure. *Brown Paper Co. v. Dean*, 123 Mass. 267.

The court says in respect to his liability that he

had no such control as would authorize him to change or remove any such structure erected upon the premises by the owner. It is very plain, therefore, that he could not be liable to other persons for failing to do what he had no right to do.

Likewise an agent who leases a house and authorizes the tenant to erect a cooking range on the premises, is not liable for damage to an adjoining proprietor caused by the use of the range, since he has no connection with the use of it. *Labadie v. Hawley*, 61 Tex. 177, 48 Am. Rep. 278.

So an agent who has charge of the renting of a building owned by a nonresident, and promises a tenant that he will pay for connecting a drain with a sewer, but expressly refuses to take any responsibility in directing the work and says that authority must be obtained from some other source, is not liable for the negligence of the tenant in leaving an unguarded excavation in the street while doing the work. *Crandall v. Loomis*, 56 Vt. 664.

The neglect of a factor's agent to communicate to the factor a message from the shipper who after shipping goods from another place to the factor tells the agent that he does not wish the goods sold until further orders, does not make such agent liable to the shipper. The court says: "We cannot see that there were any such relations between the agent and shipper to render him liable to him for the neglect." *Reid v. Humber*, 49 Ga. 207.

It would seem clear that in such a case the agent owed no duty to the shipper.

So for mismanagement of an estate by an agent he is responsible only to his principal and not to other persons who may claim to be the rightful owners of the property. *Phinney v. Phinney*, 17 How. Pr. 197.

In a few cases a general agent has been sued for negligence of his subordinate, but such liability has been denied by the decisions.

Thus the manager or agent in charge of a mine

or safeguards to prevent brick from falling; and (2) that, under the circumstances, they had no right to do so. The first of these propositions is asserted under the evidence to the effect that it is not customary to erect scaffolding on the outside of the wall, and that the wall may be built from the inside with safety. The facts will appear in the statement of the facts of the case. Our conclusion is that, for the purposes of this case, the defendants were as much bound to erect scaffolding or safeguards as if the wall had been along the sidewalk of a public street of the city of Birmingham. If, in the course of the erection of a brick wall along the sidewalk of a public street, the mason, being at work on the inside, should accidentally, or from want of skill, let slip from his hand a brick, or inadvertently cause one to topple down, and it should fall on the head of some person passing along the public sidewalk, where he had the right to be, there being no safeguard or precaution to avert such a possible result, the principal or person would be liable. In such a case the duty is so apparent, and the probable or possible danger so obvious, that no amount of testimony as to the usage or custom or comparative safety would excuse such culpable negligence.

It is next contended by the defendant that it was impossible to erect a scaffold or safeguards without occupying the space between the wall under construction and the building next to it, or by using the windows of the adjacent building, and that they were

positively prohibited from using either by the owners. We do not think this any excuse. The defendants were under no compulsion to erect the building. They should have provided for such contingencies in their contract. No man can with impunity use his own property, or exercise any supposed rights or privilege, in such way as to endanger the lives of innocent persons in the exercise of a public right and privilege. Pecuniary interest will not excuse a nuisance which endangers public safety. It is unnecessary to cite authorities on this proposition. The defendants, however, are not liable for any neglect of duty, unless such neglect was the proximate cause of the injury. So, in this case, if the defendant had completed the brick wall, had ceased to work on it, and some person, even though an employé, of his own accord, not acting under orders, nor within the scope of his duties, nor in furtherance of his employment, intentionally or recklessly or heedlessly pushed the brick from the wall, which fell and caused the injury, the act of such person, and not the neglect to provide safeguards, would be the proximate cause of the injury, and he alone would be responsible. There is no count counting on a willful or intentional wrong, nor do we think the evidence in the record authorizes such an allegation.

The main questions of inquiry may be stated as follows: Did the brick fall because of a defect in the construction of the wall or cornice? If so, the defendants are

is not liable for the negligence of a person whom he employs to work therein. *Stone v. Cartwright*, 6 T. R. 411. It is said by *Lord Kenyon* in this case: "It was never heard of that a servant who hires laborers for his master was answerable for all their acts," and similar language was used by the other judges.

So a general agent of a contractor in charge of the construction of a railroad but who had given general directions to a special agent of the contractor in respect to blasting at a particular place, who was in immediate charge of the operations in which a particular blast was made, is not liable for the negligence of the special agent. *Brown v. Lent*, 20 Vt. 522.

Cases in which a liability of an agent or servant is asserted on the basis of a contract relation are manifestly distinct from the subject of this annotation; but a few of these cases have been cited on this subject and may be noticed for the purpose of distinguishing them from the others here considered.

Thus it is held that a porter of an inn who receives one third of the portage charges for parcels brought by coach and booked at the inn, is not liable for the loss of a parcel while in the office of the inn after he has received it. *Cavenagh v. Such*, 1 Price, 323.

The judges in this case seem to regard the porter as merely a servant of the carrier and responsible only to his employer, but there is no finding that the porter was negligent and he was declared against as a common porter of goods, etc., for hire, thus attempting to establish a contract relation between him and the owners. There was also a count of trover in the declaration.

A similar action was brought in *Williams v. Cranston*, 2 Stark. 82, against the driver of a stage-coach for the loss of a watch sent by him, in which the declaration contained counts against him as a

carrier and a count in trover, but *Lord Ellenborough* in deciding the case held that he was not liable in the capacity of a carrier and that no conversion was proved, but that he was shown to be a mere servant and that the loss appears to have resulted from the negligence of the master through the medium of his servant. But in this case it appears that the watch was delivered to the driver after being repaired, to be conveyed by him to the owner but was lost by the driver.

The lack of privity between the owner of the premises and a subcontractor who engages to do the plumbing work in a building erected under a contract, prevents the subcontractor from being liable to the owner for damages sustained after the completion of the work in consequence of the defective plumbing. *Bissell v. Roden*, 84 Mo. 63, 84 Am. Dec. 71. The court says the case comes within the principle which exempts the agent or servant from liability to a stranger, but this question of a subcontractor's relation to the owner is not considered as a part of this subject.

c. Liability sustained.

In addition to the direct decisions on the subject the numerous cases which deny the master's liability for wrongful or negligent acts of a servant which are outside of the scope of his employment (found in a note on that subject beginning with the case of *Ritchie v. Waller* (Conn.) in 27 L. R. A. 161), usually assume that the servant himself can be held liable in such a case. As for instance it is said in *Swainson v. North-Eastern R. Co.* L. R. 3 Exch. Div. 241, 47 L. J. Exch. 372, 38 L. T. N. S. 201, 26 Week. Rep. 413, where a master's liability was denied, "it is clear that an action would lie against the driver of the engine by whose negligent act the death was caused," but no attempt is here made to collect mere *detra* of this kind in cases in which the liability of the servant was not in issue.

liable under the first count; otherwise, they are not liable under this count. Was it a want of skill or of due care, or heedlessness or recklessness, on the part of some employé, at the time engaged within the scope of his duties or employment, that caused the brick to fall, and not a defect in the wall? If so, the defendants were liable under the second count of the complaint. On the other hand, were the bricks pushed off the wall by some employé after the brick work of the wall had been completed in a proper and workmanlike manner, whose duties did not call him there, and who at the time was not acting under proper orders or within the scope of his duties, nor in furtherance of his master's contract? If so, whatever may have been his motive or the inducement, the defendants are not liable. The duty to construct scaffolding, in such a case, is to afford security and protection during the erection of the wall. If the wall has been fully completed without injury, the failure to construct scaffolding cannot be regarded as negligence proximately causing injury, if the injury was caused by the fall of a brick intentionally or heedlessly pushed off the wall after its completion.

The sureties, as such, on the bond of the contractor, are not liable in this action, and the bond had no office to perform on the trial. We do not see that there was error in the admission of the record of the incorporation of the contractor, nor in the admission of the contract entered into for the construction of the building.

We do not think the court erred in refusing to allow the witness to answer the question as to whether Davis, the brick mason, was paid by the day, or by the thousand of bricks put in the wall. It is possible that a person who is paid by the number of bricks he may place, instead of by the day, may be less careful in placing brick, but this fact is most too remote to be considered as tending to show that the wall was not properly constructed.

Nearly all the assignments of error in both appeals are based upon charges given and refused. We deem it unnecessary to mention them in detail, as the principles of law governing the case have been plainly stated.

There was error in the instructions given on behalf of the plaintiff, and error in those given for the defendants.

Reversed and remanded on both appeals.

The liability of a servant to a third person injured on account of his negligence would seem to be clearly implied also in the decision in *Grand Trunk R. Co. v. Latham*, 68 Me. 177, which holds the servant liable to his master for what the master has had to pay on account of the servant's negligence.

In *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507, while the liability of the owner of a team for the willful act of the driver injuring a third person is denied, the court says: "In a case of strict negligence by the servant while employed in the service of his master I see no reason why an action will not lie against both jointly."

In *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416, the court holds that principal and agent may both be liable for damages caused by a fire set by the agent in the prosecution of the other's business "if the act complained of was illegal," and also holds that the principal would be liable for the agent's act if he "carelessly or negligently" set the fire, but does not expressly decide as to the agent's liability if he was merely negligent.

For negligence in respect to the dangerous condition of premises in the control of an agent acting for a nonresident, the agent who leases them is held liable to a third person who sustains injuries in consequence of their dangerous condition existing at the time of the lease. *Baird v. Shipman*, 7 L. R. A. 128, 123 Ill. 16.

The true ground on which an agent should be held liable to a stranger who is injured by his negligence is expressed by the court in this case as follows: "It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency; nor can its breach be excused by the plea that his principal is chargeable."

So in *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503, general agents who had charge of a wharf were held liable for injury to a person who stepped into a hole in a part of the wharf which was leased but which the lessees were not required by their lease to repair. The court said on the question of negligence: "It is the actual

personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them and they act for the corporation, and when their acts or neglects result in injury to third parties they are equally responsible with their principals."

In many cases courts have made similar decisions on the ground that negligence was misfeasance. Thus a man who as agent for his wife has the entire control of the erection of a building for her and of the lot upon which it was being erected, is liable for negligence in failing to replace the sidewalk which was torn up without his direction and which he gave orders to put down again, when in consequence of his failure to replace the walk a pedestrian falls into a rut in the night-time and is injured. *Ellis v. McNaughton*, 78 Mich. 237.

In this case the court says: "To say that he only was guilty of a non-feasance—an omission of duty to his principal—does not cover the case. He not only omitted a duty he owed to the traveling public, but by his acts he increased the danger and every day committed a wrong and was guilty of a misfeasance in keeping this walk torn up and using it as a driveway." The court further declares: "Irrespective of his relation to his principal he was bound while doing the work to so use the premises, including this sidewalk, as not to injure others. Misfeasance may involve to some extent the idea of not doing; as where an agent engaged in the performance of his undertaking does not do something which it was his duty to do under the circumstances; as for instance, when he does not exercise that care which a due regard for the rights of others would require; this is not doing, but it is the not doing of that which is not imposed upon the agent merely by his relation to his principal, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes negligence in any relation, and is actionable."

So in *GREENBERG v. WHITCOMB LUMBER CO.* (Wis.) post, 439, the court while declaring it to be well settled that an agent or servant is liable for misfeasance only and not for non-feasance, holds a managing officer or agent liable to a workman for

WISCONSIN SUPREME COURT.

August GREENBERG, *Appt. and Resp.*,
v.

WHITCOMB LUMBER CO., *Appt.*, and
Parlan SEMPLE, *Resp.*

(.....Wis.....)

1. **Placing an inexperienced and ignorant employe at work at a machine** which has a saw defectively and insecurely fastened to the shaft, which is known to the employer but not to the employe, without giving any instructions in respect to the danger, renders the employer liable for resulting injuries to the employe.
2. **An officer who is the general managing agent** of a lumber company may be held personally liable for setting an inexperienced and ignorant employe at work on a machine which the former knows to be dangerous.
3. **A corporation and an officer thereof**, both being liable for the same act of negligence, may be joined as defendants.

(April 23, 1895.)

negligence in setting him at work at a defective machine although it says he would not have been liable for negligence merely in respect to the condition of the machine without having set the man at work upon it.

So an agent of the owner of a house occupied by a tenant, who negligently filled up a tunnel which he had dug to connect a cellar on adjoining premises with a sewer under the leased house, is liable for damages caused such tenant by the overflow of water from such sewer on account of the negligent filling, on the ground that his act was not a mere non-feasance but a misfeasance. *Martin v. Benoit*, 20 Mo. App. 282.

And the negligence of a man in making a trap-door on his wife's premises while acting as her agent makes him liable to an occupant of the building injured in consequence of a defect in the work. The court says in regard to such liability, "the present case seems to be one not of mere non-feasance or omission, but of strict negligence or wrong." *Harriman v. Stowe*, 57 Mo. 93.

Again a claim that a man acting as agent for his wife in the management of a building, who negligently left open a faucet in the second story of the building and afterwards directed the water to be turned on, could not be held liable because his negligence was mere non-feasance, is unsuccessfully made in *Beil v. Josselyn*, 3 Gray, 308, 63 Am. Dec. 741. The court said: "The defendant's omission to examine the state of the pipes in the house before causing the water to be let on is a non-feasance. But if he had not caused the water to be let on that non-feasance would not have injured the plaintiff. . . . As the facts are the non-feasance caused the act done to be a misfeasance." The court therefore decides the case on the theory that defendant's negligence constituted a misfeasance, but did not expressly decide whether or not he could have been held liable for a mere non-feasance.

Likewise the negligence of an agent or employe when hauling wood in failing to put up the bars where he passed through a fence, in consequence of which hogs escaped from pasture to a railroad and were killed, makes him liable to the owner of the hogs. *Horner v. Lawrence*, 87 N. J. L. 44.

39 L. R. A.

CRoss-APPEALS from orders of the Circuit Court for Shawano County in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendants; plaintiff appealing from an order sustaining a demurrer by defendant Semple to his complaint and defendant Lumber Company, appealing from an order overruling its demurrer to the complaint. *Affirmed on defendant's appeal; reversed on plaintiff's appeal.*

Statement by Newman, J.:

The duly verified complaint, omitting formal parts, is as follows: The above-named plaintiff, by Mylrea, Marchetti & Bird, his attorneys, for a complaint alleges and shows to the court: First. That defendant the Whitcomb Lumber Company, at all the times herein mentioned, was, and still is, a corporation organized under the laws of Wisconsin, and doing business at Whitcomb, Shawano county, Wisconsin, where, among other things, in its business it operated a certain machine for the purpose of sawing

The court says in this case: "His conduct was not mere neglect—it was intentional and willful violation of his authority. It was his own misfeasance for which as servant he cannot in any respect claim exemption against the party injured."

How much trouble mere *dicta* can make especially when stated as authority in text-books appears in a considerable number of the above cases in which the courts have struggled to avoid conflict with the supposed rule against an agent's or servant's liability to third persons for non-feasance. The needless effort to reconcile a reasonable decision with this ambiguous and misleading rule has all been caused by the indefensible citation in text-books of such a *dictum* in a dissenting opinion on another subject.

The architect of a building who also superintended its construction was held liable for an injury to a workman upon it, caused by insufficiency of girders or columns used in its construction, or else by the negligent attempt made under direction of the architect to raise the building. *Lottman v. Barnett*, 62 Mo. 159.

The court declares that "for negligence he is responsible, not merely to his employer, but to persons injured by reason of his acts."

A distinction between non-feasance and misfeasance is also made in the case of *Nowell v. Wright*, 3 Allen, 169, 80 Am. Dec. 62, in which it was held that negligence in opening a draw-bridge, which it was lawful to open in a proper manner, was misfeasance. This was a case of a salaried officer and this note does not aim to include cases about public officers, but only those as to the agents or servants of private persons.

In discussing the liability of persons who participate in a display of fireworks in a public street the court says that all participants in the creation of a public nuisance are liable to answer for its ill effects without regard to the fact that they in such affair were but the agents of other persons. *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578.

In holding persons liable for negligently injuring buildings in removing them it is said in *Bickford v. Richards*, 154 Mass. 163, "whether servants or contractors they were liable for the damages caused to the plaintiff's property by their tortious acts or misfeasance."

timber into firewood, which sawing machine consisted of a large circular steel saw, attached to a frame, and run by steam at a high rate of speed. That at all times herein mentioned said defendant Parlan Semple was an officer of said defendant company, and as such officer, as plaintiff is informed and believes, had full charge, management, control, and supervision of said sawing machine and assigning of employes to operate the same, and caused the same to be built expressly for said company, and erected on their grounds and used in their business. That said sawing machine, as plaintiff is informed and believes, was dangerous, defective, and unfit for use, and of a dangerous and unsafe design and plan. That said saw was improperly, defectively, and insecurely fastened to the shaft upon which it revolved, all of which was well known to both of said defendants at all times herein stated, and for a long time prior to February 14, 1892. That on or about the 14th day of February, 1892, said plaintiff entered the employ of said defendant corporation as a common laborer, and was placed by said company at work about said sawing machine, and stationed by it in front of the same. That there was no barrier erected between said saw and the place where plaintiff was stationed, or guards of any nature or description, and that it was a dangerous and unsafe place in which to place a man to work. That said plaintiff was wholly inexperienced in work in saw-mills, or about sawing machines, or any similar kind of work, all of which was well known to both of said defendants. That neither of said defendants

gave plaintiff any instructions whatever as to the dangers attendant upon such work, or informed him of the dangerous construction of said machine, or the defective condition thereof, and that it was all unknown to this plaintiff until after the injury hereinafter mentioned. That on the 15th day of February, 1892, and the day after said plaintiff entered upon the performance of his duties as aforesaid, and while in the employ of said defendant company at the place designated by them for him to work, the said saw, by reason of its defective construction and defective and insecure fastening, while the same was revolving, became separated from the shaft to which it was fastened, and struck this plaintiff with great force upon his left arm and shoulder, and otherwise injuring his body, by reason of which plaintiff became for a long time sick and lame, and was prevented from prosecuting his work as a laborer or any work whatever, and suffered great bodily pain, and was put to great expense for medical assistance and other care, and that said left arm and shoulder have become permanently stiff, so that he is unable to use them for any manual labor, thus greatly impairing his ability to earn a living, all to his damage in the sum of ten thousand dollars. Wherefore plaintiff demands judgment against said defendants for the sum of ten thousand dollars and costs." To this complaint each defendant interposed a separate demurrer. The demurrer of the defendant the Whitcomb Lumber Company specified as grounds therefor: First, that several causes of action have been improperly united; second, that the complaint does

The fact that a person who employs a laborer on certain work was himself merely an agent, which fact was known to the laborer, does not relieve him from liability for negligence in furnishing the workman with a defective chain which he represents to be sufficient, but which breaks, causing him an injury. *Malone v. Morton*, 84 Mo. 488.

A railroad engineer, by whose negligence a switchman engaged in making up another train is injured, is held in *Martin v. Louisville & N. R. Co.*, 95 Ky. 612, liable with the company for the injury. The court said of him: "Of course the appellee Robinson is liable directly for his own negligence, and cannot escape responsibility on the contention that he was acting merely as agent for another." The negligence of the engineer in this case consisted in leaving cars which he had kicked into the yard too close to another track whereby the switchman was struck and knocked off from the side of other cars when passing them.

In holding a person liable for improperly removing the lateral support of land although he did not own the land where he made the excavation, the court, while it says that he "appears not to have been an agent of the owner of the land but to have removed the soil therefrom for his own benefit," says that "even an agent of the owner of the adjoining land would be liable for his own negligence and positive wrongs." *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 812.

In holding an insurance company liable for negligence when co-operating in the management of a steam boiler which burst, causing injury to adjacent property, it is said in *Van Winkle v. American Steam Boiler Co.*, 53 N. J. L. 240, that every person is responsible who participates in a substantial degree in such management, whether

he be a contractor with the owner, or his servant, or even a mere volunteer.

Engineers employed to erect a boiler and who are in charge of the premises for the purpose of testing the boiler were held liable for damages resulting from their negligence in *Witte v. Hague*, 2 Dowl. & R. 33. But this can hardly be regarded as the negligence of an agent or servant since it is expressly found in the case that the engineers were in control of the premises, and were testing the boiler rather as contractors than as employes.

Other instances of holding servants liable to third persons for negligence are to be found under the division (III.) as to joint liability of master and servant.

II. To fellow servants.

The doctrine is now fully established in this country that a servant is liable to his fellow servant for negligence whereby the latter is injured. *Hare v. McIntyre*, 8 L. R. A. 450, 33 Me. 240; *Hinds v. Harbou*, 53 Ind. 121; *Hinds v. Overacker*, 60 Ind. 547, 33 Am. Rep. 114; *Rogers v. Overton*, 37 Ind. 410; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437, overruling *Albro v. Jaquith*, 4 Gray, 99, 64 Am. Dec. 58; *Griffiths v. Wolfram*, 23 Minn. 185; *Wright v. Roxburgh*, 2 Ct. Sess. Cas. 3d Series, 743.

A mere *dictum* to the contrary appears in *Southcote v. Stanley*, as reported in 1 Hurlst. & N. 247, 25 L. J. Exch. 339.

In declaring the liability of one servant to another who is injured by his negligence the court in *Hinds v. Harbou*, *supra*, very pertinently says: "We do not clearly perceive how it can well be that in a little community of employes of the same employer upon the same general undertaking, the common duties of man to man in society generally

not state facts sufficient to constitute a cause of action against the defendant the Whitcomb Lumber Company. The separate demurrer of Parlan Semple specified as grounds therefor: First, that several causes of action have been improperly united; second, that the complaint does not state facts sufficient to constitute a cause of action against the defendant Parlan Semple. The plaintiff having made a motion to strike out as frivolous each of said demurrers, and the same coming on for argument, the demurrer of the defendant the Whitcomb Lumber Company was overruled, and the demurrer of the defendant Parlan Semple was sustained. From the order overruling the demurrer of the Whitcomb Lumber Company said defendant the Whitcomb Lumber Company appeals, and from the order sustaining the demurrer of the defendant Parlan Semple the plaintiff, August Greenberg, appeals.

Messrs. Mylrea, Marchetti & Bird, for Greenberg:

The facts alleged, if true, make defendant Semple personally liable. It is not a case of mere non-feasance, failure to do what his duty to the company required him to do. For such alone, no liability would exist.

Mechem, Agency, §§ 589, 569.

But for either misfeasance or malfeasance he is personally liable by all the authorities.

Bell v. Josselyn, 8 Gray, 309, 63 Am. Dec. 741; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Delaney v. Rochereau*, 84 La. Ann. 1133, 44 Am. Rep. 456; *Harriman v. Stowe*, 57 Mo. 93; Mechem, Agency, §§ 540, 571 *et seq.*; 1 Am. & Eng. Encyclop. Law, p. 407;

should cease to exist and as a consequence liability for breaches of them."

The liability of one servant to another for negligence does not depend on any contract relation, but fellow servants owe to each other the duty to exercise ordinary care and prudence in the transaction of their work, and for failure to do so are liable at common law to each other for resulting personal injury. *Hare v. McIntyre*, *supra*.

In discussing the liability of the owners of a building for an injury to a workman employed by a contractor it is said that if the owners in doing a certain piece of work acted only as employés or agents of the contractor and were guilty of negligence in doing so, they would be liable for an injury thereby caused. *Griffiths v. Wolfram*, 22 Minn. 185.

The court further declares that where several persons are engaged in the same work in which the negligent or unskillful performance of his part by one may cause injury to the others, it is the duty of each to the others engaged in the work to exercise the care and skill ordinarily employed by prudent men in similar circumstances. It was therefore held that the person to whose negligence (if there was any negligence) the insufficiency of the centerpiece of an arch was due would be liable to a workman injured in consequence of it, unless he was also negligent.

III. Joint Liability of master and servant.

Some conflict appears on the question of the right to join master and servant as defendants in an action for the servant's negligence, but most cases allow it.

In *Parsons v. Winchell*, 5 Cush. 502, 52 Am. Dec. 745, it was held that a joint action against master

Story, Agency, §§ 811, 812; Bishop, Non-Cont. L. §§ 622, 627, 695.

This liability exists, not because of the agency, but in spite of it.

Carey v. Rochereau, 16 Fed. Rep. 87.

The defendant Semple owed the duty to all persons with whom he came in contact not to injure them by his negligence.

Shearm. & Redf. Neg. § 112; *Britton v. Green Bay & Ft. H. Water Works Co.* 81 Wis. 48; *Bright v. Barnett & R. Co.* 28 L. R. A. 524, 88 Wis. 299.

Positive affirmative acts of negligence are alleged.

Semple himself has built a defective machine, he knows its defective and dangerous condition, he places it in the yard to be used by employés who, he knows, will endanger their lives by such use. This is an act of negligence for which he is liable to any one injured thereby. It is a positive wrong on his part. The fact that he does it as agent for another, and also binds that other, makes it none the less a wrong on his part.

Peck v. Cooper, 112 Ill. 192, 54 Am. Rep. 281; *Bennett v. Ives*, 30 Conn. 329; *Griffiths v. Wolfram*, 22 Minn. 185; *Hawkesworth v. Thompson*, 98 Mass. 77, 98 Am. Dec. 187; *Richardson v. Kimball*, 28 Me. 463; *Campbell v. Portland Sugar Co.* 62 Me. 552, 16 Am. Rep. 503; *Crane v. Onderdonk*, 67 Barb. 47.

The actual wrong is that of the officer. Were the company required to pay, they would have their remedy over against the actual wrongdoer.

Cooley, Torts, 145; *Brokaw v. New Jersey R. & Transp. Co.* 33 N. J. L. 323, 90 Am. Dec. 659; *Horner v. Lawrence*, 37 N. J. L. 46;

and servant for the servant's negligence in driving the master's horses and carriage in his absence cannot be maintained.

The reason for this decision seems to be chiefly the injustice that might ensue if a joint judgment was rendered by reason of the inability of the master in such case if obliged to satisfy an execution against them to call on the servant for reimbursement or even for contribution.

The court in *Parsons v. Winchell*, *supra*, distinguishes the case in *Michael v. Alestree*, 2 Lev. 172, 3 Keb. 650, on the ground that in that case "it appears that the principle of the decision was that the master though absent had ordered his servant to train intractable horses in a place constantly frequented with passengers, and was therefore guilty of the act of training them there, jointly with the servant," and quotes from that case the statement: "It shall be intended the master sent the servant to train the horses there."

The case of *Whitmore v. Waterhouse*, 4 Car. & P. 382, which was brought jointly against a coachman and his employer, is also distinguished in *Parsons v. Winchell*, *supra*, as one in which the court did not actually decide the question. In that case although the court on being referred to the case of *Michael v. Alestree*, declined to require a discharge of either coachman or employer as the question would afterwards be open for arrest of judgment, the plaintiff's counsel thereupon consented to the acquittal of the coachman and proceeded against the proprietors alone.

The liability of the principal and agent for the latter's negligence was held in *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503, not to be joint but several on the authority of *Parsons v. Winchell*, *supra*.

Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507; *Phelps v. Wait*, 80 N. Y. 78; *Suydam v. Moore*, 8 Barb. 358; *Moore v. Fitchburg R. Corp.* 4 Gray, 465, 64 Am. Dec. 83; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Reed v. Peterson*, 91 Ill. 288; *Weber v. Weber*, 47 Mich. 569; *Bergloff v. McDonald*, 87 Ind. 549; *Deering*, Neg. § 231.

If both corporation and agent are liable, they may both be joined in this action.

Shearm. & Redf. Neg. § 116; 1 *Wait*, Pr. 131; *Deering*, Neg. 231; *Johnson v. Barber*, 10 Ill. 426, 50 Am. Dec. 416; *Phelps v. Wait*, *supra*.

Messrs. Goodrick & Goodrick, for defendants:

Plaintiff does not make a case by simply alleging that the defendant has been guilty of negligence.

Goff v. Chippewa River & M. R. Co. 86 Wis. 287; *Maxwell*, Code Pl. p. 241.

Where the negligence consists in the omission of a duty, the facts which are relied upon must be alleged.

2 *Estes*, Pl. § 2010.

It is incumbent on the plaintiff to allege in his complaint and prove on the trial "that defendant was negligent, and it cannot be conjectured from the mere fact of the accident."

Redmond v. Delta Lumber Co. 96 Mich. 545; *Ling v. St. Paul, M. & M. R. Co.* 50 Minn. 180; *Van den Heuvel v. National Furnace Co.* 64 Wis. 636; *Peschel v. Chicago, M. & St. P. R. Co.* 62 Wis. 888; *Johnson v. Ashland Water Co.* 77 Wis. 53; *Whitcomb v. Wisconsin & M. R. Co.* 58 Wis. 418; *Johnson v. Boston Tow-Boat Co.* 185 Mass. 211, 46 Am. Rep. 458;

Collins v. St. Paul & S. O. R. Co. 30 Minn. 31; *Kriegel v. Weiss & V. Mfg. Co.* 84 Wis. 149.

The complaint does not specify any defect in the construction of the machinery, known to the defendant, which caused the saw to become loosened from the shaft. If the saw became loosened from the arbor through some cause not alleged in the complaint the plaintiff fails to make out a case.

Lockwood v. Chicago & N. W. R. Co. 55 Wis. 500.

For aught that appears from the complaint, the plaintiff's injury was purely accidental, unforeseen, and unaccountable.

Wood v. Chicago, M. & St. P. R. Co. 51 Wis. 196; *Schultz v. Chicago & N. W. R. Co.* 67 Wis. 616, 58 Am. Rep. 881; *Harris v. Cameron*, 81 Wis. 239.

The master is not liable for accidents not likely to happen.

14 *Am. & Eng. Encyclop. Law*, p. 891.

Nor for injuries which appear to be the result of an unaccountable accident.

Morrison v. Phillips & C. Constr. Co. 44 Wis. 405, 28 Am. Rep. 599; *Steffen v. Chicago & N. W. R. Co.* 46 Wis. 259.

The plaintiff was not a servant of the defendant Semple, neither was Mr. Semple master in the sense which would make him liable for a neglect on the part of the defendant, Whitcomb Lumber Company, in furnishing and providing reasonably safe machinery and appliances. For this reason the separate demurrer of defendant Semple was properly sustained.

14 *Am. & Eng. Encyclop. Law*, p. 875; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am.

So it is held in *Mulchey v. Methodist Religious Soc.* 125 Mass. 487, that members of a committee who as agents of a religious society make a contract for the building of a staging to be used in painting a church, and accepted the staging, which afterwards falls and causes injury to a workman engaged in painting the church for another contractor, if liable for negligence cannot be sued jointly with the society for which they acted.

But one who gratuitously superintends the work of opening the walls of a sewer and replacing the earth around it so loosely that water escapes to the damage of the neighboring proprietor, was held in *Hawkesworth v. Thompson*, 96 Mass. 77, 93 Am. Dec. 137, to be jointly liable with the owner of the premises for whom the work was done and who participated in doing it, on the ground that both were negligent in respect to directing the workmen.

Other cases hold the liability of the master and servant to be joint even if the actual negligence is that of the servant only and the master held liable only by virtue of his relation to the servant.

Thus for negligence in conducting a railroad train the engineer and fireman, who were negligent, are held liable with the railroad company for an injury thereby caused, such as the killing of a cow on the track. *Suydam v. Moore*, 8 Barb. 358.

So in *Martin v. Louisville & N. R. Co.*, 95 Ky. 412, 16 Ky. L. Rep. 150, a negligent railroad engineer and the company which employed him were held liable for his negligence in the same action.

So the owner of a team of horses is jointly liable with his son who was driving them in his employment, for the latter's negligent driving whereby he ran over and injured another person. *Phelps v. Wait*, 80 N. Y. 78.

The liability of master and servant to a joint ac-
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tion for the servant's negligence is also sustained in *Montford v. Hughes*, 3 E. D. Smith, 591, in which it is said that the masters were not present nor in any wise concerned in the injury complained of except in virtue of the responsibility for his negligence.

And a superintendent in charge of the work of building a bridge for a contractor is liable for his negligence in the construction of a scaffolding whereby a laborer subject to his direction and control is injured, and in such a case an action will lie against the superintendent or master, or both jointly. *Fort v. Whipple*, 11 Hun, 593.

So it was held in *Wright v. Compton*, 53 Ind. 337, that a servant as well as his master is liable for his own carelessness and neglect and in an action therefor both master and servant may be joined.

Such joint liability is also upheld in case of a corporation and one of two officers whose negligence created the liability, in *GREENBERG v. WHITCOMB LUMBER CO.* (Wis.) post, 439.

Cases in which one who has contracted with an agent undertakes to hold the agent personally liable for breach of the contract are plainly on different footing from those which involve the agent's negligence toward third persons by which the latter are injured, and are not here included. So all matters between sub-agents as well as other agents and their principals are excluded.

The liability of the captain of a vessel for negligence of subordinate officers or pilot is a question which seems to rest, not on the ground of his agency or representative capacity, but on the ground that he must be regarded as the principal since the owners may be beyond reach. Cases of this sort also have been omitted from consideration here.

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Dec. 455; *Sawyer v. Minneapolis & St. L. R. Co.*, 38 Minn. 108; *Loop v. Litchfield*, 42 N. Y. 357, 1 Am. Rep. 549.

Newman, J., delivered the opinion of the court:

The complaint states, in substance, that the defendant the Whitcomb Lumber Company is a corporation; that the defendant Parlan Semple was one of its officers and its general managing agent; that its business was the manufacturing of timber into firewood; that it operated, in this work, a machine which was defective and dangerous; that it knew the machine to be defective and dangerous; that the defect which rendered it dangerous was that the saw was defectively and insecurely fastened to its shaft; that the plaintiff was employed to work upon or with this machine; that he was inexperienced in such work and as to such machine, and did not know of the defect of the machine; that the defendants knew that he was so inexperienced and ignorant; that plaintiff received no instructions; that he was injured, without his fault, by reason of the defect of the machine. Fairly construed, this is the substance of the complaint. It was the duty of the defendant the Whitcomb Lumber Company to furnish the plaintiff a safe machine to work with, and, knowing the defect of the machine and that he was inexperienced, to instruct him of the dangers of the employment. Not to do this was negligence. The complaint states a cause of action against the defendant the Whitcomb Lumber Company.

Whether the complaint states a cause of action against the defendant Parlan Semple is more complex. He was the agent or servant of the Whitcomb Lumber Company, charged with the oversight and management of its operations, and with the duty of providing a safe machine for the work in which the plaintiff was engaged. The principle is well settled that the agent or servant is responsible to third persons only for injuries which are occasioned by his misfeasance, and not for those occasioned by his mere non-feasance. Some confusion has arisen in the cases, from a failure to observe clearly the distinction between non-feasance and misfeasance. These terms are very accurately defined, and their application to questions of negligence pointed out, by Judge Metcalf in *Bell v. Josselyn*, 3 Gray, 809, 63 Am. Dec. 741. "Non-feasance," says the learned judge, "is the omission of an act which a person ought to do: misfeasance is the improper doing of an act which a person might lawfully do; malfeasance is the doing of an act which a person ought not to do at all." The application of these definitions to the case at bar is not difficult. It was Semple's duty to have had this machine safe. His neglect to do so was non-feasance. But that alone would not have harmed the plaintiff, if he had not set him to work upon it. To set him to work upon this defective and dangerous machine, knowing it to be dangerous, was doing improperly an act which one might lawfully do in a proper manner—It was misfeasance. Both elements, non-

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feasance and misfeasance, entered into the act, or fact, which caused the plaintiff's damages. But the non-feasance alone could not have produced it. The misfeasance was the efficient cause. For this the defendant Semple is responsible to the plaintiff. *Mechem, Agency*, § 569 *et seq.*; 14 Am. & Eng. Encyclop. Law, p. 878, and cases cited in note 4; *Wood, Mast. & S.* 2d ed. 667; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437. The complaint states but a single cause of action. It is the same cause of action against both defendants, arising from the same acts of negligence,—the master for the negligence of its servant; the servant for his own misfeasance. Both master and servant, being liable for the same acts of negligence, may be joined as defendants. *Wood, Mast. & S. supra*; *Wright v. Wilcox*, 19 Wend. 843, 32 Am. Dec. 507; *Phelps v. Wait*, 30 N. Y. 78.

The order appealed from by the Whitcomb Lumber Company is affirmed, and the order appealed from by the plaintiff is reversed.

PATTEN PAPER CO., LIMITED, *Appt.*,

KAUKAUNA WATER-POWER CO. *et al.*,
Appls.

GREEN BAY & MISSISSIPPI CANAL
CO., Cross-Complainant, *Resp.*

(30 Wis. 370.)

1. Riparian rights of the lower owners of land upon the bank of a stream are property such as cannot be taken by the state even for a public use except in aid of navigation without compensation to the owner, and cannot be taken at all or impaired for a private use.
2. Surplus water of a dam lawfully made in a river to supply a canal past rapids in aid of navigation, although under a statute declaring that the water-power created should belong to the state, cannot be diverted from its natural channel to the detriment of the lower riparian proprietors by the state or its grantees through the canal and sluice-ways therefrom for the operation of mills on the canal bank.

(On Rehearing.)

3. An appellate court will not determine in what precise manner an upper proprietor upon a stream may use the water and at what specific place it must be returned to the stream so as not to infringe the rights of a lower proprietor, where no such issue was made in the lower court and the record contains no evidence from which such questions could be determined.

(February 5, 1895.)

APPPEAL by Patten Paper Company, Limited, Kaukauna Water-Power Company,

NOTE.—The protection of riparian rights as "property" within the meaning of constitutional guaranties, is shown, in respect to the cutting off of access to a water front by railroads, in *Rumsey v. New York & N. E. R. Co.* (N. Y.) 15 L. R. A. 614, and *note*.

and Henry Hewitt *et al.*, from a judgment of the Superior Court for Milwaukee County establishing a superior right in favor of the Green Bay & Mississippi Canal Company to water flowing in the Fox river. *Reversed.*

Statement by Newman, J.:

In 1846 congress granted to the state of Wisconsin, when it should become a state, certain lands to be used in improving the navigation of the Fox and Wisconsin rivers. In 1848 the state accepted the grant, and placed the construction, maintenance, and operation of such improvement under control of a board of public works. Section 15 of the Act provided: "In the construction of such improvements, the said board shall have power to enter on, to take possession of and use all lands, waters and materials, the appropriation of which for the use of such works of improvement shall in their judgment be necessary." This board of public works entered upon the work of improving the navigation of those streams. In 1853 the legislature incorporated the Fox & Wisconsin Improvement Company, and granted to it all the works of improvement, land, and property of the state connected therewith, on condition that it should prosecute the work of improvement with vigor. The property owned by the state and granted to the improvement company consisted in an easement in the lands occupied by the canal, dams, and ponds, and the water powers incidentally created by the dams. The water powers which the state owned and transferred to the improvement company were such as the state owned by virtue of section 16 of the Act of 1848, which provided: "Whenever a water power shall be created by reason of any dam or other improvement made on any of said rivers, such water power shall belong to the state." The state did not take or own real estate below its dams, except what was taken for and occupied by the canal. In 1866 all the title and interests of the improvement company in all the works of improvement, lands, and property, including the water powers created by the improvements, were sold under a judgment of foreclosure and sale under a deed of trust executed by the improvement company. The purchasers became incorporated as the Green Bay & Mississippi Canal Company, which became the owner of all the property and improvements which had been owned by the improvement company. In September, 1872, the Green Bay & Mississippi Canal Company conveyed its canal and works of improvement to the United States, reserving to itself all its water powers, in the following language: "The water powers created by the dams and the use of the surplus waters, not required for purposes of navigation, . . . and lots necessary to the enjoyment of the same." In this manner the Green Bay & Mississippi Canal Company has derived whatever title and rights it has in the water powers created by the improvements and in the water of the streams. The Green Bay & Mississippi Canal Company, and its said predecessors in title, made many and expensive works of improvement for the purpose of facilitating the navigation

of the Fox river such as dams, canals, and locks. The Fox river is a navigable stream, which has an ordinary flow of about 300,000 cubic feet a minute, and, in low water, a flow of 150,000 cubic feet a minute. At Kaukauna there was a rapids which had a descent of about 42 feet, from the head of the rapids to slack water below, a distance of about one mile and a half. The flow of 150,000 cubic feet a minute of the water down this rapids affords a power equal to 300 horse power per foot of fall. This is substantially equal to 12,600 horse power on the whole rapids. Between the years 1851 and 1856 a public dam was built under the Act of 1848, at Kaukauna, at the head of the rapids, for the purpose of creating slack water above, and feeding a canal around, the rapids. This dam created about a 9-foot head, equal to about 2,700 horse power of water. A navigable canal was constructed from the pond made by this dam to slack water below the rapids. One thousand cubic feet of water a minute is required for the use of the canal, for the purposes of navigation, during the season of navigation. This is less than 1 per cent of the natural flow of the stream. The rest constitutes the surplus water power which is created by the dam. The river, between the dam and slack water below is rapids, and has never been navigable. It is divided by islands into three principal channels, known as the north, middle and south channels. All these islands were surveyed and sold as separate parcels of land by the United States. Island No. 4 is about 700 feet below the dam, and is about 135 rods long. Island No. 3 is about 70 rods below the head of island No. 4. The water in the river below the dam, by nature, flowed 95-200 in the north channel, 62-200 in the middle channel, and 43-200 in the south channel. The natural ordinary flow of the water down the rapids affords 300 horse power per foot of fall. This is substantially 2,700 horse power at the dam, and 12,600 horse power below the dam. The crest of the government dam is lower than the walls of the canal; so that so much of the flow of the stream as is not used for navigation must pass over the dam, and down the channel of the stream, over the rapids, and past the lower riparian proprietors, unless it is diverted for purposes other than the uses of navigation. The canal takes its water from the pond immediately above the dam, at the north bank of the stream. Its course for some distance is nearly along the north bank of the stream. From the intake of the canal to the first lock (a distance of more than 1,100 feet) the waters of the canal are on the same level as the waters in the pond. There was at one time a guard lock at the point where the canal meets the pond, to protect the banks of the canal in times of freshet. This guard lock is no longer used, and is out of repair. The Green Bay & Mississippi Canal Company has cut the south bank of the canal between the dam and the first lock, in several different places, in order to make water power for its own mills, and to be leased to others. For this purpose it diverts through the canal and through its sluiceways, through the bank of

the canal, a large part of the natural flow of the water of the stream, and discharges it again below the heads of islands Nos. 4 and 8; so that a considerable part of the natural flow of the stream is wholly diverted from the south and middle channels. This diversion of the water of the stream works great detriment to the riparian owners of water powers below the government dam, and, by accelerating the current, impairs navigation. The action was brought originally by the Patten Paper Company, Limited, to obtain an adjudication of the relative proportions of the flow of the river below the dam in the several channels, and to enjoin the Kaukauna Water-Power Company from diverting any water to the south channel which of right should flow in the middle channel. But, in the course of the litigation, the issues have been changed and enlarged; so that now the principal question involved is the right of the Green Bay & Mississippi Canal Company to divert the water of the stream for water power, by means of the canal and its sluiceways, from the riparian proprietors of water powers below the dam. All the parties to the action, except the Green Bay & Mississippi Canal Company, are riparian proprietors or lessees of water powers, upon the rapids, below the dam, who are damaged by the diversion of the water from its accustomed channels. The Green Bay & Mississippi Canal Company, in its pleading, in the nature of a cross-complaint, claims that "it is the owner of all of the water power created by the government dam in question, and has the right to make exclusive use of the same at any point on its own lands where the same can be made available, and particularly at points or places on said dam, including its extension to the said lock." The other parties to the action denied this right, and over this issue is the contention. The superior court, among other things, adjudged as follows: "It is hereby considered, adjudged, and decreed that the defendant, the Green Bay & Mississippi Canal Company, is the owner of and entitled, as against all of the parties to this action and their successors, heirs, and assigns, to the full flow of the river not necessary for navigation from the said upper or government dam across the Fox river at Kaukauna, and is not obliged to permit any of the water of the river or pond to flow over the dam, but is entitled to withdraw from the pond made by said dam all of the surplus waters not necessary for navigation, either through the canal extending from the pond to slack water below the rapids, or directly from the pond, and use the same from said canal or said pond, and let such water to others to be used wherever it may be available for water power, and return the same to the river where it shall see fit, and is not obliged to permit any of the water from the river or pond to flow over said dam. And it is further considered and adjudged that all and singular the other parties to this action are hereby forever enjoined from interfering with the said Green Bay & Mississippi Canal Company in so withdrawing and using such water." From this and some other parts of the judgment, Patten Paper Company, Limited, et al., Kaukauna Water-Power Company et al., Henry Hewitt, Jr., and William P. Hewitt appealed.

ited, et al., Kaukauna Water-Power Company et al., Henry Hewitt, Jr., and William P. Hewitt appealed.

Messrs. D. S. Ordway, Moses Hooper, George G. Greene, and John T. Fish for appellants.

Messrs. B. J. Stevens and E. Mariner for respondent.

Newman, J., delivered the opinion of the court:

It is settled by the decisions in *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, and Id., 142 U. S. 254, 85 L. ed. 1004, that the respondent in these appeals, the Green Bay & Mississippi Canal Company, is the legal owner of all the water power which has been created by the dam at the head of the rapids at Kaukauna beyond what is required for the purpose of navigation; and that it has all the right and title in that water power which the state acquired in it under section 16 of the Act of 1848; and that such title amounts to entire and absolute ownership. But the court in those cases did not "determine the relative rights of the respondent and the other riparian owners below the dam in respect to the use of the water which would run over the dam if not taken from the pond into the canal," nor "whether there is any restriction upon the manner or place in which the water shall be returned to the river below the dam." The questions so left undecided in that case are the very questions presented by the record for decision here. The court is now called upon to determine and define the relative rights of the respondent and the other riparian owners below the dam in respect to the use of the water which would run over the dam if not taken from the pond, through the canal, to furnish water power lower down the stream, and whether there is any restriction in the manner or place in which the water shall be returned to the river below the dam. There is no question of the right of the government to divert through the canal so much of the water of the stream as is required for the purpose of navigation. This amounts to about 1 per cent of the water of the stream. The controversy concerns only the use of the surplus water after the purposes of navigation have been served. The ordinary rule governing such questions would, no doubt, require the person owning or controlling the Kaukauna dam, and the water power created by it, to so use his right as that the water should be returned to the stream in such a manner and at such a place as not to deprive a lower riparian owner of its use as it has been accustomed to flow past his banks; for as said by Lyon, J., in *Kimberly & O. Co. v. Hewitt*, 79 Wis. 334: "The rule is elementary that unless affected by license, grant, prescription, or public right, or the like, every proprietor of land on the bank of a stream of water, whether navigable or not, has the right to use the water as it is wont to run, without material alteration or diminution; and no riparian owner has the right to use the water of the stream to the prejudice of other riparian owners,

above or below him, by throwing it back upon the former, or subtracting it from the latter." This must be the extent and limit of the respondent's right, unless the state, whose title it has acquired, had greater rights.

The statute which vested the title to this water power in the state is in these words: "Whenever a water power shall be created by reason of any dam erected or other improvement made, . . . such water power shall belong to the state." See section 16, Act 1848. It is by no means clear that this statute invested the state with a title more absolute, or with rights more extensive or exclusive, in the water of the stream, than would belong to the owner of both banks of the stream who should have erected the dam for the purpose of creating water power. Such a private owner would own the water power created by the dam, absolutely and entirely, subject only to the public right to divert the water required for navigation. It is not easy of apprehension how the state could acquire a title more ample. The state could acquire title to such water power only as was created by improvements in the stream which it might lawfully make. It could not lawfully make a dam or any other improvement in the stream, for the purpose of creating a water power, if such improvement should work injury to a lower riparian owner, any more than could a private person; for the riparian rights of the lower owners of land upon the bank of the stream are property such as cannot be taken by the state for even a public use, except in aid of navigation, without compensation to the owner, and cannot be taken at all or impaired for a private use. *Chapman v. Oshkosh & M. R. Co.* 33 Wis. 629; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 886; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808; *Atty-Gen. v. Eau Claire*, 87 Wis. 400-436; *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 272, 278, 35 L. ed. 1004, 1010. The right of the state to improve the stream as a highway, and for the purpose of aiding its navigation, is superior to the rights of riparian owners. It may take and divert, absolutely and without compensation, so much of the water of the stream as may be required to improve its navigation. But that is the limit of its right. But, because it is not practically feasible to measure and determine with exactness the amount of water required for this public purpose, some discretion is allowed; and it may well happen that an excess of water will be produced by a dam. As in this case, it may be necessary to stop the entire flow of the stream, by a dam, in order to divert some small part of the water for the uses of navigation. In that case the surplus need not be permitted to run to waste. The power so created by the surplus water may be leased or sold. This is the water power, created by the dam, which the state owned. In *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, *supra*, it is said: "It is probably true that it is beyond the competency of the state to appropriate to

itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes." And on page 275, 142 U. S., 35 L. ed. 1011: "The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where, in building a dam for a public improvement, a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement, and a reasonable provision for securing an adequate supply of water at all times for such improvement. . . . So long as the dam was erected for the bona fide purpose of furnishing an adequate supply of water for the canal, and was not a colorable device for creating a water power, the agents of the state are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created."

But it is not the dam itself of which complaint is made. It is claimed that the dam is unlawfully used as a colorable device for the purpose of creating a water power at a point at some distance removed from the dam. It is evident that the water power which was created incidentally, by the erection of the dam, is due to the gravity of the water as it falls from the crest to the foot of the dam. What further power it may have in its present distribution is not incidental to the erection of the dam, but such as has been added to it from deliberate design. The first reach of the canal, to the first lock, did not create a water power. No power existed there until the bank of the canal was cut for the very purpose of creating it. Until then all the water of the stream not required for navigation passed over the dam. There it created a power which was, in a true sense, incidental to the erection of the dam. The power created by the cutting of the canal was not incidental to the erection of the dam, or to the construction and use of the canal for navigation, but was *ex industria*, for the purpose of creating a water power. It was created for its own sake, and not incidentally. So far from being an incident to the lawful public improvement, it is in derogation of the public improvement. It impedes rather than aids the navigation of the stream. In some sense, it may be said that the first reach of the canal, down to the first lock, is a part of the dam. Since the use of the guard lock has been abandoned, it upholds the pond. In that sense it is a part of the dam. But, as bearing upon the question as to what rights are incidental to the building of the dam proper, it is a perversion of terms and ideas. It is merely color, to cover the subtraction of the riparian right to this private use of the water of the stream. There seems to be no sufficient ground for holding that the respondent has acquired additional right by prescription. Twenty years before the commencement of the action, it had diverted and was diverting only a small part of the water of the stream. The amount diverted was inconsiderable. It was no such "strong act of exclusive possession" as that it was,

per se, notice of an adverse claim of right. The state owned no such right to divert the water from the lower riparian owners as is claimed by the respondent. The respondent has acquired no such right. The ordinary rule which governs the relative rights of riparian owners is the rule which governs this case. The lower owners are entitled to have the water—except what is required for navigation—returned to its accustomed channels, in such manner and place as that it shall flow past their lands as it was accustomed to flow.

The judgment of the Superior Court of Milwaukee County is reversed upon each of the three appeals, and remanded, with directions to enter judgment in accordance with this opinion.

A petition for rehearing was subsequently filed in response to which on June 20, 1895, Newman, J., delivered the following opinion:

This action was originally commenced by the Patten Paper Company, Limited, one of the appellants, to obtain an adjudication of the relative proportions of the flow of the river, below the dam, in the several channels, and to enjoin the Kaukauna Water-Power Company from diverting any water to the south channel, which, of right, should flow in the middle channel. An adjudication of these relative rights is included in the judgment of the trial court, and all parties are, by it, enjoined from interfering with the flow of the water in the several channels in the proportions adjudged to be the due of each channel. There is no appeal from this part of the judgment; so no consideration of it by this court is due or proper. But in the course of the litigation a new issue was introduced by the Green Bay & Mississippi Canal Company. It claimed that, by its purchase from the state of the canal and improvements, and the water powers which were created by the improvements, it became the absolute owner of the water of the stream, with the right, as against the owners of water powers on the rapids, below the Kaukauna dam, to divert all the water of the stream, and to use it wherever it best suited its interests, and to return it to the stream wherever it chose, regardless of its effect upon the water powers and rights of such lower owners. This claim the trial court sustained, to its full extent. It gave judgment sustaining it, and enjoined all the other parties to the action from interfering with the complete exercise of the rights so claimed. From this part of the judgment these appeals were taken. The right of this contention of the Green Bay & Mississippi Canal Company was the only question presented by these appeals. This court held that the Green Bay & Mississippi Canal Company owned all the water power which was created by the construction and operation of the government dam at Kaukauna; that it

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had the right to use all the water of the stream, not used for the purposes of navigation, for the purposes of power, wherever it could or chose, so far as it could do so without impairing the just rights of other owners of water powers upon the stream; that it was due to other owners of water powers below the dam that the water, after being used by it, should be returned to the stream, at such place and in such manner as that it shall flow past the banks of such lower owners, in its accustomed channels, and as it was accustomed aforesaid to flow. The limit to its right is at the point where it infringes upon the rights of others. It concedes to it all the rights which the state had, or could acquire, as against such lower owners. The place where it may use the water, for power, is restricted only by its duty to refrain from injuring others. The court is satisfied of the correctness and justice of its judgment. It is not deemed to be inconsistent with anything previously said or decided by this court, or to the decision of any other court to which attention has been called. It is believed to be grounded impreguably, upon that widely applied mandate of the law "*sic utere tuo ut alienum non ledas*."

But it is urged upon this motion that the language of the opinion is only general, and will not enable the trial court to determine and direct in what specific place, or in what precise manner, the water must be returned to the stream; nor how and where the respondent may lawfully use that relative proportion of the flow of the stream which is appurtenant to its bank, below the dam. Probably this is a just estimation of the opinion. It has assumed to determine only the general principle by which the relative rights of the parties are to be determined, and has pronounced that general principle in general terms only. It could well do no more. The court had no concrete question before it. No such issue was made, nor such judgment asked, by the respondent's pleading; nor was any such issue adjudged by the trial court. Nor does the record furnish data by which such questions can be determined by this court. These are practical questions, which cannot be answered by the aid only of mere theory. Probably it cannot be satisfactorily predicted, in advance of experiment, just where and how the water must be returned to the stream, so as to work no injury to lower owners. Certainly, it cannot be determined by a court without evidence of some kind. The court has performed its full function, in this case, when it has established the general rule which governs it. The judgment of the superior court of Milwaukee county is reversed, upon each of the three appeals as to those parts of the judgment which were appealed from, and the cause is remanded, with direction to enter judgment in accordance with the opinion.

The motion for a rehearing is denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

DOVER STAMPING CO.

v.

FELLOWS *et al.*

(188 Mass. 191.)

1. The exclusive right to the use of a name given by a patentee to an article describing his patented article ceases with the expiration of the patent, at least if there is no special and distinguishing use which shows that the word was not used merely as the name of the thing.
2. The right to protection of a trade-mark under Pub. Stat., chap. 76, § 1, does not change the rule that the name of a patented article becomes open to general use on the expiration of the patent.
3. The manufacturer of articles similar in construction and general appearance to those made by another which were formerly covered by a patent, and the use of the same name which had been given to the patented articles, does not necessarily make a case of deception or unfair competition.

(March 1, 1895.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court in an action brought to enjoin the infringement of an alleged trade-mark. *Bill dismissed.*

The facts are stated in the opinion.

Mr. Thomas William Clarke for complainant.

Mr. Edward S. Beach for defendants.

Allen, J., delivered the opinion of the court:

This case comes up on a report of the evidence, without any findings of the facts. We have therefore, in the first place, to determine and state the material facts shown by the evidence, and then to determine the rules of law applicable to the facts. In 1857 a partnership or company was established under the name of the Dover Stamping Company, which in 1871 was organized as a corporation, under the laws of this commonwealth, having its usual place of business in Boston and its factory in Cambridge. This company, both before and after its organization as a corporation, may for convenience be called the "plaintiff." It manufactured and dealt in kitchen furnishing goods and tinware. On May 31, 1870, one Turner Williams obtained letters-patent for an improved egg beater, the essential principle of which consisted in having two interworking or interlacing floats or beaters, revolving in opposite directions, on separate centers, and occupying the same working space. The plaintiff dealt in egg beaters of

different kinds, and in 1870 obtained control of the Williams patent, and as early as 1872 became the owner of it. In 1870 the plaintiff contracted with the Lamb Knitting-Machine Manufacturing Company for the manufacture of egg beaters under the Williams patent, and also of other kinds of egg beaters. To the egg beaters under the Williams patent the plaintiff gave the name of "Dover," and on October 31, 1870, directed the Lamb Company to put on the wheel of the egg beaters the words and figures, "Dover Egg Beater. Patd. May 31st, 1870." This was done. On May 6, 1878, one Ethan Hadley obtained letters-patent for an improvement in egg beaters. In his specification he said: "My invention relates to an improvement in what is known as the 'Dover egg beater';" and in his claim he spoke of his invention as "an improvement on the Dover egg beater." This invention was assigned to the plaintiff. The Lamb Company continued to be the exclusive manufacturer of the Dover egg beaters for the plaintiff under these patents until the expiration of the last patent, in 1890. These egg beaters were made in three sizes. The ordinary size, adapted for family use, constituted 99 per cent of the whole manufacture. The largest size was sometimes called the "mammoth" or "hotel" size. Of these, perhaps 1,000 were made in all. The second largest size was called the "extra family size," and perhaps ten times as many of these were made as of the hotel size. The whole number of Dover egg beaters of all sizes made for the plaintiff by the Lamb Company was about 4,000,000. These egg beaters were known by the trade and by the public as "Dover egg beaters." They were spoken of and bought and sold under that name; and they had no other name. The name "Dover" was used to signify and indicate this article; and there was no other usual short way in which to describe it. "Dover" was the name by which they were universally known. This name signified the above-mentioned combination of floats or beaters propelled by a wheel and handle. The improvement patented by Hadley and various unpatented improvements which were made from time to time were not essential features of the machine, but were rather changes and improvements in mechanical details, not affecting the principle or the general mode of construction. Some stress has been laid on these changes in the argument of the plaintiff, but they appear to us insufficient to show that the word "Dover" meant to dealers or to the public anything else than egg beaters of that general construction and appearance. From the outset, the general construction and appearance remained about the same; only there were some changes in mechanical details, which were not distinguishing characteristics of the article. Since 1875 various other articles manufactured or sold by the plaintiff have been named or called "Dover;" as for instance, Dover can spouts, Dover teakettles,

NOTE.—The above case is a valuable review of the subject of trade-marks in names of patented articles. For the same rule applied to an embossed periphery on a spool of thread after a patent therefor has expired, see *Coats v. Merrick Thread Co.* 149 U. S. 562, 37 L. ed. 847.

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Dover coal hods, etc. The plaintiff's machines were all marked "Dover Egg Beaters," with dates of patents, in which last particular there was some change after the Hadley patent was obtained. The defendants' machines which are complained of were marked simply "Dover," with dates of other patents. The defendants' mode of packing the goods had been in use before the Williams patent was obtained.

The plaintiff contends, in the first place, that the word "Dover," as applied to egg beaters, is a trade-mark, and that it is entitled to be protected in the exclusive use of that word. The defendants deny that the plaintiff could acquire a valid trade-mark in the word "Dover" under any circumstances. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144; *Sebastian Trade-Marks*, 82, and cases cited. But it is enough for us to inquire whether the plaintiff has done so under the particular circumstances of this case. A word which might become a valid trade-mark when applied to an unpatented article may not be so when applied to an article which has the protection of letters-patent. In the latter case the letters-patent indicate the ownership and origin of the article, and it is more readily to be inferred that the word is used as a name merely to identify the article. Usually the protection given by a patent is far greater, though of less duration in time, than that obtained by the use of a trade-mark, because if an article is patented, nobody but the owner of the patent can without his consent make or sell anything embodying the same principles or elements, while a trade-mark only secures one in the use of the name or emblem adopted by him and applied to the article. *Sebastian Trade-Marks*, 15. One may choose to rely on the name alone; and, if so, he may establish or create a trade-mark which will be permanent. But, if he seeks and obtains the protection afforded by a patent, he is bound to yield up his monopoly, with all that belongs to it, at the end of the term; and the right to the exclusive use of the name given to his goods, which might otherwise have become a trade-mark, will ordinarily fall with the patent itself. It is sometimes said that the granting of a patent is a contract with two sides to it; that the government grants an exclusive use for a term of years, and the patentee agrees to surrender that use fully and freely for the general benefit of the public at the end of that term; and that this contract is to be liberally construed in favor of the patentee during the term, and in like manner liberally construed in favor of the public after the term has expired. 1 *Robinson, Patents*, §§ 40, 44. This, at any rate, describes with substantial accuracy the resulting rights of the parties. After the expiration of a patent, the public is entitled to make and use the patented article, free from restrictions; and this right carries with it whatever is necessary for its full enjoyment. In *Cheavin v. Walker*, L. R. 5 Ch. Div. 850, 862, it was said by Jessel, M. R.: "Protection only extends to the time allowed by the statute for the patent, and, if the court were afterwards to protect the use of

the word as a trade-mark, it would be in fact extending the time for protection given by the statute. It is therefore impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trade-mark." And, in the same case, James, L. J., said: "It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trade-mark. Whatever is mere description is open to all the world." In *Re Palmer's Trade-Mark*, L. R. 24 Ch. Div. 504, 521, Lindley, L. J., said: "I do not mean to say that a manufacturer of a patented article cannot have a trade-mark not descriptive of the patented article, so as to be entitled to the exclusive use of that mark after the patent has expired,—for instance, if he impressed on the patented articles a griffin or some other device; but, if his only trade-mark is a word or set of words descriptive of the patented article of which he is the only maker, it appears to me to be impossible for him ever to make out, as a matter of fact, that this mark denotes him as the maker, as distinguished from other makers." And in *Re Leonard & Ellis's Trade-Mark*, L. R. 26 Ch. Div. 288, 308, 304, after an elaborate exposition by Lord Chancellor Selborne, it was said by Cotton L. J.: "If a man has a patent, and during the term of his patent is the only maker of an article to which he gives a particular name, which name, during the continuance of the patent, comes to be merely a description of the article, he cannot, in my opinion, after his patent is gone, and the making of the article is free and open to all the world, claim the name as his trade-mark."

In the present case it is not necessary for us to go so far as to say that where there is a patent there can be no trade-mark, especially where some special device or symbol is added to the general name of the article manufactured. But where one who has a patented article gives to it and puts upon it a name, and calls it by that name, and by no other, and it becomes known to the trade and to the public exclusively by the name so given to it by the patentee or person controlling the patent, then certainly it may be said that, as a general rule, the right to the exclusive use of the name ceases with the termination of the exclusive right to make and sell the thing. This is shown by numerous decisions in England and in this country. *Linoleum Mfg. Co. v. Nairn*, L. R. 7 Ch. Div. 834; *Wheeler & Wilson Mfg. Co. v. Shakespear*, 39 L. J. Ch. 36; *Young v. Macrae*, 9 Jur. N. S. 822; *Re Palmer's Trade-Mark*, L. R. 24 Ch. Div. 504, 517, 520, 521; *Re Leonard & Ellis's Trade-Mark*, L. R. 26 Ch. Div. 288; *Singer Mfg. Co. v. Stanage*, 8 Fed. Rep. 279; *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706; *Singer Mfg. Co. v. Larsen*, 8 Biss. 151, Fed. Cas. No. 12,903; *Singer Mfg. Co. v. June Mfg. Co.* 41 Fed. Rep. 208; *Brill v. Singer Mfg. Co.* 41 Ohio St. 127; *Trucker Mfg. Co. v. Boyington*, 9 Pat. Off. Gaz. 455, Fed. Cas. No. 14,229; *Consolidated Fruit-Jar Co.* 14 Pat. Off. Gaz. 269; *Lorillard v. Pride*, 28 Fed. Rep. 434; *Gally v. Colt's Patent Fire*

Arms Mfg. Co. 80 Fed. Rep. 118; *Coats v. Merrick Thread Co.* 86 Fed. Rep. 324; *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34. The inclination of courts to treat a name so used as merely the name of the goods, and not as denoting any connection between them and the trader, is mentioned by the text-writers. Kerly, *Trade-Marks*, 40, 42, 201, 202, 405; Sebastian *Trade-Marks*, 59, 61. See also Browne, *Trade-Marks*, §§ 220a, 221.

If, therefore, we should assume that there may be a double use of a word like "Dover," and that it may be used both as the name of the patented article and as a trade-mark, then it would be necessary to see if, in this case, there was sufficient evidence to show that the plaintiff so used it as to import a trade-mark, as well as the name of the patented article, and also that the defendants have used it in a like double sense. Since, ordinarily, the exclusive right to use the names ceases with the expiration of the patent, there must, at least, be something to show some special and distinguishing use, by which it can be seen and known that the word is not used merely as the name of the thing, but to import the additional feature of a trade-mark. *Re Leonard & Ellis's Trade-Mark*, L. R. 26 Ch. Div. 288, 296, 298. There is nothing to show that the plaintiff ever had this distinction in mind, or used the word in any other manner than merely as the name given to the egg beaters. Nor, on the other hand, is there anything to show that the defendants, since the expiration of the patent, have used the word in any other sense than to call the machine by its name. This they have a right to do; and, to entitle the plaintiff to an injunction, it must be shown that the defendants have used the word in a further sense, so as to violate the plaintiff's right of trade-mark while using the word "Dover" as the name of the machine, as they lawfully may do. And any injunction which might be granted would have to be so limited as not to prohibit the defendants from calling the egg beaters by their name. The distinction is fine; perhaps too fine for practical application. In this case we are not satisfied, on the evidence, that the plaintiff has any trade-mark in the name "Dover." A mere name is often held to be simply descriptive of the article which is called and known by it, and by no other name; and it may be assignable to others, even though it is the name of the inventor or original manufacturer or dealer himself. *Thomson v. Winchester*, 19 Pick. 214, 31 Am. Dec. 135; *Gilman v. Hunnewell*, 122 Mass. 189; *Russia Cement Co. v. Le Page*, 147 Mass. 206, and cases there cited; *Noera v. H. A. Williams Mfg. Co.* 168 Mass. 110. See also *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144; *Hall v. Barrows*, 4 De G. J. & S. 150. The word "Dover" has, by use, thus come to be simply descriptive of an egg beater made under the Williams patent, and it became common to the public on the expiration of that patent.

The plaintiff contends that it has a right to protection under Pub. Stat., chap. 76, § 1, providing that trade-marks are not to be used without the consent of their owner. But the plaintiff derives no additional rights under 28 L. R. A.

this provision of statute, because the word "Dover" was used as the name of the machines, and not as a trade-mark, and it was not the intention of the statute to do away with the rule that the name of a patented article becomes open to general use upon the expiration of the patent. This rule has heretofore been incidentally alluded to in a way to imply that it was understood to be in force in this commonwealth. *American Order of Scottish Clans v. Merrill*, 151 Mass. 558, 562, 8 L. R. A. 820; *Chadwick v. Covell*, 151 Mass. 190, 195, 6 L. R. A. 839.

The plaintiff further contends that the defendants have used the word "Dover" as a mark on their egg beaters in a way calculated to deceive the public, independently of the question of the trade-mark. This, according to the contention of the plaintiff, means that they are passing off their goods as goods made for or by the plaintiff, and thus are injuring the plaintiff by unfair competition. No doubt, the use of the word "Dover" on the egg beaters is an advantage in the market; but this is an advantage which the defendants are entitled to have, unless the plaintiff has a valid trade-mark. It must now be assumed that the plaintiff has no trade-mark in the name, and that the name as well as the invention is open to common use. This being so, something more must be shown than merely that the defendants are making and selling egg beaters similar in kind and under the same name as that of the plaintiff. *Mages Furnace Co. v. Le Barron*, 127 Mass. 115; *Brill v. Singer Mfg. Co.* 41 Ohio St. 127; *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706; *Re Leonard & Ellis's Trade-Mark*, L. R. 26 Ch. Div. 288; *Re Ralph's Trade-Mark*, L. R. 25 Ch. Div. 194, 198; *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15.

The evidence fails to show any violation of the plaintiff's rights in this respect. There is nothing in the making of the defendants' egg beaters to indicate that they were made by the plaintiff, unless the use of the word "Dover" on the wheel. The defendants had a right to put this marking on the wheel. In form and construction and general appearance there was some resemblance between the defendants' egg beaters and the plaintiff's but imitation in these respects is lawful. In *Fairbanks v. Jacobus*, 14 Blatchf. 337, Fed. Case. No. 4,608, it was held that, apart from patents and trade-marks, "any one may make anything in any form, and may copy with exactness that which another has produced, without inflicting any legal injury, unless he attributes to that which he has made a false origin, by claiming it to be the manufacture of another person." This was cited and approved in *Brill v. Singer Mfg. Co.*, 41 Ohio St. 127, where it was held broadly that "where machines, during the time they are protected by a patent, become known and identified in the trade by their shape, external appearance, and ornamentation the patentee, after the expiration of the patent, cannot prevent others from using the same modes of identification in machines of the same kind manufactured and sold by them." And in *Singer Mfg. Co. v. June Mfg. Co.*, 41

Fed. Rep. 208, the above doctrines were reaffirmed with distinctness and emphasis. There is no unfair competition, apart from the infringement of a patent or trade-mark, unless the competing person so makes or marks his goods or conducts his business that purchasers of ordinary caution and prudence, and not those who are exceptionally dull, are likely to be misled into the belief that his goods are the goods of somebody else. *Gilman v. Hunnewell*, 122 Mass. 189, 148, 150; *Singer Mfg. Co. v. Wilson*, L. R. 2 Ch. Div. 484, 447 (per Jessel, *M. R.*, whose decree was affirmed on appeal); *Brill v. Singer Mfg. Co.* 41 Ohio St. 127; *Robertson v. Berry*, 50 Md. 591, 33 Am. Rep. 328.

Looking at the whole case, in the light of the defendants' right to use the word "Dover" and to make egg beaters similar in construction and general appearance to those of the plaintiff, we find no proof of anything unlawful on their part.

Bill dismissed.

George PATTEE

v.

Dennis A. PAIGE *et al.*, *Appts.*

(153 Mass. 352.)

A discharge of two firms in the same insolvency proceeding does not affect the claim of a nonresident creditor against one of the firms merely because he proved a claim against the other firm which included the partners in the former and voted for their assignee and accepted a dividend on the claim.

(April 2, 1895.)

APPEAL by defendants from a judgment of the Superior Court for Middlesex County in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Blaney & Robinson, for appellants:

The plaintiff, being a nonresident creditor, is not bound by the decree of the insolvent court unless he has submitted himself to its jurisdiction.

Journey v. Gardner, 11 Cush. 355; *Clay v. Smith*, 28 U. S. 8 Pet. 411, 7 L. ed. 723.

If, however, he has participated in the insolvency proceedings, and sought to avail himself of the benefits thereof, he cannot refuse to be bound thereby.

Ibid.; *Phelps v. Borland*, 108 N. Y. 406, 57 Am. Rep. 755; *Murray v. Roberts*, 6 L. R. A. 846, 150 Mass. 353.

Where a nonresident brings a suit for his own purposes against property of a debtor, and such suit under the peculiar laws of that forum is, by order of court, consolidated with proceedings brought by other creditors against the same and other property of the debtor, to

cause the whole property to be sequestered for the benefit of all the creditors, he cannot thereafter withdraw or avoid any judgment entered in such consolidated suit.

Baker v. Kinnaird, 94 Ky. 5.

In *Hyde v. Moxie Nerve Food Co.*, 160 Mass. 559, the court, after determining that a firm is not a legal person, decides that, "for technical purposes of suing or being sued, the law does not know the firm, but only the men composing it."

So, in this case, this plaintiff, when he voted for an assignee who should hold all property joint and several of all the three members of the new firm, and proved a claim against all three members, likewise became a party to a proceeding in which he might have proved a second claim against two of those same individuals whose property, from which such second claim might have been paid, he had chosen an assignee to receive.

A firm cannot be insolvent so long as any partner is solvent. Therefore a petition in behalf of a partnership for the benefit of the insolvent laws must aver the individual insolvency of all the partners.

Hanson v. Paige, 3 Gray, 239; *Dearborn v. Keith*, 5 Cush. 224.

A person so choosing an assignee must be considered as dealing with the assets of the individual partner.

Pub. Stat. chap. 157, § 121.

It is possible, therefore, that the dividend received by the plaintiff in this case may have been paid in part at least from the individual assets of these defendants.

Messrs. Williams & Copeland for appellee.

Allen, J., delivered the opinion of the court:

It is well settled and familiar that a nonresident creditor is not barred of his claim by a discharge in insolvency granted here, unless he has come in and submitted himself to the jurisdiction of the court. *Phoenix Nat. Bank of Providence v. Batcheller*, 151 Mass. 589, 8 L. R. A. 644. If he thus comes in, and proves his claim and takes a dividend, or if he accepts the sum offered under composition proceedings, he is held to have waived this right of objection. *Murray v. Roberts*, 150 Mass. 353, 6 L. R. A. 846; *Evans v. Bolles*, 146 Mass. 413, 16 L. R. A. 361, 37 L. ed. 1111. In the present case there were two firms,—Paige & Gove and Crosby, Paige & Gove. The latter firm consisted of the members of the former firm, with the addition of Crosby. Both firms were included in the same proceedings in insolvency, and the plaintiff, a nonresident, held a claim against each firm. He proved only the claim against Crosby, Paige & Gove, and voted thereon for assignee, and took a dividend therein. It is not stated whether his vote affected the choice of assignee or not. The question is whether his claim against the other firm and its members is thereby barred, a discharge having been granted to the debtors. No objection has been raised to the method of including both firms in the same proceedings in insolvency. There was nothing, beyond the facts already stated, to show an intention, on the part of the plaintiff, to waive his right to pursue his present claim by an action at law.

NOTE.—As to effect generally of insolvency proceedings upon nonresident creditors, see *Murray v. Roberts* (Mass.) 6 L. R. A. 846, and note; *Phoenix Nat. Bank of Providence v. Batcheller* (Mass.) 8 L. R. A. 644, and note.

28 L. R. A.

The statutes do not in terms provide for a case where the same persons are members of more than one firm. In England a practice grew up by which a commission in bankruptcy against several partners would include, not only the individual members, but all minor partnerships existing among them as well, distinct accounts being kept. Under this practice a general order was passed by Lord Rosslyn, in 1794, that, under a joint commission against a firm, separate debts might be proved as of course, without filing a special petition for liberty to do so. 2 Christian, Bankrupt Law, 2d ed. 81, 82. And it was held that creditors of a minor firm consisting of some of the members of the larger firm might, in like manner, prove their claims. *Ex parte Worthington*, 8 Madd. 26. But a creditor whose claim was against the firm and also against one or more of its members could not make double proof, even though the obligation was created by different instruments. *Ex parte Bevan*, 10 Ves. Jr. 107; Robson, Bankr. 726-728. This, however, was altered by the Bankruptcy Acts of 1861 and 1883, so that double proof might be made, and it was held that the fact that an individual partner had given security for the debt would not prevent the creditor from proving against the firm without giving up his security; the reason being that the joint and separate estates are considered, in the administration of the property in bankruptcy, as distinct estates. Robson, Bankr. 729-731, and cases cited. In Massachusetts double proof is allowed without any express statute authorizing it. *Roger Williams Nat. Bank v. Hall*, 160 Mass. 171. And, although the proceedings are joint, this is rather as a matter of convenience. It was held in England that the jurisdiction to supersede prior proceedings against one partner, upon the institution of proceedings which embraced the firm, was entirely discretionary, and would be determined by considerations of convenience. *Ex parte Rowlandson*, 1 Rose, Bankr. Cas. 416; Robson, Bankr. 687. The practice in this country seems to have been the same. *Re Mitchell*, 8 Nat. Bankr. Reg. 441, Fed. Cas. No. 9,656; *Re Stevens*, 5 Nat. Bankr. Reg. 112, 1 Sawy. 897, and Fed. Cas. No. 18,898. And where one of the partners of a bankrupt firm was also a member of another firm, which had a claim against the bankrupt firm, the claim was allowed to be proved; the two firms being regarded as distinct legal entities, capable of contracting with each other in equity. *Re Buckhause*, 10 Nat. Bankr. Reg. 208, Fed. Cas. No. 2,086. In the present case the transactions of the different firms were distinct, and for most purposes the estates are also considered as distinct. The plaintiff's claim against the defendants is not the same as that which he proved in insolvency. And we are of opinion that the waiver which is implied by his act of proving a claim against one of the partnerships does not extend to his claim against the other.

Merely proving the claim, of itself, signifies but little. A claim, after being proved and allowed, may be withdrawn, by leave of court; and, being so withdrawn, no consequence follows from the fact of its having been so proved. *Morse v. Lovell*, 7 Met. 152; *Safford v. Slade*, 11 Cush. 29; *Franklin County Nat. Bank v. First* 28 L. R. A.

Nat. Bank of Greenfield, 138 Mass. 515, 52; *Nichols v. Smith*, 143 Mass. 455. In *Bemis v. Smith*, 10 Met. 194, it was held to be the right of a creditor, under the circumstances there shown, to withdraw his proof without leave of court, in order to use his claim by way of set-off.

The fact of a creditor's having voted for assignee, and even of having, by his vote, controlled the choice, settles nothing conclusively. After having done so, he may still, by leave of court, withdraw the claim so voted upon, in order to avail himself of advantages which he would lose if the proof stood. *Franklin County Nat. Bank v. First Nat. Bank of Greenfield* and *Nichols v. Smith*, *supra*.

The taking of a dividend by the plaintiff upon his claim against one firm ought not to affect his claim against the other firm. No decision has come to our notice where this question has been determined. We need not consider how it would be if both claims were against the same firm, or the same individual, and only one of them was proved, or if a creditor held two claims,—one fiduciary, and the other not,—and only proved the latter. We limit ourselves to the question which is now presented. If two firms, consisting in part of the same members, are included in the same proceedings in insolvency, and a nonresident creditor holds a claim against each firm, and proves against only one of them, and votes for assignee, and takes a dividend thereon, the granting of a discharge to the debtors will not debar him from subsequently maintaining an action upon the other claim. For these reasons, in the opinion of a majority of the court, the entry must be,

Judgment for the plaintiff affirmed.

Andrew H. BELL *et al.*

v.

AMERICAN PROTECTIVE LEAGUE.

Re James J. GRACE, Petitioner.

(.....Mass.....)

A receiver of an insolvent corporation by taking possession of its leasehold estate becomes liable only for a reasonable rent while he retains possession, and does not become liable on the covenants of the lease as an assignee of the term.

(May 23, 1895.)

APPEAL by the Receiver of the American Protective League from a decree of the Superior Court for Suffolk County requiring him to pay rent for leasehold premises of the league under the covenants contained in the lease. *Reversed*.

The American Protective League is an insolvent beneficiary association, for which a receiver had been appointed at the suit of An-

NOTE.—For receiver's liability on contracts of the party whose property he holds, see *Central Trust Co. of New York v. Marietta & N. G. R. Co.* (C. C. N. D. Ga.) 16 L. R. A. 90, and *nota*.

drew H. Bell *et al.* The league was possessed of a lease which it had obtained from James J. Grace, as lessor. The receiver after taking possession took steps to dispose of the lease, which not being successful, he abandoned the premises. Grace thereupon filed this petition to hold the receiver liable for the rent under the terms of the lease. Subsequently, by direction of the court, the receiver assigned the lease to an irresponsible person and the court held that he was liable for the rents which accrued up to the time of such assignment.

Further facts sufficiently appear in the opinion.

Mr. George Putnam, for appellant:

The receiver is under no legal liability.

A receiver takes no title and his occupation is simply that of the lessee, acting through the agency of the court's officers instead of its own.

Wilson v. Welch, 157 Mass. 77; *Thompson v. Phenix Ins. Co. of Brooklyn*, N. Y. 186 U. S. 287, 84 L. ed. 408; *Union Nat. Bank of Chicago v. Bank of Kansas City*, 186 U. S. 223, 84 L. ed. 841; *Quincy, M. & P. E. Co. v. Humphreys*, 145 U. S. 82, 86 L. ed. 682; *Gaither v. Stockbridge*, 67 Md. 222.

The liability of a receiver in equity for rent does not extend beyond the time of his occupation.

Re Oak Pitts Colliery Co. L. R. 21 Ch. Div. 823; *Re Blackburn & D. B. Bldg. Soc.* L. R. 42 Ch. Div. 848; *Gaither v. Stockbridge*, *supra*; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Re Otis*, 101 N. Y. 580; *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197; *Quincy, M. & P. R. Co. v. Humphreys*, *supra*; *Coe v. New Jersey Midland R. Co.* 27 N. J. Eq. 87.

If the receiver holds the estate for the benefit of the trust fund, and resists the lessor's attempt to get possession, equity requires that the rent should be paid, because if it is not paid the lessor has a right to possession and can destroy the value of the lease.

Re Silkatone & D. Coal & Iron Co. L. R. 17 Ch. Div. 153.

And if the receiver merely holds for the purpose of selling lease, plant, machinery, etc., to a new tenant, with the assent of the lessor and for the mutual benefit of lessor and lessee, it has been held that the landlord had no claim on the assets for rent even during such occupation.

Re Bridgewater Engineering Co. L. R. 12 Ch. Div. 181; *Re Lancashire Cotton Spinning Co. L. R.* 35 Ch. Div. 656; *Re Oak Pitts Colliery Co. L. R.* 21 Ch. Div. 830; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 86 L. ed. 682.

So a railroad receiver who has entered into possession of a leased line and afterwards abandoned it has never been held for after accruing rent, and where the receipts of the lines have been insufficient to pay rent, he has been held liable for rent only for such time as he resisted the claim of the lessor for possession.

United States Trust Co. of New York v. Wabash Western Railway, 150 U. S. 287, 87 L. ed. 1036; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197.

Even if the receiver were an assignee, and so under the technical doctrine of the feudal law bound by privity of estate upon the covenants

of the lease, the claim of the lessor would not be an equitable one and equity would require the receiver to put an end to his legal liability by an assignment to an irresponsible person as the superior court finally did in this case.

Fagg v. Dobie, 8 Younge & C. Exch. 96; *Rowley v. Adams*, 4 Myl. & C. 584; *Onslow v. Corrie*, 2 Madd. 830.

In the view of the court of equity, in a winding-up process there is no difference between a simple abandonment by a receiver, with notice to the lessor, and an assignment for a nominal consideration.

Re Blackburn & D. B. Bldg. Soc. L. R. 42 Ch. Div. 848.

An assignee in bankruptcy or insolvency, like an assignee by deed, becomes seised of the bankrupt's leasehold interests and is bound by an artificial and highly technical rule of law to perform the covenants of the lease by reason of what is called privity of estate.

Turner v. Richardson, 7 East, 385; *Copeland v. Stephens*, 1 Barn. & Ald. 593; *Hoyt v. Stoddard*, 2 Allen, 442; *Patten v. Deshon*, 1 Gray, 325; *Sanders v. Partridge*, 108 Mass. 556.

But he may divest himself of title, privity, and liability by an assignment of the lease to another person, although that person be wholly irresponsible and although the motive of the assignment be to escape liability on the covenants.

Patten v. Deshon, *supra*; *Abbott v. Stearns*, 139 Mass. 168.

It may even be his duty to make such an assignment for the purpose of ceasing to be legally liable on a burdensome lease belonging to the estate which he represents and from which he would be entitled to indemnity.

Onslow v. Corrie, 2 Madd. 830; *Rowley v. Adams*, 4 Myl. & C. 534; *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197.

But inasmuch as an assignee in bankruptcy takes title only by operation of law, for the benefit of creditors and under a general assignment, not especially directed to the leasehold interests of the debtor, the law permits him to elect whether he will accept the lease or not, and if he does not elect to accept it, he does not become liable on the covenants and does not need to assign to escape liability.

Hoyt v. Stoddard, *supra*.

Abandonment without assignment put an end to the receiver's liability.

Gaither v. Stockbridge, 67 Md. 222; *Re Blackburn & D. B. Bldg. Soc.* L. R. 42 Ch. Div. 848.

The petitioner's conduct has been inequitable towards the trust estate and disentitles him to any relief against it in equity.

Lohmann v. McArthur, L. R. 8 Eq. 746; *Richardson v. Evans*, 8 Madd. 218; *Willmott v. Barber*, L. R. 15 Ch. Div. 96.

Messrs. Robert M. Morse and G. Philip Wardner for appellees.

Lathrop, J., delivered the opinion of the court:

It does not clearly appear whether the superior court took jurisdiction of the bill in equity of Bell and others against the American Protective League by virtue of the general equity jurisdiction conferred upon it by Stat. 1883, chap. 223, or by virtue of Stat. 1892, chap. 435, which gives to the

supreme judicial court and to the superior court "exclusive and concurrent jurisdiction, in cases of insolvency, of the settlement of the affairs of corporations which are authorized to transact insurance upon the assessment plan, or of any fraternal beneficiary corporations which are so authorized," and which provides that, "to that end," the court "may appoint agents or receivers to take possession of the property and effects of the corporations, subject to such rules and orders as may from time to time be prescribed by said courts, or any justice thereof." The language of this statute follows the form of the decree long ago prescribed by this court appointing a receiver of an insolvent corporation, which form was adopted by the superior court when equity jurisdiction was conferred upon it. It makes no difference, therefore, whether the receiver was appointed under the general equity jurisdiction of the superior court, or under the statute above referred to.

The question presented in this case is as to the correctness of the ruling of the superior court that the receiver, by reason of the facts reported, became liable, by privity of estate, upon the covenants of the lease, and continued so liable until the receiver assigned the lease to one Clancy. It is a familiar doctrine of the common law that, while there is no privity of contract between the lessor and the assignee of a term, there is a privity of estate, which renders the assignee liable upon the covenants of the lease, so long as he holds the term. This applies not only to private individuals, but to assignees in bankruptcy and insolvency, as the title to the leasehold estate vests in them, provided they take possession. But an assignee of a term or an assignee in bankruptcy may, by assigning the term, free himself from all further responsibility; and this assignment may be made to any one, however irresponsible he may be, provided the assignor does not retain any interest in the thing assigned. See 2 Platt, Leases, 400-452. The rights and duties of an assignee of an insolvent debtor are now regulated in this commonwealth by Stat. 1879, chap. 245, re-enacted in Pub. Stat. chap. 157, § 26. See *Abbott v. Stearns*, 189 Mass. 168. The decree in the court below that the petitioner was entitled to recover apparently proceeded upon the ground that the same rule applied to a receiver as to an assignee in bankruptcy; and this seems to have been assumed to be the law in *Com. v. Franklin Ins. Co.*, 115 Mass. 278, 281. It is to be observed, however, that that case was submitted on briefs, as appears by the reporter's docket, and the question now before us was not taken by the counsel for the receivers, whose brief we have examined, nor was it discussed by the court. There were two petitions in the case, each relating to a separate parcel of land. One petition was dismissed, and the other was granted. In relation to the latter the facts were that, at the time the receivers were appointed, the insurance company was lessee of a room in a building which it had prior to that time sublet. By the terms of the lease to the insurance company, when the receivers were

appointed, two quarterly payments of rent would become due in the future. When the first became due, the lessors demanded the rent, and threatened to eject the sublessee if the rent was not paid. Certain negotiations were had between the lessors and the receivers which the court found amounted to an agreement by the receivers to pay to the lessors the rent in full for the first quarterly payment, and a dividend on the last payment. The first payment was made, and the controversy was as to the last payment under the lease; the lessors contending that they were entitled to the entire rent, and the receivers that, as they had not taken possession of the land, they were not liable at all. The decision of the court was that the agreement should be carried out, and the lessors "are therefore entitled to such dividend on the amount of rent and taxes so due as is paid to other creditors." It will be seen, therefore, that the case did not turn upon the effect of a receiver taking possession of a leasehold estate, but upon the effect of a contract made by receivers with the lessors of a leasehold estate in relation to the rent.

It is difficult to see upon what principle a receiver, in the absence of a statute vesting the title of the insolvent in him, can, in any legal sense, be said to be the assignee of a term. In *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1, 28, it was said by Mr. Justice Wells, speaking of a decree of this court appointing receivers of a railroad company: "It had no effect to change the title or create any lien upon the property. Its purpose, like that of an injunction *pendente lite*, was merely to preserve the property until the rights of all parties could be adjudged. The receivers are officers of the court for this purpose, and act under its direction and control." A receiver is merely a ministerial officer of the court, or, as he is sometimes called, the "hand of the court." The title to the property does not change; and, if he is required to take property into his custody, such custody is that of the court. *Union Nat. Bank of Chicago v. Bank of Kansas City*, 136 U. S. 223, 236, 34 L. ed. 841, 846; *Thompson v. Phenix Ins. Co. of Brooklyn, N. Y.* 186 U. S. 287, 297, 34 L. ed. 408, 413.

The question now before the court was carefully considered in *Gaither v. Stockbridge*, 67 Md. 222, and it was held, as a necessary deduction from the principles which we have stated, that a receiver, by taking possession of a leasehold estate, did not become the assignee of the term. This case was cited with approval by Chief Justice Fuller in the case of *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 97, 98, 36 L. ed. 632, 637. It is true that the authority of the case as a precedent is somewhat weakened by the fact that the learned chief justice proceeded to show that the receivers in that case were not responsible on the covenants of the lease, even if they were regarded as assignees; and by the fact that in the subsequent case of *United States Trust Co. of New York v. Wabash Western Railway*, 150 U. S. 287, 37 L. ed. 1085, Mr. Justice Brown, in delivering the opinion of the court, overlooks or disregards the language of Chief

Justice Fuller, and considers a receiver to stand in the same position as an assignee. It was held, however, that the mere act of taking possession of leasehold property did not render the receiver liable on the covenants of the lease, but that he was entitled to a reasonable time after taking possession to determine whether to affirm the lease and retain the premises, or to give them up. There are many cases in New York in which it is asserted that there is no difference between an assignee and a receiver who takes possession of leasehold premises. We understand, however, that in New York a receiver of an insolvent corporation has vested in him by statute the title of the insolvent. See *Atty. Gen. v. Life & Fire Ins. Co.* 4 Paige, 224, 3 L. ed. 418; *Booth v. Clark*, 58 U. S. 17 How. 822, 831, 15 L. ed. 164, 167.

We regard the question presented in the case at bar as an open one in this commonwealth; and, on principle, it seems to us that, if a receiver of an insolvent corporation takes possession of its leasehold estate, he is liable only for a reasonable rent during the time that he retains possession; that he does not become an assignee of the term, and is not liable on the covenants of the lease. As the receiver paid the rent to the satisfaction of the lessor while in possession, we are of opinion that he is not liable for any further rent.

It follows, therefore, that the decree of the Superior Court was erroneous, and must be reversed.

ATTORNEY-GENERAL

John E. SULLIVAN.

(103 Mass. 446.)

1. The trial of the title of a public officer by information in the nature of quo warranto, as a substitute for the writ of quo warranto, under authority of Pub. Stat., chap. 150, § 2, authorizing the issue of such writs by the supreme judicial court, is exclusively a civil proceeding.
2. A public office such as that of the president of the common council of a city is not property, and a trial on an information in the nature of a writ of quo warranto is not a suit between two or more persons within the meaning of the declaration of rights in the Constitution, article 15, giving the right to a jury trial in controversies concerning property, and in suits between two or more persons.
3. The right to a jury trial is not given by implication on an information in the nature of quo warranto to try title to a public office, entertained as a substitute for a writ of quo warranto authorized by Pub. Stat., chap. 150, § 2.

(May 21, 1896.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Middlesex

NOTE.—For note on the right to jury trial in a quo warranto case, see note to *Buckman v. State* (Fla.) 24 L. R. A. 808.

28 L. R. A.

County denying a jury trial in a proceeding in the nature of quo warranto to oust him from the office of president of the common council of the city of Lowell. *Overruled.*

The facts are stated in the opinion.

Messrs. J. J. Hogan and W. A. Hogan, for defendant:

An information in the nature of quo warranto is a criminal proceeding. Its purpose is to try the title to a public office created by the sovereign power. The court can impose a fine as well as judgment of ouster.

Stat. of 9 Anne, chap. 25, § 5; Shortt, Information, ed. 1887, p. 115.

By Statute passed in 47 and 48 Vict. chap. 61, § 15, the criminal character of an information in the nature of a quo warranto was taken away.

This is an information at common law not regulated by any statute, for the usurpation of an office, which the attorney-general has a right to file *ex officio*, in the name and behalf of the commonwealth.

Com. v. Allen, 128 Mass. 908.

The information is in its nature a prosecution for some offense against the government, by an application to a court of criminal prosecution.

Goddard v. Smithett, 3 Gray, 128; *Donnelly v. People*, 11 Ill. 552, 52 Am. Dec. 459; *People v. Mississippi & A. R. Co.* 18 Ill. 66; *Atty. Gen. v. Salem*, 103 Mass. 139.

If a person charged with the offense of having usurped a public office is liable for a judgment and fine, if fine is not paid, imprisonment would follow. Such a person it is contended is entitled to a trial by jury.

Bill of Rights, art. 12.

In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to a trial by jury.

Bill of Rights, art. 15.

At common law in proceedings in information in the nature of quo warranto the respondent was entitled to a trial by jury.

People v. Doesburg, 16 Mich. 183; Ang. & A. Priv. Corp. ed. 1883, chap. 741; *State v. Mesmore*, 14 Wis. 116; 8 Stephens, Nisi Prius, 2429 et seq.; *People v. Richardson*, 4 Cow. 97, note A; *Reynolds v. State*, 61 Ind. 892, cases cited.

An action to try the title to public office is one of legal not equitable cognizance, and the issues therein are strictly legal and triable by jury.

People v. Albany & S. R. Co. 57 N. Y. 161; *Atty. Gen. v. Tudor Ice Co.* 104 Mass. 241, 6 Am. Rep. 227.

In the following cases it was held respondents had a constitutional right to a trial by jury in informations in the nature of a quo warranto.

State v. Burnett, 2 Ala. 140; *People v. Doesburg* and *People v. Albany & S. R. Co.* supra.

Mr. Francis W. Qua for plaintiff.

Field, Ch. J., delivered the opinion of the court:

This is an information in the nature of quo warranto, to try the title of the defendant to the office of president of the common council of the city of Lowell, and the single question

before us is whether the defendant is as of right entitled to a trial by jury. So far as we know, the first time the words "quo warranto" are found in the statutes, whether of the colony, province, or commonwealth, is in Rev. Stat., chap. 81, § 5, wherein the supreme judicial court is given power, "to issue writs of error, certiorari, mandamus, prohibition, and quo warranto, and all other writs and processes to corporations and individuals, that shall be necessary to the furtherance of justice and the regular prosecution of the laws." This provision is now found in Pub. Stat., chap. 150, § 8. Of this section in the revised statutes the commissioners say: "This power has always been exercised by the supreme judicial court, though not expressly mentioned in the statutes." Commissioners' Report, chap. 81, notes. No form of the writ of quo warranto has ever been prescribed in this commonwealth. So far as we know an information in the nature of quo warranto is first mentioned in our statutes in Stat. 1851, chap. 233, §§ 55-64. This statute was repealed by Stat. 1852, chap. 812, and sections 42-50 of said last-named statutes substituted therefor. See Pub. Stat. chap. 186, §§ 17-25. These sections in Stat. 1852, chap. 812, empowered any person whose private right or interest has been injured or is put in hazard by the exercise by a private corporation, or by persons claiming to be a private corporation, of a franchise or a privilege not conferred by law, to apply to the supreme judicial court for leave to file an information in the nature of a quo warranto, and they regulated the proceedings. Both the writ of quo warranto and the information in the nature of quo warranto were common-law processes. The writ was an original writ, issued out of chancery, and was regarded as a writ of right on the part of the crown, and was exclusively a civil process. The information in the nature of quo warranto was originally a criminal proceeding, in which, if the issue was found against the defendant, in addition to a judgment of ouster, a fine might be imposed. The colonists of Massachusetts were familiar with the writ of quo warranto, and were in great fear that their charter would be seized into the king's hands on such a writ, and the writ was actually issued and served upon the officers of the colony, a copy of which is found in 5 Mass. Col. Rec. 421. This writ was not prosecuted, and the charter was subsequently canceled on *scire facias* in chancery.

From such investigation as we have been able to make, we cannot find that the writ of quo warranto was ever actually used in the colony, province, or commonwealth. There were no private business corporations in the colony or province until near the time of the Revolution, and perhaps only one private corporation of any kind in Massachusetts before the year 1772; namely, that of Harvard College. See 5 Provincial Laws, 177-179. The municipal corporations of towns and parishes were always subject to the control of the legislature, and bore little resemblance to the cities and boroughs in England; and neither the writ nor the information has ever been used here to try the title of the inhabitants to their municipal franchises, although the question whether either proceeding can be used for such a pur-

pose has never been decided. See *Atty. Gen. v. Salem*, 108 Mass. 138; *State v. Bradford*, 32 Vt. 50. There were no ecclesiastical corporations here, in the English sense of that term. There was therefore probably nothing in the colony or province which could be brought within the reach of a writ of quo warranto or of an information in the nature of quo warranto except the public offices. Whether the information in the nature of quo warranto was used during the provincial period to try the title to public offices we have no knowledge, as only a partial search of the records has been made. The earliest printed reports of cases decided since the adoption of the constitution show a familiarity on the part of the judges with an information in the nature of quo warranto to try the title to a public office; and apparently the judges at first followed the practice in England under the Statute of 9 Anne, chap. 20, which did not in terms extend to the colonies. See *Com. v. Athearn*, 3 Mass. 285; *Com. v. Smead*, 11 Mass. 74. At common law the attorney-general, *ex officio*, has the right either to sue out a writ of quo warranto or to bring an information in the nature of quo warranto, to try the title to a public office, and is not compelled to ask leave of the court; but no private individual at common law has the right to use the name of the attorney-general for the purpose of suing out such a writ or of bringing such an information. The practice of permitting a private individual to apply to this court for leave to file an information in the nature of quo warranto rests, it seems, in this commonwealth, upon statute. This is explained in *Goddard v. Smithett*, 3 Gray, 116. In that case the court says: "There is and always has been, in this commonwealth, an authority in the attorney and the solicitor general, as incident to the office, to file informations *ex officio*, in the name and behalf of the commonwealth. The information is in its nature a prosecution for some offense against the government, by an application to a court of criminal jurisdiction, and is essentially a public criminal prosecution. When filed by the attorney-general, it is done at his own discretion, according to his own view of the rights of the government, without leave of court, nor will the court direct or advise him on the subject." See *Com. v. Allen*, 128 Mass. 308. The English statutes on the subject may be found in Cole, Criminal Information, pp. 115 *et seq.*, and Shortt, Information, pp. 108 *et seq.* Our statutes concerning informations in the nature of quo warranto have no application to the present case, as they relate solely to private corporations or to persons claiming to be a private corporation; and Pub. Stat., chap. 150, § 8, empowering this court to issue writs, relates to writs of quo warranto, and not to information in the nature of quo warranto. The writ of quo warranto seems to have become obsolete in England before our Revolution, and from the precedents here, so far as we know, an information in the nature of quo warranto instead of a writ has uniformly been used; and Pub. Stat., chap. 150, § 8, should, we think, be interpreted to authorize proceedings in the form of an information in the nature of the writ. See *State v. Leatherman*, 38 Ark. 81; *People v. Keeling*, 4 Colo. 129; *State v. West*

Wisconsin R. Co. 84 Wis. 197; *State v. Gleason*, 13 Fla. 190; 2 Spelling Extraordinary Relief, §§ 1768 *et seq.*

The question of the constitutional right of the defendant to a trial by jury has been argued in the present case. There is, however, no statute prescribing the procedure, and no statute intimating whether in such a case as this the defendant has or has not a right to a trial by jury; and therefore no question of the constitutionality of a statute is involved in the case. In Pub. Stat., chap. 186, § 23, the attorney-general is authorized to intervene in certain cases, and to demand "a judgment of fine and forfeiture," which seems to indicate that informations under this chapter are still regarded as of a criminal nature; and this is also intimated in the opinion in *Goddard v. Smithett*, *supra*. But in *Com. v. Fowler*, 11 Mass. 339, which was an information at common law, the judgment is a judgment of ouster without a fine. See *Campbell v. Talbot*, 132 Mass. 174. In many of the states of this country the information in the nature of quo warranto is now regarded as a purely civil proceeding. *Ames v. Kansas*, 111 U. S. 460, 28 L. ed. 487. It has been made so in England by Stats. 47 & 48 Vict. chap. 61, § 15. If the present information must be considered as a criminal proceeding, undoubtedly the defendant is entitled to a trial by jury. But, if it is a civil proceeding, the rights of the defendant are not so clear. Mr. Dane (6 Abr. chap. 186, art. 13), in speaking of quo warranto information, says: "The law upon this subject has been but very imperfectly settled by American decisions. No one is recollected in the federal courts, and but few have been made in the state courts. The want of such is less to be regretted, for it is believed that there are few or no American statutes on the subject of informations in the nature of the old writ of quo warranto (though there are sundry American statutes concerning informations on the penal statutes for the recovery of statute penalties), and therefore common law privileges govern mainly." The earliest Massachusetts case cited by him is *Com. v. Athearn*, 3 Mass. 285. In speaking of the cases in New York, and of Statutes of 4 & 5 W. & M. chap. 12, and 9 Anne, chap. 20, he says that if these statutes "have not been adopted in Massachusetts, and no evidence is found to show they have been, then quo warranto informations are wholly at common law." See *People v. Richardson*, 4 Cow. 97, and *note*.

This court, by statute, has ceased to have original jurisdiction over crimes; and, if the present information is to be entertained, we think it should be under the statute authorizing this court to issue writs of quo warranto, and should be regarded as a substitute for a writ of quo warranto, and therefore as exclusively a civil proceeding. We need not consider what is the nature of informations brought under Pub. Stat., chap. 186, §§ 17 *et seq.* The English practice in informations of this character, so far as they were brought under statutes passed after the colonization of Massachusetts, do not seem to us very material, as these statutes did not extend to the colonies, and were not, so far as we know, ever adopted in Massachusetts. The practice in England, 28 L. R. A.

however, at common law, as well as under the statutes, both in writs of quo warranto and in informations in the nature of quo warranto, always, we think, has been to try issues of fact in the country by a jury since juries were established; and this is true of many of the states of this country. Bracton's Note Book, 241, 862, 1228, 1666; Keilway, p. 151, para. 47-49, Id. p. 152, par. 54; 1 Co. Inst. 155b, 156a, *note*; *Case of Abbot of Strata Mercella*, 9 Coke, 24a; *Atty-Gen. v. Farnham*, Hardr. 504; 3 Nelson, Abr. 42; *Rez v. Bennett*, 1 Strange, 101; 14 Petersdorff, Abr. 97 *et seq.*; Stat. 18 Edw. I.; 2 Co. Inst. 494-496; *Rez v. Higgins*, T. Raym. 484; *Darell v. Bridge*, 1 W. Bl. 47; *Rez v. Cambridge*, 4 Burr. 2010; *Rez v. Francis*, 2 T. R. 484; *Rez v. Mein*, 8 T. R. 596; *People v. Richardson*, 4 Cow. 97, 100, *note*; *United States v. Addison*, 73 U. S. 6 Wall. 291, 18 L. ed. 919; *People v. Albany & S. R. Co.* 57 N. Y. 161; *Buckman v. State*, 24 L. R. A. 806, *note*, 34 Fla. 48; *Van Dorn v. State*, 34 Fla. 63; *People v. Sackett*, 14 Mich. 243; *People v. Deesburg*, 16 Mich. 183; *Harbaugh v. People*, 33 Mich. 241; *Donnelly v. People*, 11 Ill. 553, 52 Am. Dec. 459; *Wight v. People*, 15 Ill. 417; *Hay v. People*, 59 Ill. 94; *People v. Golden Rule*, 114 Ill. 34; *People v. Rensselaer & S. R. Co.* 15 Wend. 113, 30 Am. Dec. 33, and *note*.

The declaration of rights in our Constitution (art. 15) secures the right of a trial by jury in all controversies concerning property, and in all suits between two or more persons, except in cases in which theretofore it had been otherwise used and practiced. Without considering whether a suit or information to declare forfeited the charter of a private corporation would not be held to be a controversy concerning property, within the meaning of this article, we are of opinion a public office, such as that of president of the common council of the city of Lowell, cannot be considered as property, within the meaning of this article. *Atty-Gen. v. Jochim*, 99 Mich. 358, 23 L. R. A. 699. Neither do we think that the present information is a suit between two or more persons, within the meaning of this article, because the attorney general represents the commonwealth. This defendant, therefore, has no constitutional right to a trial by jury. There is no statute conferring upon him any such right, unless it be the statute which empowers this court to issue writs of quo warranto. There was no established practice in Massachusetts, so far as we know, in cases of this kind, at the time of the adoption of our constitution, and writs of quo warranto had then become obsolete in England. We have no doubt that the legislature could provide for the determination of the validity of an election contest such as this by other methods than by a jury trial; and in leaving such a contest to this court to be determined on a writ of quo warranto, or on an information which we regard as a substitute for such a writ, without more, we are of opinion that the legislature did not mean necessarily to confer upon a defendant the right to a trial by jury in cases where the constitution did not require it. This view is supported by the following decisions, which turn more or less upon the provisions of the constitution or of the statutes of the state: *State v. Minnesota Thresher Mfg. Co.*

40 Minn. 218, 3 L. R. A. 510; *State v. Johnson*, 26 Ark. 281; *Wheat v. Smith*, 50 Ark. 266; *State v. Lewis*, 51 Conn. 118; *Ehoing v. Filley*, 43 Pa. 884; *Hilliard v. Brown*, 97 Ala. 92. Whether it may not be in the discretion of the court to grant such trial in such an information as the present we need not consider. In *Com. v. Dearborn*, 15 Mass. 126, the original records show that there was a verdict of a jury, but it was ultimately held that the information would not lie; and in *Com. v. Tenth Massachusetts Turnp. Corp.*, 11 Cush. 171, issues were submitted to a jury, but this was an information to forfeit the charter of a private

corporation. So far as we know, there has been no usage in this commonwealth to try the title to a public office by a jury; and the legislature has, by various statutes, taken from this court in great measure its original jurisdiction over actions which require a jury trial. Certainly, the modern practice has been to try such an information as this without a jury, although it does not appear that a jury was demanded. *Com. v. Allen*, 128 Mass. 808; *Com. v. Swasey*, 133 Mass. 598; *Com. v. Harriman*, 134 Mass. 814; *Atty Gen. v. Crocker*, 138 Mass. 214.

PENNSYLVANIA SUPREME COURT.

A. J. GEIGER

PRESIDENT, etc., OF PERKIOMEN & READING TURNPIKE ROAD, *App't*.

(167 Pa. 582.)

1. Tolls from bicycles may be collected by a turnpike company authorized to collect tolls from any of designated carriages "or other carriage of burthen or pleasure" based upon the number of horses and wheels, although the amount of toll to be charged cannot be computed by the method designated for other vehicles.

2. A toll of one cent per mile upon bicycles which under the statute are entitled to the same rights and subject to the same restrictions as prescribed by law in the case of persons using carriages drawn by horses may be imposed by a turnpike company authorized to collect from sulkies a toll of six cents for every five miles.

(April 29, 1895.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Berks County in favor of plaintiff in an action brought to recover back the amount of toll which he had been compelled to pay by defendant for the privilege of passing over its road. *Reversed*.

The opinion of the court below, delivered by ENDLICH, J., was as follows:

A turnpike road is a public highway: *Huntingdon, O. & I. Turnp. Road v. Brown*, 2 Penr. & W. 462, 464, per Gibson, Ch. J., differing from a common highway only in being authorized by public authority and made at the expense of individuals, which expense is reimbursed by a toll imposed by authority of law. *Com. v. Wilkinson*, 16 Pick. 175, 177, 26 Am. Dec. 654, per Shaw, Ch. J.; *Northern Cent. R. Co. v. Com.* 90 Pa. 300, 806, per Mercur, J. (citing the preceding case); *Pittsburgh, McK. & Y. R. Co. v. Com.* 104 Pa. 583, 586. It is a highway, notwithstanding the fact that the beneficial interest in the form of tolls is in the private corporation or

company. *Elliott, Roads & Streets*, 53. "It is for the use of every person desiring to pass over it, on payment of the toll established by law. . . . Its use is common to all who comply with the law." *Pittsburgh, McK. & Y. R. Co. v. Com. supra*. Subject to this qualification, the very notion of a highway is that of a way common to all passengers: *Harding v. Medway*, 10 Met. 465, 469—a road open to the public for use in their own vehicles. *Flint & P. M. R. Co. v. Gordon*, 41 Mich. 420, 428, 429, per Cooley, J. Of course, a corporation chartered by the commonwealth for a specific purpose cannot lawfully do that which will defeat that purpose. *Gordon v. Winchester Bldg. & Accumulating Fund Assn.* 12 Bush, 110, 28 Am. Rep. 718; *Bergman v. St. Paul Mut. Bldg. Assn. No. 1*, 29 Minn. 275; *Martin v. Nashville Bldg. Assn.* 2 Coldw. 418 (not overruled as to this principle in *Patterson v. Workingmen's Bldg. & Loan Assn.* 14 Lea, 677). It follows that the right of a company, chartered for the purpose of constructing and maintaining a highway, to exclude from the same any portion of the public must necessarily be circumscribed, and that the criterion of its existence, in any given case, cannot be solely the pecuniary advantage of the corporation. The construction and maintenance of the road being authorized for the accommodation of the public, and the road being devoted to the use of the public, subject only to such exactions in the form of tolls as the legislature has deemed sufficient to make up to its owners their outlay and reasonable profits thereon, it is manifest that no portion of the public, so long as it submits to the precise exactions authorized by law, can be excluded from the use of the road except for reasons having at least some connection with the interests and necessities of the public—as, e. g., that there be danger or annoyance to the remainder of the public from permitting that portion of it upon the road. Nor can it make any difference, in this respect, whether the persons attempted to be excluded are such as are required by the law to pay toll for the use of the road or such as are not. The latter are just as much a part of the public for whose benefit the road was designed as the former. Upon the principle *expressio unius est exclusio alterius*, and upon the further principle that, as against the public, whatever powers are not

NOTE.—For decisions on regulation of bicycle riding, see *note* to *Twilley v. Perkins* (Md.) 19 L. R. A. 632.

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expressly given to a corporation in its charter are withheld. *Bank of Pennsylvania v. Com.* 19 Pa. 144, 153; *Packer v. Sunbury & E. R. Co.* Id. 211, 218,—it must be regarded as a condition of the grant of the franchise that such classes of the traveling public, and such kinds of vehicles used by them as are not expressly made liable to pay toll, shall be permitted, unless otherwise obnoxious, to use the road free of toll; and if the stockholders accepted their charter with that condition annexed, they have no one to blame but themselves if that condition turns out to be burdensome. See *Grumbine v. State*, 60 Md. 355, per Stone, J. The test of the right to use the road, so far as payment of toll is concerned, is simply "compliance with the law," "payment of the toll established by law." *Pittsburgh, McK. & Y. R. Co. v. Com. supra*. Where no toll is established by law the payment of none is required in order to comply with the law, and the use of the road without payment of toll is, so far as this limitation is concerned, a compliance with the law. Says Mr. Chief Justice Gibson, in *Huntingdon, O. & I. Turnp. Road v. Brown, supra*: "Our turnpike roads are public highways and it is the franchise of the citizen to use them free of every restriction that is not explicitly imposed by the legislature." The right to use turnpikes free of toll is, no doubt, a privilege granted to those to whom it applies by express or by tacit exemption; and every legislative grant of a privilege is made with the implied reservation that it shall not injure others. *Pittsburgh & O. R. Co. v. Southwest Pennsylvania R. Co.* 77 Pa. 173, 186. It is, therefore, subject to the qualification that the use these people make of the road shall not derogate from the rights of others upon it, and thereby injure its owners as well as the public. The right of the corporation to exclude any portion of the public from the use of the road must then be based upon and measured by this qualification. But clearly, the right to exclude persons or vehicles because they interfere with the rights of the public, or the proper service of the public, on the road is not a right to license an annoyance of the public for a money consideration paid to the company. There is no analogy between the proposition involved in such a contention, and the assertion of the right of a municipality to make its consent to the occupation of its streets by a *g.*, a passenger railway company dependent upon the payment of an equivalent or the performance of some other condition by the latter: *Allegheny v. Millville, E. & S. Street R. Co.* 159 Pa. 411; because the power of the railway company to occupy the streets is to be derived from the municipality and the power of the latter to give or withhold its consent is absolute and subject to no control or interference. *Ibid.* p. 416. The analogy (if analogies are worth anything, see *Overman's App.*, 88 Pa. 276, 285, Woodward, J.) is rather with the case of a company authorized by the sovereign power of the state, superior to the municipality, to lay its pipes in the streets of the latter, subject to the declaration of its assent and to "such regulations as the councils may adopt"—a case in which it is held that the municipality's powers over the subject are limited and do not include the at-

taching to its consent of any conditions beyond such reasonable regulations of the mode of carrying out the statutory powers of the corporation as are required by considerations of public safety and convenience. *Pittsburgh's App.* 115 Pa. 4. I take it, therefore, to be beyond question, that a turnpike company cannot subject to the payment of toll for the use of its road any class of persons or vehicles upon which it is not expressly permitted to charge toll, on the ground that it has the power to exclude them from its road, and, as involved in that power, the right to permit them to use it for a consideration. The maxim, *omne majus continet in se minus*, does not apply; because the right to abate a public nuisance does not involve the right to license it. The two powers are utterly dissimilar, and, therefore, the one cannot contain or be contained in the other. Neither can it be said that the right to forbid the use of the road involves the right to restrict its use by the imposition of a toll. Doubtless such imposition may operate as a restriction. But the power to restrict in that way is the power to take toll, and that power must be measured by the grant of the legislature. Either this must be true, or the rule that a turnpike company can charge toll only where expressly authorized must be practically worthless. "The soundness of a principle," says Sharswood, J., in *Mayer v. Walter*, 64 Pa. 283, 286, "is often best tested by its practical working." That rule, however, as has been seen, is an established rule; and because of its existence the principle applied in *Frankford & P. Pass. R. Co. v. Philadelphia*, 58 Pa. 119, 98 Am. Dec. 242, and similar cases has no relevancy here. If, then, the turnpike company has not the right to demand toll from bicyclists under the legislative enumeration of subjects chargeable with toll, it has no such right under any power to exclude them from the use of the road; and if they have a right to be upon the road, the turnpike company cannot exclude them from it for failure to pay toll. The order of April 1, 1894, recited in the case stated, is not, perhaps, strictly speaking, an attempt to exclude them from defendant's road. It is rather an attempt to license them on condition of payment of toll and thus incidentally to restrict them in the use of the road. But as such, it may operate as an exclusion upon failure to perform that condition. Applying, therefore, the principles already discussed, the first question to be determined is, Have bicyclists riding their machines a right to be upon and pass over this highway under the facts agreed in the case stated?

It is altogether proper under the doctrine established by such decisions as *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200; *Terhune v. Phillips*, 99 U. S. 592, 25 L. ed. 298; *King v. Gallun*, 109 U. S. 99, 27 L. ed. 870; *Oppenheim v. Wolf*, 8 Sandf. Ch. 571, 7 L. ed. 961; *Bronson v. Wiman*, 10 Barb. 406; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 5 Mo. App. 347; *State v. Price*, 12 Gill & J. 260, 37 Am. Dec. 81, for courts to take judicial cognizance of the fact that, within the past ten years, the use of bicycles has come to be very general in business and for purposes of pleasure and recreation; indeed, one of the established means of

transportation. Even in the decision of a case stated, the court may bring to its aid matters of common knowledge, see *Knedler v. Norristown*, 100 Pa. 368, 372. It is moreover a fact that bicycles have been judicially declared to be "carriages" or "vehicles" within an enactment against the furious driving of such: *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228; or requiring persons traveling on the highway with such to turn out to the right: *State v. Collins*, 3 L. R. A. 894, 16 R. I. 371; or forbidding such upon public sidewalks: *Mercer v. Corbin*, 3 L. R. A. 221, 117 Ind. 450; and as "carriages" or "vehicles," subject to the law of the road: *Schimpf v. Sliter*, 64 Hun, 463; but entitled to the rights of the road equally with other vehicles: *Holland v. Bartsch*, 120 Ind. 46; and "having the same right upon the highway:" *Lacey v. Winn*, 8 Pa. Dist. Rep. 811; and upon a public bridge of a city. *Swift v. Topeka*, 3 L. R. A. 772, 43 Kan. 671. Upon the basis of common knowledge, therefore, as well as express judicial authority, it would seem to be clear that, at this day, persons riding bicycles are to be deemed as having the same rights upon highways as the remainder of the public, and as part of the public, using carriages. Doubtless it is within the power of the legislature, supreme over all highways of the state, if this species of vehicles is in fact dangerous to others, entirely to forbid their use upon the highways or any portion of them: *Twilley v. Perkins*, 19 L. R. A. 632, 77 Md. 252; or to forbid it on a certain road without the express permission of the superintendent thereof. *State v. Yopp*, 97 N. C. 477. It has been even held that, under a power to make reasonable rules and regulations for the use of a certain county bridge, the municipal authorities having control of it, may forbid the riding (as distinguished from the taking or rolling) of bicycles across the same: *Twilley v. Perkins*, *supra* (see to the contrary *Swift v. Topeka*, *supra*); and that, under a similar power given to a public park commission, the use of them may by it be prohibited in such park. *Re Wright*, 29 Hun, 357, as cited in *Twilley v. Perkins*, *supra*. And it appears that section 3 of the defendant's charter provides that its managers and their successors "shall and may make such by-laws, rules, orders, and regulations not inconsistent with the constitution and laws of this commonwealth, as shall be necessary for the well ordering the affairs of the said company." But, even if the decisions of *Twilley v. Perkins* and *Re Wright*, *supra*, be accepted as good law, it may be that there is a distinction between the right of a pecuniarily disinterested municipal body to determine who shall be regarded as lawfully upon a highway under its control, and the right of a private corporation to do so, the primary object of whose management is its own advantage. In the former case, a much stronger presumption of the reasonableness of the action from a public standpoint may perhaps obtain than in the latter, and therefore a less appearance of harmful tendency of the thing prohibited be necessary to sustain the prohibition. Now, what have we here?

The case stated agrees that, "as a general rule, horses ordinarily gentle and well broken do not become frightened at bicycles, but some

horses ordinarily gentle are frightened at bicycles ridden by persons along the turnpike road." This is far less than was proven in *State v. Yopp*, *supra*, to sustain the action of the legislature in excluding bicycles except by permission of the superintendent of a road. "The evidence," says Merrimon, J., at p. 481, "tended strongly to show that the use of the bicycle on the road materially interfered with the exercise of the rights and safety of others in the lawful use of their carriages and horses in passing over the road. In repeated instances the horses became frightened at them, and carriages were thrown into the ditches along the side of the road." It falls short, even, of the facts relied on in *Twilley v. Perkins*, *supra*, to sustain the restriction placed by the county commissioners upon the right to have bicycles on the bridge there in question. "It was also shown in proof," says Alvey, Ch. J., 19 L. R. A. 632, 77 Md. 252, "that some horses ordinarily gentle are frightened at bicycles ridden by persons along the public highways, and that some horses never get accustomed to them." When, however, the above-quoted paragraph of the case stated is read in connection with the order of April 1, 1894, its efficacy to justify the exclusion of bicycles from the turnpike is very materially diminished. That order places no restriction whatever upon the manner of the use of the road by bicyclists with their machines, but simply requires them to pay toll at the rate of one cent per mile before they are permitted to pass through any of the gates. This is not the assertion or recognition of a public danger in the use of bicycles. Manifestly, a bicycle that pays toll is no less dangerous to other travelers on the highway than one that pays no toll. There is nothing in the order to show that it was required by or made from any consideration relating to the interests of the public; and the fact that some gentle horses shy at bicycles and other gentle horses do not, is not, in view of that order, a declaration that these vehicles are such a menace to public safety as ought in reason to expel them from the public highways. Indeed, it could not be regarded as such a declaration even standing alone. As was pointed out in *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 306, 316, 49 Am. Rep. 580, the frightening of horses is an incalculable thing, governed by no known rules. Their mere eccentricities ought certainly not to be made the measure of the rights of the public upon the highways. The agreed fact in the case stated is that some gentle horses shy at passing bicycles, but that the rule is the other way. So far as any conclusion concerning the right of bicycles to be ridden upon the highway can be based upon the fact thus agreed, it is, I think, favorable to that right and not in negation of it. It follows that the case stated makes out no right on the part of the defendant company to exclude bicyclists from the use of its road, and that they have a lawful right to use it as part of the traveling public, and subject to the general legal rules applicable to its rights and duties upon the highway.

The next question, then, is, Has the turnpike company the right to charge the plaintiff toll as provided by the order of April 1, 1894, under any express statutory grant? The Incon-

porating Act of March 20, 1810, Pub. Laws, 156, permits the defendant to charge the tolls authorized by the Act of March 25, 1805, Pub. Laws, 187, incorporating the Center Turnpike Road. Section 12 of the latter Act provides as follows: "That the said company having perfected the said road or such part thereof, from time to time, as aforesaid, and the same being examined, approved, and licensed as aforesaid, it shall and may be lawful for them to appoint such and so many toll-gatherers as they shall think proper to collect and receive of and from all and every person and persons using the said road, the tolls and rates herein-after mentioned, and to stop any person riding, leading, or driving any horse or mule, or driving any cattle, hogs, sheep, sulky, chair, chaise, phaeton, cart, wagon, wain, sleigh, sled or other carriage of burthen or pleasure, from passing through the said gates or turnpikes until they have respectively paid the same; that is to say, for every space of five miles in length of the said road the following sums of money, and so in proportion for any greater or less distance or for any greater or less number of hogs, sheep, or cattle; to wit: For every score of sheep, four cents; for every score of hogs, six cents; for every score of cattle, twelve cents; for every horse or mule, laden or unladen, with his rider or leader, three cents; for every sulky, chair or chaise with one horse and two wheels, six cents; and with two horses, nine cents; for every chariot, coach, phaeton, chaise, stage, wagon, coach or light wagon with two horses and four wheels, twelve cents; for either of the carriages last mentioned with four horses, twenty cents; for every other carriage of pleasure under whatever name it may go, like sums according to the number of wheels and of horses drawing the same; for every sleigh or sled, two cents for each horse drawing the same; for every cart or wagon, the wheels of which shall exceed in breadth four inches and shall not exceed seven inches, three cents for each horse drawing the same; and when any such carriage as aforesaid shall be drawn by oxen or mules, in the whole or in part, two oxen shall be estimated as equal to one horse, and every ass or mule as equal to one horse in charging the aforesaid tolls."

It is manifest in this enactment there is no authority for charging toll upon any species of vehicle not drawn by an animal but propelled by human agency alone; nor upon persons passing over the road except when riding, driving or leading certain animals. The most liberal construction imaginable of the legislative language cannot make it include a bicycle any more than a wheelbarrow, or a rolling chair, or a baby coach, or a mere foot passenger. In *Williams v. Ellis*, L. R. 5 Q. B. Div. 175, the language of the provision imposing toll for the use of a turnpike was much more comprehensive than that here controlling. It was:

"For every horse, mule or other beast drawing any coach, sociable, chariot, berlin, landau, vis-a-vis, phaeton, curricle, etc., 6d.

"For every carriage of whatever description, and for whatever purpose, which shall be drawn or impelled, or set up or kept in motion by steam or other power or agency, than

being drawn by any horse or horses, or other beast or beasts of draught, 5d."

Yet it was held that bicycles were not included as subject to toll. "The Act," says the court in that case, "begins with imposing toll upon particular carriages . . . and then imposes a further toll upon 'every carriage of whatsoever description . . .'. The carriages here referred to must be carriages *ejusdem generis* with the carriages previously specified."

There may be no good reason why bicycles should not pay toll on this turnpike road. If so the power rests with the legislature to make them liable. It is, indeed, ingeniously argued on behalf of the defendant company that the legislature has done so by the Act of April 23, 1889, Pub. Laws, 44, which provides:

"That bicycles, tricycles and all other vehicles propelled by hand or foot, and all persons by whom bicycles, tricycles, and such other vehicles are used, ridden, or propelled upon public highways of this state, shall be entitled to the same rights and subject to the same restrictions, in the use thereof, as are prescribed by law in the cases of persons using carriages drawn by horses."

I have thus far made no reference to this enactment, and shall make none except to indicate why I do not deem it necessary, in this case, to pass upon its nature or precise meaning. If that statute is simply, as insisted by the plaintiff, declaratory of the previously existing law, it adds nothing to the rights which bicycles had without it. If it is intended to give them rights upon this turnpike which they had not there before, then it may be true, as argued in behalf of the company, that, its charter antedating the Constitutional Amendments of 1857, the statute can have no such effect. If, finally, as contended by defendant, the provision that bicycles shall be "subject to the same restrictions," etc., can be construed as making them subject to toll on turnpike roads, *i. e.*, as conferring on turnpike companies a right they had not before of demanding toll from riders of bicycles, then the act is, to that extent, an act passed for the benefit of turnpike companies. But article 16, section 2, of the Constitution of 1874 forbids the legislature to pass any general or special law for the benefit of a corporation existing at the time of the adoption of the constitution, except upon condition that such corporation shall thereafter hold its charter subject to the provisions of said constitution; and the Act of May 22, 1878, Pub. Laws, 84, provides the manner in which acceptance of the constitution shall be made by such corporation. See also Act April 29, 1874, Pub. Laws, 88, section 26. Now, the case stated does not show the fact of an acceptance of the constitution on the part of the defendant's company, and what is not stated is to be taken as not existing. *Berks County v. Pile*, 18 Pa. 493; *Philadelphia & R. R. Co. v. Waterman*, 54 Pa. 337. As operating, therefore, to enlarge the powers of any turnpike company to demand toll, the Act of 1889 is inapplicable to this company. Of course, it is not to be supposed that non-accepting corporations are beyond the pale of legislative care or protection by general laws, though the latter confer a benefit upon them in common with all other citizens, including

corporations. But that is not the proposition here. The attempt here is to give to the language employed by the legislature the effect of conferring upon this company a special additional power or privilege, a benefit not common to other citizens. The company is not in a position to take advantage of such a gift at the hands of the legislature, and the latter was not at liberty to make it. It may be added, that, as the legislature is never presumed knowingly to transcend its legitimate powers: *Bolton v. Johns*, 5 Pa. 145, 151, 47 Am. Dec. 404; and as its language is always to be so construed as to make it conform with constitutional limitations: see *Com. v. Butler*, 99 Pa. 535, 540,—the existence of the provision I have referred to would seem to forbid an interpretation of the clause in question as empowering the collection of tolls from bicycles by this company. In no view, therefore, does the Act of 1889 appear to be a controlling element in the decision of this case.

For the reasons given, I am of the opinion that the exaction complained of in this case is unsustainable, either under the specific enumeration in defendants' charter of the subjects of toll, or under any right to exclude from its road obnoxious persons or vehicles, or under its power to make orders and regulations concerning its affairs—in a word, that, upon the facts set out in the case stated, it had no right to collect from plaintiff toll here sought to be recovered. Under the agreement forming the last paragraph of the case stated, therefore, the plaintiff is entitled to judgment.

And now, to wit, January 14, 1895, judgment is entered upon the case stated in favor of plaintiff for the sum of five cents.

Messrs. David F. Mauger, Isaac Hiestler, and John G. Johnson, for appellant:

The Act of April 23, 1889, Pub. Laws, 44, was passed for the express purpose of defining bicycles to be of the same class as carriages drawn by horses with reference to all their rights and restrictions on all the public highways of the state.

It cannot be claimed that the legislature intended to grant a right to the use of the turnpike road in favor of uninvented vehicles or that any such right is implied.

That the legislature meant to permit an unrestricted use by unnamed and uninvented vehicles without charge when they had only permitted invented and known vehicles to use the turnpike road subject to charge.

The managers of the turnpike road are allowed by law a reasonable discretion in regulating the use of the road, and it is competent for them to restrain and even forbid the use of such vehicles as bicycles or tricycles if they in fact are dangerous to the traveling public just as they might forbid the use of steam carriages, or electric carriages, or coasting.

State v. Yopp, 97 N. C. 477; *Re Wright*, 29 Hun, 357, 65 How. Pr. 119; *Toivley v. Perkins*, 19 L. R. A. 632, 77 Md. 252.

The Act of 1889, considered as a remedial Act, would be utterly unconstitutional against the defendants if it failed to contain a compensatory clause insuring the defendants' consent.

Atty-Gen. v. Germantown & P. Turnp. Road, 56 Pa. 466.

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Messrs. George S. Graham, Jeff. C. Snyder, and George F. Baer for appellee.

Dean, J., delivered the opinion of the court:

These facts, as abbreviated from the case stated, were agreed upon in the court below:

1. The defendant is a turnpike company, incorporated by Act of March 20, 1810. Said act and its supplements were made part of the cases stated.

2. On March 9, 1894, the company made an order that all persons riding bicycles upon the turnpike should not pass through any of its gates, except upon payment of toll at the rate of one cent per mile.

3. The bicycle was not invented and in common use until the year 1875.

4. The plaintiff, on December 11, 1894, while on his bicycle, attempted to pass through a toll-gate on the turnpike, but was stopped by the gate-keeper, who demanded from him five cents toll, being the amount demandable at the rate of one cent per mile. Plaintiff paid the five cents under protest, and was then permitted to pass.

5. As a general rule, horses, gentle and well broken do not take fright at bicycles, but some such horses do.

The question of the law for the court to answer was whether on these facts the company had a right to collect this toll from the plaintiff? The court below, being of opinion that there was no express statutory grant of authority, and no necessary implication of one, to defendant to collect toll from bicyclers, entered judgment for plaintiff; hence this appeal by defendant.

The defendant was organized as a turnpike company under the Act of 1810, and under that act had authority to make all such by-laws, rules, and regulations for its management as the Centre Turnpike Company, organized under Act of March 25, 1805, had, with the right to collect such tolls and profits in proportion to the distance as was granted to Centre Turnpike Company. On turning to this last-named act, we find, in section 11, the company had the right "to fix such and so many gates or turnpikes upon and across the said road as will be necessary and sufficient," to collect the tolls hereinafter granted to the said company from all persons traveling on the same with horses, cattle, and carriages.

Three distinct uses of the highway are here enumerated as subject to tolls—by horses, cattle, and carriages.

Then the method of enforcing payment of tolls is specified: "It shall and may be lawful for them (the managers) to appoint such and so many toll-gatherers as they shall think proper, to collect and receive of and from all and every person and persons using the said road the tolls and rates hereinafter mentioned, and to stop any person driving any . . . sulky, chair, chaise, phaeton, cart, wagon, wain, sleigh, sled or other carriage of burthen or pleasure from passing through the said gates until they shall have respectively paid the same." Then follows a basis of computation or limitation on the rates to be charged; thus, "that is to say, for every space of five miles in length of the road,

and so in proportion for any greater or less distance, . . . for every sulky, chair, or chaise with one horse and two wheels, six cents; with two horses nine cents; . . . for every other carriage of pleasure, under whatever name it may go, the like sums according to the number of wheels and horses drawing the same." There is no mention of bicycle propelled by the muscles of the rider; therefore the appellees contend there is no express or plainly implied statutory power in the company to collect tolls from the bicyclist.

There is no power in a corporation as against the public except that expressed in its grant, or that which is necessarily implied from it. What is the power granted to this company by the law?

The commonwealth conferred on the defendant a right of eminent domain, for a public highway, under which it appropriated land and constructed and kept in repair its turnpike. As soon as constructed and opened it became public; it was open to all on equal terms, that is, to all paying toll alike, for a like use. The taking of tolls, it has been held, is only another method of taxing the public for the cost of construction, repair, and reimbursement to the corporation for the capital invested: *Com. v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654; *Perryville & Z. Turnp. or Pl. Road Co. v. Thomas*, 20 Pa. 91. The power here, then, was to a private corporation:—(1) to take sufficient land for a public highway, and construct and keep the same in repair for the convenient and safe use of the public; (2) to collect from the public who used it by animals and carriages, tolls.

The word "tolls," in 1810 and 1805, had in this state a well-defined meaning. As is said in *Boyle v. Philadelphia & R. R. Co.* 54 Pa. 810: "It is a tribute or custom paid for passage." Strong, J.; in that case, says: "Before 1833 transportation had generally been over common roads, turnpikes, and canals. The common and the legislative mind were then familiar with what is called tolls." Here the defendant demanded, through the toll-gatherer it was expressly authorized to appoint, at the gate it was expressly authorized to erect, from the plaintiff, five cents for passage over the highway, or a toll for its use. It may be conceded that the enumeration in the Act of 1805, of the uses for which tolls may be collected, restricts the right to collect for such uses only, as are either specially or generally designated. But if a bicycle be a carriage, then the general words "other carriage of burthen or pleasure," and "every other carriage of pleasure under whatever name it may go," are sufficiently descriptive to subject it to toll. It is not strenuously contended that a bicycle is not a two-wheeled carriage. It is no less a carriage because propelled by a man instead of being drawn by a horse; whether it be one of burden or pleasure, or both, is not material, for if either, defendant was expressly authorized to collect toll from the persons using it on the turnpike.

But, it is argued, the only basis fixed in the act for computation of toll on carriages

is by wheels and horses, not wheels or horses; therefore, as this carriage is not drawn by horses, the amount of toll cannot be determined by the law of the corporation and as it cannot thus be determined there is no power to demand any.

Assuming the amount of toll to be charged is incapable of computation by the method designated for other vehicles in the act, that does not negative the power expressly given to collect toll from those traveling by carriage. The method of computation by wheels and horses is not the power to collect toll, which is expressly given; that is a mere limitation on the power; the demand must not exceed the sums specified for the animals and vehicles enumerated.

In *Pennsylvania R. Co. v. Sly*, 65 Pa. 205, it is held that toll is the consideration for the use of the highway, and where there is no express power to charge for transportation by the corporation itself over its own road, the right is a necessary incident of the power granted. Says Sharswood, J., repeating the language of Strong, J., in *Boyle v. Philadelphia & R. R. Co. supra*, "No provision was made respecting rates and charges for their own service as carriers; but the very purpose of their incorporation was, that they might carry. How can they carry without compensation? Authorized to engage in a business, it is necessarily incident to their authority, that they have the rights which ordinarily belong to such a business."

If no method of computation had been given in the 12th section of the Act, the power to collect could have been enforced. If a statute confers authority to receive toll, the law will furnish a remedy to enforce the right. Here, however, not only is the right or power statutory; but also the method of collection; the right to appoint toll-gatherers, and erect gates, is expressly given, and the right to the managers to make all such rules and orders as shall be necessary for the well ordering of the affairs of the company.

Undoubtedly, the rules and regulations so made must be reasonable and the amount demanded for the carriage subject to toll must be reasonable; and this is the limitation on the power which the law fixes when the statute is silent as to the amount.

The manifest intent of the Act of 1810, clearly expressed, was to confer upon defendant authority to collect tolls upon this highway from all persons using the same by carriage of burthen or pleasure, and it acted within its authority in collecting toll from this plaintiff.

The only other question raised is, whether the amount demanded and received, five cents, was in excess of the amount authorized by law. Prior to the Act of April 23, 1889, it was at least a matter of disputation, whether the use of bicycles on the public highways was not fraught with danger to travelers driving horses; on some of the highways and bridges owned by private corporations they were excluded, because, in the judgment of the managers, safety to the general public demanded their exclusion. Then the legislature, in the exercise of its undoubted control over the highways of the commonwealth,

passed the act referred to, which reads thus:

"Bicycles, tricycles, and all vehicles propelled by hand or foot, and all persons by whom bicycles, tricycles, and such other vehicles are used, ridden, or propelled upon the public highways of this state, shall be entitled to the same rights and subject to the same restrictions in the use thereof, as are prescribed by law in the case of persons using carriages drawn by horses."

This act deprived turnpike companies of all discretion in determining whether this kind of vehicle was dangerous to the traveling public, and, in effect, peremptorily forbade its exclusion. Under it, the bicyclist, with his two-wheeled carriage, has the same right to travel on the turnpike as the owner of a sulky, whose carriage is drawn by a horse, but subject to the same restriction as is prescribed by law for the owner of the two-wheeled horse carriage. The only restriction of the right to the use of the road by the driver of the two-wheeled horse carriage is, that he shall pay six cents toll for every five miles. The amount charged in this case is somewhat less than that sum; therefore it is within the limits as to the amount fixed by the Act of 1889. Without this act, the power to demand and receive tolls under the Act of 1810 was clear; the amount, however, being incapable of computation under that act, the managers would have been restricted by the law to a reasonable charge; as this would have been a source of irritation and possible litigation, the legislature has imposed a maximum charge on

defendant, beyond which it cannot go. It has established, out of reach of the discretion of the company, the bicyclist's right upon the turnpike, and at the same time has placed a peremptory limitation on the power of the company to exact excessive tolls. The act invests the corporation with no power it did not already possess; confers no benefit it did not already enjoy; and therefore, whether it had accepted the Constitution of 1874, as provided in article 16, section 2, is wholly immaterial. The act was solely for the benefit of the bicyclist, and the corporation only points to it, as demonstrating that it did not exceed the limit of its power by the Act of 1810 in receiving this toll.

It may well be doubted whether, without express authority from the legislature, the managers of a public highway could lawfully so discriminate between vehicles using it as to exempt wholly one class of carriages from the tolls which it imposed on all other carriages. Under the Act of 1889 there is no power to exclude the bicyclist from the turnpike; he has the same right as owners of other carriages to insist that the highway shall be maintained in a reasonably safe condition of repair; the corporation is answerable for injury to himself or vehicle, if this duty be not maintained. Then why should he not bear his fair share of the burden imposed upon the public for the use of it? We see no reason in law or in fact why he should not.

Therefore the judgment is reversed and it is directed that judgment be entered on the case stated for defendant.

OREGON SUPREME COURT.

LONGSHORE PRINTING & PUBLISHING CO., *Appt.*,

v.

George H. HOWELL *et al.*

(26 Or. 527.)

1. Trades unions are not within and of themselves unlawful combinations.

2. A combination of laborers to maintain wages or limit the number of apprentices is not contrary to public policy.

3. An agreement of employes between themselves to quit their employer is not unlawful.

4. Communicating to their employer the reasons for the design of employes to quit their service and to signify their intention is not unlawful.

NOTE.—*Injunction against strikes.*

- I. *Injunctions generally.*
- II. *Proceedings under the interstate commerce act.*
- III. *Receivers.*

Injunctions generally.

A strike is a refusal on the part of employes to work for their employer unless some demand is complied with. It is generally caused by discontent on account of wages, hours of labor, or rules of employer, or by combinations through labor organizations co-operating to regulate the price or hours of labor, or to dictate who shall be employed. It may be lawful or unlawful as controlled by the intent, or by combination to injure, or means used to coerce employers to accede to the terms of the employes or organization.

A boycott is a malicious attempt to injure the business of a particular person by interfering with his trade or his employes and differs from a strike, in that strikes are used invariably with regard to the relation of employer and employe, and cannot

exist without the co-operation or intimidation of employes. A boycott may be made by antagonistic organizations independent of the employes. The boycotting may include the employes who do not strike, or a boycott may be made by a number of dealers controlling an article of commerce or by other persons, combining to denounce the business of the person boycotted, or to refuse to trade with him, or to handle the articles sold by him, or to refuse to deal with persons patronizing him, or to ostracize his employes. Strikers generally use boycotting as a means of coercion. Cases in regard to boycotting not connected with strikes of employes are not included in this note.

While the authorities hold that equity cannot enjoin a person from quitting employment, or compel an employe against his will to work for his employer, or prevent him from persuading other employes to quit, yet they conclusively hold that there may be times and circumstances under which such acts are unlawful and criminal.

The use of the writ of injunction is sustained

5. Civil liabilities may ensue by reason of a conspiracy to commit that which is not made unlawful by statute.
6. An injury must be threatened and imminent which will become irreparable in order to justify an injunction against a conspiracy to injure business or property rights.
7. An injunction will not be granted to restrain the continuance of a strike and boycott by a printers' union because of a single act of trespass in entering the plaintiff's premises to call out his workmen, and of publications announcing the withdrawal of the union from the plaintiff's shop with the exercise of influence causing loss to the plaintiff of city printing and of two private customers during a space of about ten months, with threats of the union to make war to the knife and fight the plaintiff to the death, since these facts do not show such an irreparable injury impending as will justify equitable relief.

(December, 17, 1894.)

A PPEAL by plaintiff from a decree of the Circuit Court for Multnomah County in favor of defendants in an action brought to enjoin the alleged unlawful interference by defendants with plaintiff's business. *Affirmed.*

Statement by **Wolverton, J.:**

The plaintiff was incorporated March 21, 1891, and is engaged in the business of lithographing, engraving, printing, and publishing journals, newspapers, etc. The Multnomah Typographical Union is an unincorporated voluntary association, of which

against combinations and conspiracies to quit for the purpose of injuring or crippling the business of the employer, or to intimidate the employer or his employes, and against all strikers using force, violence, threats, or intimidation, or where they politely request the employes to quit accompanying the request by a show of formidable force, or where they conspire to hinder employes from performing their duties, if the damages would be irreparable, and the remedy at law inadequate, and a multiplicity of suits would be prevented.

Thus strikers refusing to work and intimidating employes by threats or menaces to prevent them from continuing in the performance of their duties or employment, will be enjoined. *Lake Erie & W. R. Co. v. Bailey*, 61 Fed. Rep. 494; *Wick China Co. v. Brown*, 164 Pa. 449; *McCandless v. O'Brien*, 21 Pitts. L. J. N. B. 486, 8 Lano. L. Rev. 254; *Perkins v. Rogg*, 28 Ohio L. J. 32; *Murdock v. Walker*, 152 Pa. 596; *Cœur D'Alene Consol. Min. Co. v. Miners Union of Wardner*, 19 L. R. A. 382, 51 Fed. Rep. 280.

So where the request to quit was accompanied by the intimation that there will be bloodshed and riot, an injunction was allowed. *New York, L. S. & W. R. Co. v. Wenger*, 17 Week. L. Bull. 806.

And interference with business by preventing the employment of sailors for a steamship owned by subjects of Great Britain will be enjoined on the ground of preventing multiplicity of suits, and inadequacy of remedy at law. But it cannot be granted under 28 U. S. Stat. at L., p. 209, providing for prevention of monopolies, in a suit brought by any party except the United States government. *Blindell v. Hagan*, 54 Fed. Rep. 40, aff'd 56 Fed. Rep. 696.

So an injunction was granted against displaying banners in front of plaintiff's premises calculated to injure his business and to deter workmen from entering his employ, although the inscription on 28 L. R. A.

the defendant George Howell is president. The defendants J. M. Maxwell, John Rhodes, Nat. L. Cassidy, J. C. Gallagher, M. Goughler, L. B. Johnson, and Hugh Glen are members of the present executive committee, of which Maxwell is chairman, and E. De Armand, L. Statham, J. Jordan, John Filbin, George F. Halsey, and M. A. Lundwall ex-members of the same committee. The object of the association, as declared by the preamble to its constitution, is in part to establish and maintain an equitable scale of wages, and to protect its members from sudden or unreasonable fluctuations in the rate of compensation for their labor, and to protect just and honorable employers from the unfair competition of unscrupulous and unreliable rivals, to defend their rights and advance their interests as workmen, to create an authority, whose seal shall constitute a certificate of character, intelligence, and skill, to foster fellowship and brotherhood, to aid the destitute and unfortunate, and to encourage the principle and practice of conciliation and arbitration in the settlement of differences between labor and capital. The membership, consisting of about 200, is confined to printers, and includes only persons directly employed in printing books, newspapers, etc., such as compositors, proof-readers, foremen, pressmen, and stereotypers. Section 1, article 15, of the Constitution provides that when a vote is taken in the union on ordering a strike, on a reduction of a scale, alteration of a scale, or any dispute as to the construction of a scale, . . .

the banners was not false, as the act of displaying banners with device to be used as threats is made illegal by Mass. Pub. Stat., chap. 74, § 2, and there was no adequate remedy at law. *Sherry v. Perkins*, 147 Mass. 212.

And an injunction was granted against members of a labor union, who boycotted plaintiffs because they refused to reinstate discharged employes, where defendants paraded the streets with placards, following the plaintiffs' wagons, and visited plaintiffs' agents and by threats of loss of business compelled them to discontinue patronage. *Pa. Pub. Laws*, 1280 (May 8, 1869) legalizing trades unions but providing for criminal liability for interference with employers, will not prevent an injunction in such a case. *Brace Bros. v. Evans*, 5 Pa. Co. Ct. Rep. 163, 3 Ry. & Corp. L. J. 561.

In *Barr v. Essex Trades Council* (N. J.) 30 Atl. Rep. 881, a boycott against a newspaper for publishing "patent insides" which reduced wages, was enjoined, where the damage caused was considerable and more was threatened, and would be irreparable. This case distinguishes *Mayer v. Journeymen Stonecutters Assn.*, *infra*, as in the latter case there was no evidence of any act committed or contemplated not fairly allowed by N. J. Rev. Stat. Supp. (1888) § 3, p. 774.

And a boycott against a printing office, for refusing to unionize the same, and pay laborers union prices, was enjoined where loss of business was caused through circulars sent by defendants; and statements of advertisers made to plaintiff's agents assigning that reason as a cause for withdrawing patronage, is competent evidence. *Casey v. Cincinnati Typographical Union No. 8*, 12 L. R. A. 193, 45 Fed. Rep. 185.

Before the English Judicature act, a court of chancery could protect property by injunction but could not try a libel. Since then it can enjoin false

it must be by secret ballot, etc.; and section 2, that no person shall be allowed to vote for or against a strike unless he shall have been a member in good standing for six months prior to the ballot. A scale of wages has been adopted and made a part of the constitution. The by-laws, among other things, provide as follows:

"Section 1, art. 6. Each newspaper office employing less than twenty-five men in its composing room shall be entitled to one apprentice. Where twenty-five or more are employed, two apprentices shall be allowed. Each job office shall be entitled to one apprentice. In offices employing five journeymen on an average, two apprentices may be employed."

"Section 1, art. 8. Any member failing to comply with the constitution, by-laws, and other established regulations of this union, or guilty of the willful violation of any boycott adopted by the union, the International Typographical Union, or any trades or labor unions represented by the delegates in a trades assembly in which this union is represented, . . . shall be punished by fine, reprimand, suspension, or expulsion."

"Sec. 2. Any member accepting work in any office where the hands have struck on any question involving the regulations of this union, the union having ordered such strike, and who shall refuse to cease work when ordered by the president or executive committee, shall be suspended or expelled, as may be determined by two thirds of the members voting."

These facts appear from the complaint, in which the following grounds for relief are also, in substance, alleged: That plaintiff has an expensive plant, and has acquired a lucrative and remunerative business. That about sixteen months after plaintiff had established itself in business it ascertained that its employes were being interviewed by the defendants and their associates, and that its business was being injuriously interfered with by them. That the plaintiff and its officers have heretofore refused to submit to all the laws, rules, and regulations of the union, or to permit the union to dictate the mode and manner in which it shall conduct its business; and that for this reason the executive committee and the officers and members of the union combined and conspired to compel a compliance with such rules and regulations, and a submission to the dictates of the union in that respect, upon pain of being boycotted in its business. The plaintiff had in its employ a number of the members of the union and other persons, among whom was a messenger boy, engaged in putting in order the odds and ends of the office, whose time was not fully occupied, which boy the executive committee demanded should be dismissed from service, and, upon being refused, without license or any lawful business, entered the premises of plaintiff, and ordered all the members of the union then and there to cease working for plaintiff, under penalty of being dealt with in accordance with the rules and regulations of the union. That the workmen were intimidated

publications tending to injure trade, and the defendants circulating a libel that "a strike was now on" at complainants' place of business, against the "sweating system" was enjoined where such statement was false. *Collard v. Marshall* [1892] 1 Ch. 571.

In *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551, 37 L. J. Ch. 889, printing and publishing placards for the purpose of intimidating workmen, as a part of a scheme to prevent work and destroy the value of plaintiff's property was enjoined. The court said that a publication of a libel is a crime and that it had no jurisdiction to prevent the commission of a crime; but it enjoined the defendants on the ground that it could protect property and prevent destruction of its value by intimidation and threats which caused interference with employment of workmen. But see next case.

In *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. 142, which was an action to restrain the publication of a libel, an injunction was refused and *Dixon v. Holden*, L. R. 7 Eq. 488, was criticized saying that decision may be maintained on the ground of improper use of "name" but that the statement of the vice-chancellor, that reputation is property and will be protected, is not borne out by the authorities cited, and that the case of *Springhead Spinning Co. v. Riley*, *supra*, was decided by the same vice chancellor, who expressed the same opinion as in *Dixon v. Holden*, and the court does not accede to "these general propositions." See on this subject *note to Flint v. Hutchinson Smoke Burner Co. (Mo.)* 16 L. R. A. 242.

An association devoting funds to support striking workmen was enjoined from such use of the funds where such use was contrary to the purposes and rules of the organization. *Warburton v. Huddersfield Industrial Soc.* [1892] 1 Q. B. 213.

But an injunction against libelous circulars denouncing plaintiff's workmen as "scabs," will not 28 L. R. A.

be granted where it is not shown by the evidence whether employes were compelled to leave through moral suasion or by intimidation, or whether alienated customers derived their information from the circulars or from other sources. *Richter v. Journeymen Tailors Union*, 24 Ohio L. J. 189.

And where the complaint did not allege any special injury or show that any unlawful act was committed, an injunction was refused against a labor union conspiring to injure plaintiff's business by placards or mottoes on the streets to the effect that plaintiff was opposed to labor unions. *De Pear v. Cooks Union*, 37 Chicago Legal News, 387.

In *Sweeny v. Torrence*, 11 Pa. Co. Ct. Rep. 497, 1 Pa. Dist. Rep. 622, an injunction was refused against a boycott by contractors and bricklayers-union, preventing sales to dealers in builders' material, as no present act was threatened which would cause irreparable injury. But it was said that a court of equity would prevent a combination to interfere or injure plaintiff's business by force, threats, intimidation, or menace of harm or violence.

So in *Rogers v. Everts*, 17 N. Y. Supp. 294, peaceable persuasion of employes to quit, and paying their expenses, and posting in the union-labor halls the names of contributors to the funds was not enjoined. But it was said that if intimidation was used it would be different, and that N. Y. Penal Code, § 171, providing for criminal liability—as well as the Act of 1870—would not prevent an injunction.

If there is no irreparable injury and the strike is over, the discretion of the trial court in refusing a perpetual injunction will not be reviewed. (But see *United States v. Workingmen's Amalgamated Council*, *infra*.) *Reynolds v. Everett*, 144 N. Y. 129, affirming 67 Hun. 294.

Where plaintiff's hands were enticed away, but no violence, force, intimidation, or coercion is

and influenced thereby, and at once obeyed the order, and without notice to plaintiff ceased work, and left its premises, leaving its contracts with patrons unfinished, many of which were important and emergent. That the said committee and members of the union circulated the fact that the employees of the plaintiff had been called off, and its office left without hands, and on the 27th and 28th days of August, 1892, published the following advertisement in the local news columns of the Oregonian: "To Our Friends: Persons intending having job printing done will bear in mind that the Longshore establishment, on Front, between Alder and Washington streets, is a non-union office. Ex. Com. M. T. U. No. 58." That at the same time the members of said executive committee, in their official as well as personal capacity, visited numerous patrons of the plaintiff, and informed them that plaintiff was under the ban of the union's displeasure, and held out the threat and intimidated to said patrons that if they continued to patronize plaintiff the members of the union, and such others as they could influence, would withdraw their business from them. That subsequently thereto the plaintiff put in a bid to the common council of the city of Portland for doing the city printing for the year 1893, which was the lowest bid made for said work, and that said executive committee and members of the union, for the purpose of preventing the acceptance of said bid, threatened said council and the members thereof with their dis-

pleasure and boycott at the polls should they seek re-election, and with injury to their private business interests, if they disregarded their demands, and that said council for that reason alone rejected plaintiff's bid. That the defendants maliciously, unlawfully, and persistently pursued this course for about eight months, when they ceased their attacks for a short time only. That on the 12th day of March, 1893, plaintiff had in its employ two apprentices, but that it also had in its employ on an average five journeymen. That the defendants demanded that it discharge one of said apprentices, and, upon being refused, the union passed a resolution ordering all men working for plaintiff to quit, and, they being intimidated thereby, obeyed the order, leaving plaintiff without necessary assistance to carry on its business; and that the executive committee, with malicious intent, conspiring and contriving to injure and destroy the business of plaintiff, posted the following notice in numerous places, viz.: "Owing to the Longshore Printing Company breaking the rules of the Multnomah Typographical Union, all members of the union were withdrawn March 16th, '93,"—and also notified plaintiff that they now intended to fight it to the death. That ever since that time the defendants and other members of the union have persistently visited and harassed the patrons of plaintiff with demands that they cease to give their work to it upon penalty of incurring the ill will and displeasure of not only this but all labor un-

shown to be committed or intended, an injunction was refused, as N. Y. Laws 1870, chap. 19, provides for co-operation to secure an advance in wages or to maintain the price. *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. C. 383.

This case was affirmed on the ground that an invasion of clear rights of plaintiffs' property, or irreparable injury was not shown. *Johnston Harvester Co. v. Meinhardt*, 24 Hun, 429.

Where the publication was not disclosed in the case, or the "various and divers ways" in which plaintiff was injured, an injunction was refused against a pilot association refusing to serve plaintiff, and libeling his branch-pilot, and instituting suits against them, as in such suits there is a remedy at law. *Francis v. Flinn*, 118 U. S. 385, 30 L. ed. 165.

Equity will not enjoin a blacklisting of employees but it is said that equity will protect property from threatened injury when the rights are equitable, or when legal and equitable and the civil and criminal remedies at common law are inadequate. *Worthington v. Waring*, 20 L. R. A. 343, 157 Mass. 421.

And an injunction was refused against a discharged workman and stockholder who interfered with any one attempting to use his accustomed bench in a foundry, there being no allegation of his insolvency. *Mechanics Foundry of San Francisco v. Ryall*, 63 Cal. 416.

And where the amended complaint alleged insolvency but did not show how the damages to plaintiff would be irreparable an injunction was still refused in the same case. It was suggested that the defendant should be evicted at the door, or a policeman called to aid the plaintiffs. *Mechanics Foundry of San Francisco v. Ryall*, 75 Cal. 601.

In *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, an indictment under U. S. Rev. Stat., §§ 5399, 5440, making it criminal to obstruct justice in the 28 L. R. A.

federal courts or to conspire to do so, not alleging that the defendants conspired to violate the injunction of the court which had been issued or to interfere with its proceedings, and not alleging notice to the defendants of the pendency of proceedings or issue of injunction, was invalid, although it alleged a conspiracy to intimidate employers to discharge the employees. See *United States v. Workingmen's Amalgamated Council*, *infra*.

In *Mayer v. Journeymen Stonecutters Assn.*, 47 N. J. Eq. 519, an injunction was refused to prevent persecution of plaintiff's company and two plaintiffs (employees) by strikes, boycotts, or violence, or intimidation, as no threat to do any unlawful act was shown in this case, and N. J. Rev. Stat. Supp., § 30, p. 774, provides that it shall not be unlawful to make a peaceable combination for or against employment. But see *Barr v. Essex Trades Council* (N. J.) 30 Atl. Rep. 881.

In the case of *LONGSHORE PRINTING & PUB. CO. v. HOWELL* it is conceded that a conspiracy to destroy or injure the business of another, or doing violence to his property or property rights, where the injury is threatened and imminent and will become irreparable to the suitor, or intimidation of workmen, will be enjoined, but in that case an injunction was refused because the petition did not show that the damages would be irreparable and failed to connect the defendants directly with the damages shown.

II. Proceedings under the interstate commerce act

Under the United States Interstate Commerce Act (U. S. Stat. at L. 1885-87, p. 379), and the amendments thereto providing that it shall be unlawful for persons to combine or conspire to hinder or obstruct commerce, and that connecting lines shall not refuse to transfer or handle cars, and confer-

ions. That the apprehension of loss of trade and the business of the members of said union and other labor unions, and the continual harassing and vexatious visits and interviews to which they have been subjected, have induced a large number of plaintiff's best patrons to withdraw their patronage from it; among others, the Meier & Frank Company, whose printing work is valuable; and that Mason, Ehrman & Co., whose business is also valuable, have notified plaintiff of its intention to so withdraw their patronage. And the plaintiff further alleges, in substance: That the whole scope, object, and intent of said typographical union are to create a monopoly of labor in the printing business, and that its said interference with plaintiff is an infringement upon private right, and against public policy. That said union arrogates to itself the right to dictate to employers as to whom and what persons they shall employ, and, if compliance with its dictates is withheld, then the right to force obedience through the instrumentality of the boycott. That the defendants and all the members of the union have unlawfully, maliciously, and deliberately conspired to destroy the business of plaintiff, and render its plant and property valueless, or, as an alternative, to drive plaintiff, against its will, into a submission to the laws, rules, and regulations of the union; and that all the aforesaid acts of defendants and other members of the union have been committed in pursuance of such conspiracy and combination. That in furtherance of said common

purpose, defendants and their associates have warned, threatened, and intimidated, and still continue to warn, threaten, and intimidate, printers and others for the purpose of deterring and preventing them from entering the employ of plaintiff, and that they have heretofore and do now continue persistently and maliciously to visit a great many of the patrons of plaintiff, and to threaten them with a withdrawal of business, for the purpose of deterring them from giving work and employment to plaintiff, with the ultimate object of reducing its profits and income, and so to cripple and injure it in its business as to force it into a submission to the unlawful demands of the union. That the long-continued and constantly recurring acts of defendants and threats to continue said trespasses constitute a nuisance, and that by reason thereof plaintiff has lost heavily, and, if continued, the injury to its business will become irreparable; to prevent which an injunction is asked. A demurrer was interposed to the complaint, which being sustained the order is assigned here as error.

Mr. J. H. Handy for appellant.

Mr. A. F. Sears, Jr., for respondents.

Wolverton, J., delivered the opinion of the court:

The questions presented for our consideration arise upon demurrer to the complaint, and hence all the allegations contained therein must be taken as true. This rule must be understood, however, to include only such

ring equitable jurisdiction on the United States circuit courts to enforce the provisions of the act, a combination or conspiracy of persons to hinder, obstruct, or interfere with the business or management of any such railroad company by threats, intimidation, force, or violence against such railroad companies or their employees in the discharge of their duties, will be enjoined. *Southern California R. Co. v. Rutherford*, 62 Fed. Rep. 790; *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, 26 L. R. A. 158, 4 Inters. Com. Rep. 831, affirmed *Workingmen's Amalgamated Council of New Orleans v. United States*, 13 U. S. App. 426, 57 Fed. Rep. 85; *United States v. Elliott*, 62 Fed. Rep. 801; *United States v. Agler*, Id. 824; *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.* 34 Fed. Rep. 481; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 54 Fed. Rep. 730; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 395, 54 Fed. Rep. 746; *Farmers Loan & T. Co. v. Northern Pac. R. Co.* 25 L. R. A. 414, note, 4 Inters. Com. Rep. 744, note, 60 Fed. Rep. 803; *Re Debs*, 158 U. S. 564, 39 L. ed. 1002, affirming *United States v. Debs*, 64 Fed. Rep. 724.

And employees remaining in the employment of the railroad company engaged in interstate commerce will be compelled to perform their accustomed duties. *Southern California R. Co. v. Rutherford*, *supra*.

And an injunction will be granted under 26 U. S. Stat. at L. p. 209 (Act of Congress, July 2, 1890, chap. 647), providing that conspiracies or combinations to hinder or obstruct interstate commerce are misdemeanors, and that the United States circuit court has equitable jurisdiction to prevent the same. Such injunction will be granted, although the strike has ended at the time of hearing. And such strike is not less unlawful by reason of the fact that other busi-

ness than interstate commerce was also affected. *United States v. Workingmen's Amalgamated Council*, *supra*.

This strike was caused by refusal of warehousemen, merchants, boss draymen, and weighers, to recognize union labor organizations. But see *Reynolds v. Everett*, 144 N. Y. 139, affirming 67 Hun, 294.

And under the same act, a conspiracy and combination to hinder the operation of railroads engaged in interstate commerce will be enjoined. *United States v. Elliott*, *supra*.

And in *United States v. Agler*, *supra*, a similar ruling was made as against interference with interstate commerce and the mails, and it was held that an injunction was not void even if the bill was demurrable, for not containing a prayer for process against named parties. But it was said that prior to the Act of July 2, 1890, the circuit courts of the United States had not equitable jurisdiction to prevent such acts. But see *United States v. Debs*, *supra*.

And where the injunction was against a connecting line refusing an interchange of freight and cars, a mandatory injunction was granted under supplemental petition against the chief officers of the brotherhood of locomotive engineers requiring them to rescind their orders against their members handling cars of a company hostile to such society, and Arthur, chief of the brotherhood, was enjoined from ordering them to quit the employment. This is based on Interstate Commerce Act, Am. 25 U. S. Stat. at L., p. 855, which provided against conspiring to commit an offense against commerce, 24 U. S. Stat. at L., p. 379, which provides that connecting lines shall not discriminate, and U. S. Rev. Stat., 5440, which provides against conspiracies to commit offense against the United States. Arthur's disclaimer of knowledge of a

allegations as contain statements of facts as distinguished from statements of conclusions of fact or of law. It is a well settled rule of pleading, that bare allegations of conclusions cannot avail the pleader, especially where a demurrer is interposed, without a statement of the probative fact upon which said conclusions are based. Even then the conclusions may often be stricken out upon motion as irrelevant and redundant matter. A brief summary of the definite, tangible facts which appear upon the face of the complaint, and which alone can form the basis of this suit, will aid us materially in arriving at a correct conclusion as to whether the plaintiff is entitled to relief in equity by the extraordinary remedy of injunction. The existence of the plaintiff as a corporation, and the Multnomah Typographical Union No. 58 as a voluntary unincorporated association, the objects of such association as shown by its constitution and by-laws, and the relations which defendants bear to such association, are all facts which are taken as granted. The overt acts charged upon which equity jurisdiction is invoked are about as follows: First. The executive committee of the Multnomah Typographical Union No. 58, without leave or license, and without lawful business, entered the premises of plaintiff and ordered all union men employed therein to quit under penalty of being dealt with in accordance with the laws, rules, and regulations of the union, which order was obeyed by the men. Second. The committee and members of the union circulated the fact that

the employes of plaintiff had been called off. Third. The committee published the following advertisement in the local news columns of the Oregonian: "To Our Friends: Persons intending having job printing done will bear in mind that the Longshore establishment on Front between Alder and Washington streets is a non-union office. Ex. Com. M. T. U. No. 58." Fourth. The committee and members of the union induced the common council of the city of Portland to reject plaintiff's bid for the city printing for the year 1893 by threatening said council with their displeasure and boycott at the polls. Fifth. On the 12th day of March, 1893, the union passed a resolution ordering all union men working for plaintiff to quit, and that the men being intimidated thereby observed the order. Sixth. The committee caused the following notice to be posted in numerous places, viz.: "Owing to the Longshore Printing Company breaking the rules of the Multnomah Typographical Union, all members of the union were withdrawn March 16th, '93." Seventh. The committee notified plaintiff that they now intended to fight it to the death. Eighth. The Meier & Frank Company, whose business was valuable to plaintiff, withdrew their patronage, and Mason, Ehrman & Co., whose business is also valuable, notified plaintiff of their intention to withdraw. All these acts are alleged to have been committed in pursuance of a conspiracy entered into by and between the executive committee and members of Multnomah Typographical Union No. 58 for the

prior injunction against the railroads and their employes was held immaterial to the question of the injunction against him. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 54 Fed. Rep. 730.

And under Interstate Commerce Act, section 3, providing against refusal of a connecting railroad to handle cars or freight, an injunction against such railroad company is binding on all their employes in their service who are served with notice of the injunction, and they will be restrained from enforcing rules of their labor union which injure the company or the public, and they need not be made parties defendants. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 385, 54 Fed. Rep. 746.

And on habeas corpus proceedings by an employe committed for contempt in disobedience of the injunction the same was held to be the rule. *Ex parte Lennon*, 64 Fed. Rep. 320.

In the same case affirmed on appeal to the Supreme Court of the United States where the relator claimed he was not a party to the suit and had no notice of the injunction, and that the circuit court had no jurisdiction of the original suit, on account of residence of parties, and that he was imprisoned without due process of law, it was held that the right under the Judiciary Act of March 3, 1891, § 5, to take an appeal to the supreme court, where the jurisdiction of the trial court is in issue did not include the right to appeal in the habeas corpus case on the ground that jurisdiction of the circuit court in the contempt case was in issue when there was issue as to the jurisdiction of the circuit court in the habeas corpus case. *Re Lennon*, 150 U. S. 303, 37 L. ed. 1120.

An injunction was granted against the officers of the American Railway Union, and all persons combining with them, to desist and refrain from hin-

dering, obstructing, or stopping any of the business of certain railroads as common carriers of passengers, freight, or mails; and from entering the premises of said roads for any of said purposes; and from compelling or inducing or attempting to compel or induce by threats, intimidation, persuasive force, or violence, any of the employes to refuse or fail to perform any of their duties as employes in any of the roads engaged in interstate commerce or carrying mails; and from compelling or inducing or attempting to compel or induce by threats, intimidation, force, or violence any of said employes to leave the service; and from preventing any person by such means from entering the service; and from doing any act in furtherance of any conspiracy or combination to restrain the railroad companies or receivers in the control of the same; and from ordering, directing, aiding, assisting, or abetting any person to commit any of said acts. On habeas corpus to release from imprisonment for contempt the Supreme Court of the United States held that the government has control over interstate commerce and of the mails; that it may remove all obstructions, by force or through its courts, and that jurisdiction is not ousted because the acts are criminal; that equity has jurisdiction, and may enforce proceedings in contempt; that such proceeding is not a criminal one, and that after service on the parties it may punish under U. S. Rev. Stat., § 725; and that its findings cannot be reviewed by habeas corpus. This is without reference to the Act of Congress of July 2, 1890. *Re Debs*, 158 U. S. 564, 39 L. ed. 1032. See *United States v. Agler*, 62 Fed. Rep. 824.

In *United States v. Debs*, 64 Fed. Rep. 724 (the same case in the circuit court), it was said that this injunction does not prevent employes from quitting in furtherance of the conspiracy or forbid others in aid of the conspiracy from persuading them

purpose of injuring and destroying plaintiff's business, or compelling it to submit to the rules and regulations of the association. When divested of all surplusage, the complaint simply shows that defendants have been guilty of one act of trespass,—that of entering plaintiff's premises unbidden; some acts by reason of which plaintiff was deprived of certain business,—that of the city printing for the year 1898; and of some acts on account of which one customer, the Meier & Frank Company, has withdrawn its employment of plaintiff, and another gave notice of an intention to do likewise. These constitute all the specific injuries which plaintiff has sustained at the hands of the defendants. To prevent further threatened injuries of the same nature and the damage to plaintiff's business from becoming irreparable an injunction is sought. The publication in the Oregonian, the posting of said notices, the circulation of the fact that the union employes of plaintiff had been called off, and the threat, made directly to the plaintiff by the executive committee, that they "now intended to fight it to the death," can hardly be termed such acts of malicious, unwarranted aggression as *per se* of themselves be regarded as actionable *per se*; but of this we will have more to say hereafter.

to quit. And it was said that Arthur v. Oakes, *infra*, does not hold that every man has a right to abandon his position for a good or bad reason, and that another for a good or bad reason may advise or persuade him to do so. "This is not true," for if men advise others to go upon a strike knowing that violence and wrong will be the probable result, they cannot escape responsibility. Some of the parties complainants in the above case were receivers.

A railroad company refusing to exchange or handle freight at the behest of a labor union threatening a boycott will be enjoined as such refusal is contrary to U. S. Stat. at L. 1885-87, p. 379, providing that common carriers shall not discriminate between connecting lines, and 1 McClain's Stat. Iowa, p. 367, providing that every railway corporation shall receive and return cars from connecting lines. Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co. 34 Fed. Rep. 481.

So under Sanborn & Berryman's Wis. Rev. Stat., § 4463a, providing that it shall be unlawful to combine for the purpose of willfully or maliciously injuring another by compelling him to do any act against his will, or to hinder others, a conspiracy and combination to cause the employes of a railroad company in the hands of a receiver to abandon the service with the object and intent of crippling the property is unlawful, and an injunction was granted against combining and conspiring "to quit with or without notice the service of said receivers with the object and intent of crippling the property in their custody." It was said any employe may abandon the service "peaceably and decently" but one has no right to abandon a service without regard to time and conditions. The Act of Congress, 24 U. S. Stat. at L., chap. 567, legalizing trades unions, does not prevent such injunction, and as to whether U. S. Stat. at L., chap. 647 (Act July 2, 1890), applied it was not necessary to decide. (See next case.) Farmers Loan & T. Co. v. Northern Pac. R. Co. 25 L. R. A. 414, note, 4 Inters. Com. Rep. 744, note, 60 Fed. Rep. 803.

The injunction in the case of Farmers' Loan & T. Co. v. Northern Pac. R. Co., *supra*, was modified to indicate more clearly that the strikes restrained

It is apparent that one purpose of this suit is to prevent strikes by the union employes of the plaintiff, or, to put it more direct, to prevent the union from calling off or interfering with such of said employes as the association is able to control through its organization. At one time, in England, it was maintained by some judges that trades unions were illegal combinations, and indictable at common law. In *King v. Maubey*, 6 T. R. 636, Grose, J., by way of illustration, makes use of the following language: "As in the case of journeymen conspiring to raise their wages, each may insist on raising his wages, if he can; but if several meet for the same purpose it is illegal, and the parties may be indicted for a conspiracy." From a review of this case it is apparent that this language was not necessary to a decision of the points made. In *Hilton v. Eckersley*, 6 El. & Bl. 52, Crompton, J., in referring to *King v. Maubey*, says that Grose, J., "assumed the illegality of such combinations as well-known law," and further remarked that "combinations of this nature, whether on the part of the workmen to increase, or of the masters to lower, wages, were equally illegal." But Lord Campbell, *Ch. J.*, in a concurring opinion with Crompton, J., seriously doubted whether such was the law,

were those designed to physically cripple the trust property or to actually obstruct the receivers in the operation of the road, or to interfere with their employes who do not wish to quit, or to prevent by any intimidation or other wrongful modes, or by any device, the employment of others to take the places of those quitting, and not such as were the result of the exercise by employes in peaceable ways of rights clearly belonging to them, and were not designed to embarrass or injure others or to interfere with the actual possession and management of the property by the receivers. Arthur v. Oakes, 25 L. R. A. 414, 42 Inters. Com. Rep. 744, 60 Fed. Rep. 810.

And interference by intimidation or force with receivers in the management of a railroad preventing employes from working is a contempt of court, and the order appointing a receiver in effect prohibits any disturbance of possession. Secor v. Toledo, P. & W. R. Co. 7 Biss. 512; *King v. Ohio & M. R. Co.* Id. 520.

The interference in these cases also prevented interstate commerce and transmission of mails, but the ground of punishment was for disturbing the receiver in possession, and the decree is notice to all persons.

The same was held in *Thomas v. Cincinnati, N. O. & T. P. R. Co.*, 4 Inters. Com. Rep. 788, 62 Fed. Rep. 803, on the ground that instigating strikes on such roads was unlawful under Act of Congress July 2, 1890, prohibiting conspiracies against interstate commerce and contrary to U. S. Rev. Stat. 3905, providing for penalties for obstructing mail trains.

In *Waterhouse v. Comer*, 19 L. R. A. 408, 55 Fed. Rep. 149, it was held that Rule 12, of the order of Brotherhood of Locomotive Engineers preventing the handling of freight of certain roads, was contrary to the interstate commerce act, and that if any employe desired to leave the service he would be required to do so in such a way as not to impede the action of the road and on such terms and conditions as the court required, where the receiver was allowed to contract with such labor organization. The same in substance was decided in respect to this Rule 12 by the case of *Toledo, A. A. &*

and, after citing *King v. Mawbey*, said: "I cannot bring myself to believe, without authority much more cogent, that if two workmen, who sincerely believe their wages to be inadequate, should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor, or liable to be punished by fine and imprisonment. The object is not illegal, and therefore, if no illegal means are to be used, there is no indictable conspiracy. Wages may be unreasonably low or unreasonably high, and I cannot understand why in the one case workmen can be considered as guilty of a crime in trying by lawful means to raise them, or masters in the other can be considered guilty of a crime in trying by lawful means to lower them." And later English authorities concede that members of trades unions binding themselves not to work except under certain conditions, and to support one another in the event of being thrown out of employment in carrying out the views of the majority, do not bring themselves within the criminal law. *Hornby v. Close*, L. R. 2 Q. B. 153, and *Farrer v. Close*, L. R. 4 Q. B. 602. Since the enactment of Statutes 6 Geo. IV. chap. 129, as modified

by 23 Vict. chap. 84, and 34 and 35 Vict. chap. 81, and similar statutes, trades unions are recognized as legal associations, with objects which they may endeavor to secure by pecuniary and other means of supporting strikes and the like, so long as they do not resort to secret or other violence, or to threats, intimidation, or any acts of like character which will tend to destroy freedom of action. Early American cases are in consonance with the earlier English adjudications, but later authorities concur in the more reasonable and enlightened view that trades unions, in the ordinary acceptation of the term, are not within and of themselves unlawful combinations. "It is no crime for any number of persons, without an unlawful object in view, to associate themselves together, and agree that they will not work for or deal with certain men or classes of men, or work under a certain price or without certain conditions." *Carew v. Rutherford*, 106 Mass. 14, 8 Am. Rep. 287; *Snow v. Wheeler*, 113 Mass. 186; *Com. v. Hunt*, 4 Met. 184, 38 Am. Dec. 349; *Rogers v. Bearts*, 17 N. Y. Supp. 268. It was therefore not unlawful for Multnomah Typographical Union No. 58 to adopt a scale of wages. Neither was it unlawful for the union to make provisions in its by-laws limiting the number of apprentices to one for

N. M. R. Co. v. Pennsylvania Co. 19 L. R. A. 387, 54 Fed. Rep. 730.

In *United States v. Patterson*, 4 Inters. Com. Rep. 775, 55 Fed. Rep. 606, which was an indictment for a criminal conspiracy, it was held that Act of Congress of 1890, chap. 647, making conspiracies in restraint of trade or to monopolize trade or commerce unlawful, did not apply to all attempts to restrain commerce between the states by strikes and boycotts, but applied to monopolies. See further next subhead.

III. Receivers.

Any interference with the possession of receivers, by attempts to control the management, or cripple the property, or hinder or obstruct its operation, or intimidate the employees or persons desirous of obtaining such employment; or any acts of violence directed against such receiver or the property or employees, in pursuance of a conspiracy to cripple the operation of the business entrusted to the receiver,—is a contempt of the court appointing him, and will render the parties liable. *Re Higginia*, 27 Fed. Rep. 448; *Frank v. Denver & R. G. R. Co.* 23 Fed. Rep. 757; *United States v. Kane*, Id. 748; *Arthur v. Oakes*, 25 L. R. A. 414, 4 Inters. Com. Rep. 744, 63 Fed. Rep. 510; *Secor v. Toledo & P. W. R. Co.* 7 Biss. 513; *King v. Ohio & M. R. Co.* Id. 522; *Waterhouse v. Comer*, 19 L. R. A. 403, 55 Fed. Rep. 149.

And a request to engineers of a railroad not to act without the consent of the strikers was a threat and intimidation. *Re Doolittle*, 23 Fed. Rep. 544.

And notice to the foreman of the shops of a railroad, requesting him to stay away (from work) until the (strike) difficulty was settled, "But in no case are you to consider this an intimidation," signed by the chairman of the committee of striking employees, is a threat and renders him guilty of contempt of court. *Re Wabash R. Co.* 24 Fed. Rep. 217. But in the same case on rehearing, *United States v. Berry*, 24 Fed. Rep. 730, it was held that under the law dividing the western district of Missouri, the court had not jurisdiction as the trial must be in the division in which the offense was committed.

In *Ames v. Union Pac. R. Co.*, 4 Inters. Com. Rep. 36 L. R. A.

619, 62 Fed. Rep. 7, it was said that an injunction cannot make men continue in the service, and an injunction against interference with the employees of a receiver cannot make it any more of a contempt, as the law itself imposes an injunction, and injurious effects are caused by injunctions creating the belief that it is not an offense to interfere if no injunction was issued.

The marshal without warrant properly arrested a person interfering with the management of a railroad in the hands of a receiver by attempting to induce men to quit work, but as the prisoner was held in custody for a month without examination, he was released on habeas corpus. In this case there was an order of court directing the marshal to attack all persons interfering with the possession of the receiver. *Re Acker*, 66 Fed. Rep. 230.

In *Waterhouse v. Comer*, 19 L. R. A. 403, 55 Fed. Rep. 149, the court refers to *Telegraphers v. Comer*, unreported, decided at the same term, in which telegraphers were enjoined from interference with property, operations, or employees of the receiver, and rules were issued against persons interfering.

In *Beers v. Wabash, St. L. & P. R. Co.*, 34 Fed. Rep. 244, where the receiver refused an interchange of freight on account of a boycott by brotherhood of engineers, but rescinded his order and disclaimed all connection with the chief of the brotherhood, the petition for injunction was allowed to remain on file for future action if necessary. See also subhead, "*Proceedings under interstate commerce act.*"

Cases in regard to enticement of servants are not included in this note, except as connected with strikes.

It will be seen from a full review of all the cases on the subject that jurisdiction to issue an injunction against a strike is fully established by numerous authorities. The above case of *LONGSHORE PRINTING & PUB. CO. v. HOWELL*, while conceding such jurisdiction in a proper case, makes in effect an important restriction of the remedy by requiring as a condition a clear showing of the inadequacy of the legal remedy and that damages to be prevented will be otherwise irreparable. Most of the other cases on the subject have proceeded without much of any discussion on this point. I.T.

each newspaper office employing less than twenty-five men and two when employing twenty-five or more, and one to each job office, and two when employing five journeymen on an average. No member of this association can now be charged with criminal conspiracy as under the common law, simply because of the fact that he with others has combined for the purpose of maintaining wages or limiting the number of apprentices, as contrary to public policy. It must be understood, however, that these associations, like other voluntary societies, must depend for their membership upon the free and untrammelled choice of each individual member. No resort can be had to compulsory methods of any kind either to increase, keep up, or retain such membership. Nor is it permissible for associations of this kind to enforce the observance of their laws, rules, and regulations through violence, threats, or intimidation, or to employ any methods that would induce intimidation or deprive persons of perfect freedom of action. Such organizations may be preserved, and their membership augmented, by reasoning and fair arguments, and even by persuasion and entreaty, and an observance of their adopted constitutions and by-laws may be exacted through the same peaceful means, but beyond this it is not advisable, from a legal standpoint, to venture. So much for the organization and its enforced coherence.

It has been said that there is no such thing as a legal or peaceful strike. The term "strike" is differently defined by authors and judges. Webster defines it as "the act of quitting work; specifically, such an act by a body of workmen, done as a means of enforcing compliance with demands made on their employer." In 24 Am. & Eng. Encyclop. Law, p. 123, it is defined as follows: "The term 'strike' is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been granted;" and again by Allen, J., in *Delaware, L. & W. R. Co. v. Bourns*, 58 N. Y. 582: "A strike is a combination among laborers, those employed by others, to compel an increase of wages, a change in the hours of labor, some change in the mode and manner of conducting the business of the principal, or to enforce some particular policy, in the character or number of the men employed, or the like." From these definitions it would seem that all strikes are not unlawful, and do not necessarily engender breaches of the peace. Sir James Hannen, in his dissenting opinion in *Farrer v. Close*, L. R. 4 Q. B. 611, says: "I am of the opinion that strikes are not necessarily illegal. A strike is properly defined as 'a simultaneous cessation of work on the part of the workmen,' and its legality or illegality must depend on the means by which it is enforced, and on its objects. It may be criminal, as if it be part of a combination for the purpose of injuring or molesting either masters or men; or it may be

simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Hilton v. Eckersley*, 6 El. & Bl. 66; or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfillment of an engagement entered into between employers and employed, or any other lawful purpose." Justice Harlan, in the now celebrated case of *Arthur v. Oakes*, 63 Fed. Rep. 327, 25 L. R. A. 414, 4 Inters. Com. Rep. 744, says: "We are not prepared, in the absence of evidence, to hold as a matter of law that a combination among employes having for its object their orderly withdrawal in large numbers or in a body from the service of their employers, on account simply of a reduction in their wages, is not a 'strike,' within the meaning of the word as commonly used. Such a withdrawal, although amounting to a strike, is not, as we have already said, either illegal or criminal." If one person can lawfully quit the service of his employer because of the rate of wages paid or the employment of objectionable persons, cannot several or many persons, first agreeing among themselves to the same purpose, likewise lawfully quit? Conspiracy at common law was a combination between two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means. Where not under special contract for a definite time, a simultaneous severance of the relations between employer and employes at the instance of the employes, and where there was no preconcerted action of such employes, was never considered unlawful. Coming to the means employed, it is not unlawful for several or many employes to agree between themselves to quit their employer. As we have seen, at one time it was held to be an unlawful conspiracy for laborers to combine for the purpose of quitting simultaneously with the ultimate purpose of raising their wages, or inducing their employer to confine his employment to certain kinds of labor, or the like; but this is not now the law, the principle underlying which having long since been discarded as inconsistent with liberty and the spirit of our free institutions. After workmen have thus combined, it is still not unlawful for them, by the use of fair means, to communicate the reasons for their design, and to signify their intention of quitting to their employer. 24 Am. & Eng. Encyclop. Law, p. 123; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 233, 234, 21 L. R. A. 337; *Walaby v. Anley*, 7 Jur. N. S. 466; *People v. Koska*, 4 N. Y. Crim. Rep. 434; *People v. Wilzig*, Id. 417; *Rogers v. Everts*, 17 N. Y. Supp. 268. Within these limits, a perfectly legitimate strike may be inaugurated and maintained, the object being to better the condition of workmen. Such an object is not only legitimate and lawful, but is just and praiseworthy. It was not wrongful, therefore, for the Multnomah Typographical Union to adopt a rule limiting the number of apprentices, and seek by fair means to

enforce the observance thereof, so that its purpose in that respect was lawful. The claim that a monopoly is thus being promoted surely constitutes no grounds for equitable interference by injunction. This whole controversy has arisen because of the existence of the rule referred to and the efforts of the union to require its observance at the hands of the plaintiff. When, however, unlawful means are used to uphold or maintain a strike, or if the purposes for which it is maintained are unlawful, then it follows as a matter of course that the strike is in itself unlawful.

It is claimed in this case that the means employed by defendants were not permissible, and, being violative of the rights of plaintiff, it is entitled to an injunction to prohibit their continuance. This brings us to the gist of the controversy. The statute provides (Hill's Or. Anno. Laws, § 1893): "If any person shall by force, threats or intimidation, prevent, or endeavor to prevent, any person employed by another from continuing or performing his work, or from accepting any new work or employment; or if any person shall circulate any false written or printed matter, or be concerned in the circulation of any such matter, to induce others not to buy from or sell to or have dealings with any person, for the purpose or with intent to prevent such person from employing any person, or to force or compel him to employ or discharge from his employment any one, or to alter his mode of carrying on his business, or to limit or increase the number of his employes or their rate of wages or time of service, such person shall be deemed guilty of a misdemeanor," etc.; and by section 1897 it is made a misdemeanor for any person to "willfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace, or health, or which openly outrages the public decency and is injurious to public morals." Section 1748 provides: "If any person, either verbally or by any written or printed communication, shall threaten any injury to the person or property of another . . . with intent thereby to extort any pecuniary advantage or property from such other, or with intent to compel such other to do any act against his will, such person upon conviction thereof shall be punished," etc. All these statutes are invoked in aid of plaintiff's contention. The first clause of section 1893 is directed against any person unlawfully preventing or endeavoring to prevent any person employed by another from continuing or performing his work. There are but two instances shown by the complaint in which the employes of plaintiff quit work. As to the first of these it is alleged: "That the said executive committee, combining and conspiring as aforesaid, for the purpose aforesaid, and professing to act by authority of the union, and in the capacity of the officers of the same, without lawful business entered the premises of the plaintiff, and ordered all members of the said union there and then at work under contract with the plaintiff to cease work further for it, under penalty of 28 L. R. A.

being dealt with according to the laws and regulations of said union. Said workmen were intimidated and influenced thereby, and without delay immediately obeyed said unlawful and injurious order." And as to the second instance, the complaint alleges: "That on the 12th day of March, 1893, the then president of said union, and its members and officers, by a resolution of said union passed on that day, maliciously and solely because plaintiff refused to submit to the said union, ordered all union men working for plaintiff to cease working for it; and the said workmen, being intimidated by said order, did obey said order, and ceased to fulfill their contracts with plaintiff." In the one instance the men quit under an order from the executive committee and in the other in pursuance of a resolution of the union. No intimidation is specifically alleged or shown, unless it can be inferred that by a refusal to quit the members of the union would subject themselves to the charge of insubordination to the order. And it does not appear that there was sufficient odium attached to this to put the members in fear, or that compliance with the order and resolution was induced thereby. The more reasonable presumption is that they quit because of the mutual understanding between the members to abide the action of the union and its executive committee. The latter clauses of section 1893 can have no application here, as it is not alleged or claimed that the notice published in the Oregonian and the one posted in numerous places were false.

The more serious phase of this case, and the one which demands special attention, is the alleged boycott of plaintiff in its business, inaugurated for the purpose of so handicapping it as to compel submission to the rules and regulations of the union. Every person has a right to require that he be protected in his property rights. "The labor and skill of the workman or the professional man, be it of high or low degree, the plant of a manufacturer, the equipment of a farmer, the investments of commerce, are all in equal sense property. If men by overt acts of violence destroy either, they are guilty of crime." Ray, *Contractual Limitations*, 409; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710. Sections 1897 and 1748, *supra*, seem especially designed to prevent and punish acts which are grossly injurious to person or property, and attempts to compel others to do any act against their will. It seems the principle that a combination or conspiracy of two or more persons to injure the rights of others is illegal, although nothing has been done in execution of that intent, has not been embodied in our statutes; but there is no good reason why civil liabilities may not ensue by reason of a conspiracy to commit that which is not made unlawful by statute. "The general rule of the common law is that it is a criminal and indictable offense for two or more to confederate and combine together by concerted means to do that which is unlawful or criminal, to the injury of the public or portions or classes of a community, or even to the rights of an individual." *Com. v. Hunt*, 4 Met. 121, 38 Am. Dec. 346.

"Combinations against law or against individuals are always dangerous to the public peace and to public security." *State v. Burnham*, 15 N. H. 401. "An agreement to effect an injury or wrong to another by two or more persons is constituted an offense, because the wrong to be effected by a combination assumes a formidable character. When done by one alone, it is but a civil injury, but it assumes a formidable or aggravated character when it is to be effected by the powers of the combination." *Reg. v. Parnell*, 14 Cox, C. C. 514. The entire current of authority for the last century or more is to the same effect. See *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649; *Crump's Case*, 84 Va. 927; *United States v. Kane*, 23 Fed. Rep. 748; *Callan v. Wilson*, 127 U. S. 540, 555, 33 L. ed. 223, 228. Powers, J., in *State v. Stewart*, 59 Vt. 286, 59 Am. Rep. 714, says: "A combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute, or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common-law conspiracy." And in *State v. Glidden*, 55 Conn. 47, an indictment for conspiracy to violate a statute very similar to section 1893, *supra*, was sustained by the court. While conspiracy in itself is not an indictable offense under our law, all these authorities show conclusively that such a combination for the purpose of doing injury to the public or to individuals is *per se* wrongful. Civil consequences are not changed by reason of the fact that the combination is not made a statutory offense. Recent decisions sustain the doctrine that in a proper case, where two or more persons conspire and confederate together for the purpose of destroying or injuring the business of another, or doing violence to his property or property rights, and it is clearly made to appear that the injury is threatened and imminent, and will become irreparable to the suitor, injunction will lie to restrain the conspirators. *Brace Bros. v. Evans*, 8 Ry. & Corp. L. J. 561; *Cogley, Strikes*, 342; *Emack v. Kane*, 34 Fed. Rep. 47; *Sherry v. Perkins*, 147 Mass. 212; *Cœur d'Alene Consol. & Min. Co. v. Miners Union of Wardner*, 51 Fed. Rep. 260, 19 L. R. A. 882; *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 185, 12 L. R. A. 193; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 54 Fed. Rep. 780, 19 L. R. A. 887, and *Arthur v. Oakes*, *supra*. The case of *Sherry v. Perkins* was put directly upon the ground that the acts complained of constituted a nuisance. The cases of *Brace Bros. v. Evans*, *Emack v. Kane*, *Cœur d'Alene Consol. & Min. Co. v. Miners Union of Wardner*, and *Casey v. Cincinnati Typographical Union No. 3*, may well be taken upon the same ground. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, went upon the ground that circuit courts of the United States have jurisdiction by a bill in equity to restrain violations of the interstate commerce law to the irreparable injury of the complainant; and *Arthur v. Oakes*, that any illegal combination or conspiracy upon the part of employes, which has for

its object to cripple the property in the hands of a receiver, and to embarrass the operation of railroads under his management, would be enjoined.

The cases principally relied upon by plaintiff to sustain the injunction in the case at bar are *Brace Bros. v. Evans* and *Casey v. Cincinnati Typographical Union No. 3*. In each of these cases the acts complained of were most aggravated and virulent. In the former the plaintiffs were proprietors and managers of a steam laundry, with a large and lucrative business. Circulars were issued alleging abusive treatment of the employes by plaintiffs, and asking all persons to cease patronizing them. This was followed by several other circulars, similar in character, some of which had printed thereon in large letters, "Boycott Brace Bros." A sign was placed on a building in large letters: "Headquarters Brace Bros. Boycott Committee." Men followed plaintiffs' wagons in buggies having banners attached to the harness on each side of the horse containing "Boycott Brace Bros." in large letters. Persons visited plaintiffs' agents, and requested them to cease acting as such, and upon their refusal to do so circulars were distributed denouncing them, and asking the public to boycott them. Men were posted in front of their places of business, who distributed circulars in large numbers, thereby collecting large and noisy crowds, which seriously interfered with the conduct of their business, and required the protection of the police. As a result, the agents of plaintiffs resigned, and many of their customers withdrew their patronage. In the latter case the facts shown by the bill of complaint and affidavits in support of the injunction were scarcely less reprehensible. *Casey*, the plaintiff, was the proprietor of the Covington Daily Commonwealth. The boycott was directed against his paper. Notices and letters were sent everywhere to his subscribers and advertisers, requesting and demanding that they should withdraw their patronage from the Commonwealth. The following are only specimen extracts therefrom: "Take Notice. It is requested of all who are friendly to organized labor that they buy nothing from the following firm. The Commonwealth (newspaper and job office), Covington, Kentucky." "The union now appeals to all in sympathy with labor to use their influence with Mr. Casey; try to show him the error of his way, and, failing in that, to withdraw their patronage from the 'rat' or 'scab' Commonwealth until it is unionized." "The union will consider it a great favor for you to give up the agency of the Commonwealth. If you do not do so, we will have to consider you the enemy of organized labor." "If you wish to retain the good will of labor, withdraw your advertising from the Commonwealth, refuse to subscribe for the sheet, and your aid in our behalf will be highly appreciated."

An article appeared in the Union Bulletin, the organ of the defendant union, entitled "Boycott the Commonwealth," which was full of such expressions as: "The boycott is still on, and will be until the proprietor

of that 'rat' sheet employs union men." "Withdraw your patronage from the 'scab' Commonwealth." "Do not patronize a merchant who advertises in the 'rat' Commonwealth." "If you see the paper in any place of business, refuse to buy goods unless the merchant immediately stops the 'rat' sheet." "We call upon every friend of organized labor to get his printing done in the union printing offices. Beware of that 'rat' trap at Fifth and Scott streets, Covington, Ky." The inevitable result of such an attack was to utterly destroy Casey's Commonwealth, and leave him without occupation or property of any value.

Has plaintiff herein brought itself within the purview of the doctrine of these cases, or, in other words, does it show such threatened and imminent injuries to its business and property as will result in its irreparable detriment and loss? The allegations of the existence of a conspiracy between the officers and members of the Multnomah Typographical Union No. 58, to compel the plaintiff to submit to the dictation of the union upon pain of being boycotted in its business must be taken as true for the purposes of the demurrer. The first overt act, as before stated, was the entry of the executive committee upon the premises of plaintiff without leave or license, and ordering the union men to cease work under penalty of being dealt with according to the laws and regulations of the union. If this was a willful aggression upon plaintiff's rights, it would constitute trespass, for which an action would lie sounding in damages. It must also be taken as true that through the willful and malicious acts of the conspirators plaintiff lost the city printing for 1893, the Meler & Frank Company business, and will lose that of Mason, Ehrman & Co.,—all valuable business. These acts were committed within a space of about ten months, and constitute a grievance not to be lightly considered, but we cannot agree with counsel that plaintiff is remediless in a court of law. The direct cause of the loss of the city printing is definitely alleged, and the cause of the loss and apprehended loss of the business of the two firms named is perhaps sufficiently, though argumentatively, stated. In aggravation of the incident of the executive committee ordering the men to cease work it is alleged "that said committee and members of said union, further combining and conspiring to injure and force the plaintiff into their unlawful demands, circulated the facts that the said employes of the plaintiff had been called off, and ordered by them to stop work, and the plaintiff's office left without hands." But it is not shown how these facts were circulated. For all that appears, it might have been by the ordinary discussion of the passing incidents of the time. Nor is it shown to whom they were communicated, whether to the patrons of plaintiff or to other members of the union, or to any person or persons in particular. As to the second time the union employes quit, the complaint is more explicit. The fact was circulated by posting the following notice in numerous places: "Owing to the Longshore Printing Company

breaking the rules of the Multnomah Typographical Union, all members of the union were withdrawn March 16, 1893." This may or may not have been detrimental to plaintiff's business, and would depend somewhat upon the state of siege existing at the time. Referring to the notice published in the Oregonian of August 27 and 28, 1892, it would appear that this was ominous of mischief, but the incident occurred some nine months prior to the commencement of this suit, and was not repeated. Neither of these notices, however, approach the vicious character of those complained of in *Brace Bros. v. Evans* and *Casey v. Cincinnati Typographical Union No. 3*. While it might be inferred therefrom that a boycott was on, and that they were intended to affect injuriously the business of plaintiff, yet they were not so direct and positive, nor so persistently and wickedly repeated and maintained, when taken in connection with the accompanying incidents, that a court of equity could say that the injury ensuing will become irreparable unless enjoined.

The allegations of the complaint that "the said president and executive committee have notified plaintiff that it had resumed its work of destruction with renewed vigor and malice against it, and this time will make war on it to the knife," and "said president and committee notified plaintiff that it now intended to resume its attacks upon it, and fight it to the death," and such amplified averments as "and so the plaintiff says that in pursuance of said unlawful combination and conspiracy from time to time, it has been unlawfully and maliciously interfered with by the said officers and members of said union in its business, and has been subjected to continual secret assaults in influence brought to bear by them in order to injure and destroy its business, and that its patrons have been continually harassed, and both impliedly and expressly threatened by them with boycott if they continued to give business to the plaintiff, and that other trades union associations have been enlisted and persuaded by said union to take part in the crusade against it.

The very nature of the attacks made on plaintiff render it impossible to trace them fully or to control them. That they are insidious, made in secret, or, at all events, without the knowledge or presence of the plaintiff when made, and few of the instances come to its knowledge except through their injurious effects, as to which plaintiff in many cases is left to infer the cause.

Enough instances have come to its knowledge in which the said officers and members of said union have been pursuing their malicious, unlawful, and fraudulent course to demonstrate that it has been kept up persistently, and has been widespread in the community for nearly all the time since the first-mentioned demand, about ten months ago,"—cannot avail the pleader unless they are accompanied with statements of definite facts and circumstances, so that the court can arrive at the same conclusions. Except as to the few instances herein discussed it does not appear which of plaintiff's patrons have been continually or at all harassed, how they or any

of them were threatened with boycott, what, if any, other trades-union associations have been enlisted to take part in the crusade, what instances of secret attack have come to the knowledge of plaintiff, or what injurious effects they can trace directly to the defendants. The facts stated should be the proximate cause of plaintiff's injuries, or of the apprehension of those threatened and imminent. As was said by Mitchell, J., in *Bohn Mfg. Co. v. Hollis*, *supra*, such averments and assertions "look very formidable, but in law as well as mathematics it simplifies things very much to reduce them to their lowest terms." The authorities all agree that a court of equity will not hesitate to avail itself of the extraordinary process by injunction when the circumstances of the particular case require it in order to protect rights of property against irreparable damage by wrongdoers. Such process, however, should be issued with great caution and circumspection. Baldwin, J., in *Bonaparte v. Camden & A. R. Co.*, *Baldw. C.C. 205*, Fed. Cas. No. 1,617, says: "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction; but that will not be awarded in doubtful cases, or new ones not coming within well-established principles, for if it issues erroneously an irreparable injury is inflicted, for which there can be no redress, it being the act of the court, not of the party who prays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act. In such a case the court owes it to its own suitors and its own principles to administer the only remedy which the law allows to prevent the commission of such act." The showing of plaintiff is clearly insufficient to bring itself within the rule thus explicitly stated by the learned judge. The plaintiff may have its action at law against defendant's for some of the acts complained of, and defendants, or some of them, may have, by their conduct, subjected themselves to a criminal prosecution under the statute, and the plaintiff may have been much annoyed, and at times viciously harassed, by defendants, yet one thing is clear: there is no such persistent aggressive and virulent boycott now in progress, nor was there at the time of the commencement of this suit, as that the court can say that plaintiff's business and property is being, or is about to be, destroyed or irreparably injured. We do not say that an injunction is an improper or unavailable remedy to stay the destructive and pernicious ravages of a boycott, but that in this particular case plaintiff has not brought itself within the rules of that particular jurisdiction of equity jurisprudence.

88 L. R. A.

The court below was right in sustaining the demurrer, and its decree in dismissing the complaint is affirmed.

E. J. SHEAHAN, *Appt.*,

v.

A. F. DAVIS, *Resp.*

(.....Or.....)

An accommodation indorser of a negotiable note which he is compelled to pay on the maker's default can enforce it against the maker if his indorsement was made in good faith, although it was for the accommodation of a third person, and although after his indorsement he may have learned of a failure of consideration.

(June 3, 1896.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in favor of defendant in an action by an accommodation indorser upon a promissory note to recover from the maker the amount which the indorser had been compelled to pay to the holder. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Ralph B. Duniway, for appellant:

An accommodation indorser who has had to pay a note to a bona fide purchaser before maturity without notice is subrogated to all the rights of said purchaser against the maker of the note.

24 Am. & Eng. Encyclop. Law, pp. 240, 242, cases cited; *Barker v. Parker*, 10 Gray, 339; *Fowler v. Strickland*, 107 Mass. 552; *Simon v. Merritt*, 83 Iowa, 537; *Morneyer v. Cooper*, 85 Iowa, 257; *Woodworth v. Huntoon*, 40 Ill. 131, 89 Am. Dec. 340; *Hoffman v. Butler*, 105 Ind. 371; *Lawson, Rights, Rem. & Fr.* §§ 1588, 1594, 1596; 3 Randolph, Com. Paper, ed. 1888, §§ 1430, 1431, 1643.

Messrs. Emmons & Emmons, for respondent:

There was no consideration for the notes in this case as they were given for the purchase price of land the title to which was in the state of Oregon.

Scudder v. Andrews, 2 McLean, 464.

It is always competent to show by parol evidence that the indorsement was made without consideration for the accommodation of the indorsee.

Tiedeman, Com. Paper, § 274.

Subsequent failure of consideration may be shown by parol evidence as well as an original want of consideration.

Smith v. Carter, 25 Wis. 283.

The contract and liability of an accommodation party to a note are those of a surety for the party accommodated, and if he take the paper up at maturity the party accommodated will be liable for it as a principal to a surety.

2 Randolph, Com. Paper, p. 43, cases cited.

NOTE.—The above case seems to be a novel one in respect to the rights of an accommodation indorser who indorses to accommodate a third person. For the general subject of indorsement by a stranger before delivery, see note to *Fullerton v. Hill* (Kan.) 18 L. R. A. 33.

A surety or an accommodation indorsee for the payee is in no better position than such payee.

Davis v. Wait, 12 Or. 425.

Moore, J., delivered the opinion of the court:

This is an action by an accommodation indorser against the maker of two negotiable notes to recover the amount he was compelled to pay to the holders thereof upon the default of the maker. The facts are: That on November 7, 1892, the defendant executed his promissory notes, payable to the order of one J. C. McCaffrey, for \$100 and \$300, due in thirty and ninety days, respectively, in consideration of McCaffrey's agreement to procure for him a conveyance of 160 acres of school land in Lane county, Or., and the further agreement that, if said land should, upon examination, prove unsatisfactory to the defendant, he would, within three months, repurchase it, and repay the purchase price, and the expense of the examination. That McCaffrey, for value, immediately transferred the smaller note to one J. P. Smith, and the larger one to the Portland National Bank, by the following indorsement on each: "For value received, we hereby waive protest, demand, and notice of nonpayment. [Signed] J. C. McCaffrey. E. J. Sheahan. G. Kutzschan." That on the 17th of said month, the defendant, not having received said conveyance, and having examined the land, and being dissatisfied therewith, notified McCaffrey, who agreed to return said notes, but, failing to do so, and the defendant having made default in their payment, the plaintiff paid the amount of each to the holders thereof, and to recover the sums so paid brings this action against the maker, in which he alleges, *inter alia*, that he indorsed said notes for the accommodation of the defendant, at his instance and request, and without any consideration therefor. This allegation was denied by the defendant, and upon the issue thus formed a trial was had, at which the court, in substance, instructed the jury that if the plaintiff indorsed said notes for McCaffrey at his request, and for his accommodation, and not at the request or for the accommodation of the defendant, he could not recover in the action; to the giving of which the plaintiff, by his counsel, excepted, and the exception was allowed by the court. The verdict being for the defendant, the court rendered a judgment thereon, from which the plaintiff appeals.

The question here presented is whether the maker of a negotiable promissory note will become liable to one who, without his request, indorses it for the accommodation of another, in case such indorser is compelled to pay it upon default of the maker. The rule is well settled that one who voluntarily and officiously pays the debt of another, without any request or authority to do so from the debtor, cannot recover from him the sum so paid. 2 Edwards, Bills & Notes, § 728; Byles, Bills, 273. The reason for this rule doubtless is that by the voluntary payment of the debt no privity of contract is created between the debtor and the person paying the debt; but when a creditor assigns the debt, though without the request of the debtor, a privity of contract be-

tween the assignee and the debtor is established. The maker of a negotiable note promises to pay at maturity to the person lawfully holding it the amount of money named therein, and an indorser of such note, who, upon the default of the maker, satisfies the demands of the indorsee, and takes up the note, becomes the lawful holder, and may enforce the terms of the contract against all prior indorsers who have been notified of the dishonor as well as against the maker, who, by putting such a note in circulation, invites indorsements thereof, which, when accepted, creates a privity of contract between the maker and indorser. *Barker v. Parker*, 10 Gray, 839. If the plaintiff indorsed these notes to accommodate McCaffrey, his liability was equally as great as though he had at one time been the lawful holder for value, and transferred them in the ordinary course of business. 2 Randolph, Com. Paper, § 692. The plaintiff having incurred this liability upon the faith of the maker's promise and the obligation of the payee's indorsement, shall the defendant be allowed to escape his liability as maker because he did not request the plaintiff to indorse these notes? It is true, the plaintiff alleged he was an accommodation indorser for the defendant; but, having taken up the note upon the maker's default, his right of action depends upon the fact of his indorsement, and not upon the manner of it. *Id.* § 743. If the plaintiff, to accommodate McCaffrey, indorsed the notes in good faith, believing them to have been executed for a valuable consideration, and the indorsees discounted them before maturity in good faith, without knowledge or notice of any infirmities therein, the plaintiff incurred a conditional liability; and, when the maker made default in their payment, his liability to the indorsees became fixed, and it was his duty to satisfy their demands, and take up the notes (*Id.* § 747), upon the payment of which the law subrogated him to all the rights the indorsees had against the payee and maker; and he, being a bona fide holder, became entitled at once to proceed against the maker, and it could make no difference with his legal or equitable rights what he may have heard or ascertained in regard to fraud in the original consideration after his liability had been incurred (*Beckwith v. Webber*, 78 Mich. 390), for when an indorsement has been made in good faith, and the indorser has been compelled to pay and take up a negotiable promissory note at or after its maturity, his title relates back to the date of his indorsement, and he thus becomes the lawful holder for value, and without notice, although, after his indorsement, he may learn of the want or failure of the original consideration. The indorsees having acquired these notes before maturity, for value, and without knowledge or notice of their want or failure of consideration, they had such a title as rendered the defendant liable to them for the amount thereof; and if the plaintiff indorsed them in good faith, believing that they had been executed for a valuable consideration, then, upon acquiring the title from the indorsees, the defendant became liable to the plaintiff for their payment; and it can make no difference whether the indorsement was made for the accommodation of another or for

value, since an accommodation indorser cannot recover from the maker until he has paid and satisfied the demands of the indorsees. The defendant, by executing his negotiable promissory notes, impliedly requested the plaintiff to indorse them, and, having done so, a privity of contract between them was estab-

lished, and it was error to instruct the jury that the defendant would not be liable thereon if the plaintiff, without his request, had indorsed them for McCaffrey's accommodation alone; for which reason *the judgment is reversed*, and a new trial ordered.

KENTUCKY SUPREME COURT.

U. S. TITUS, *Appt.*,

v.

ROCHESTER GERMAN INSURANCE CO.

(.....Ky.....)

Relief from a settlement and compromise of a claim for insurance will be granted where the insured acted without any real consideration in ignorance of the rights and obligations of the parties, while the insurer had full knowledge thereof and of his ignorance, and induced him to act by false and fraudulent misrepresentations, although his mistake was in respect to his legal rights.

(May 24, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendant in an action brought to rescind a settlement of a loss upon an insurance policy. *Reversed.*

The facts are stated in the opinion.

Messrs. Simrall, Bodley & Doolan for appellant.

Messrs. Gibson, Marshall & Lochre for appellee.

Eastin, J., delivered the opinion of the court:

This equitable action was brought by appellant to rescind a contract made with appellee by which, as alleged, he was induced to accept, in satisfaction of a loss under a policy of insurance issued to him by appellee, an amount equal to one half of that loss and to one half of the amount of insurance named in the policy. As grounds of rescission, the petition charges that appellant was ignorant of his legal rights under the policy, and that, through fraud and imposition practiced upon him by appellee's agents and by willful misrepresentations made by them as to the rights under the contract of insurance, he was induced to accept a part of his claim in satisfaction of the whole. The chancellor sustained a general demurrer to the petition, and, appellant declining to plead further, his petition was

NOTE.—The relief granted in the above case against surrender or compromise of insurance under a mistake as to legal rights fraudulently induced by the other party is in harmony with the case of *Heinlein v. Imperial L. Ins. Co.* (Mich.) 25 L. R. A. 627, and also that of *Springfield Fire & Marine Ins. Co. v. Hull* (Ohio) 25 L. R. A. 87.

As to surrender of policy under mutual mistake of fact after loss actually accrued, see *Riegel v. American L. Ins. Co.* (Pa.) 11 L. R. A. 867, and 19 L. R. A. 166.

28 L. R. A.

dismissed, from which ruling this appeal is prosecuted; so that the only question for consideration here is whether or not the facts alleged in the petition, and admitted by the demurrer, are sufficient in equity to entitle appellant to the relief sought.

The petition charges, in the fullest and strongest terms, appellant's ignorance of the rights and obligations of the parties under the policy of insurance, and full knowledge on part of appellee both as to the rights of the parties and as to appellant's ignorance of them, as well as false and fraudulent misrepresentations made by appellee's agents for the purpose of deceiving, and which did deceive, appellant, as to the validity of his claim under the policy. It charges, among other things, that appellee fully understood its liability to appellant for the full amount of his loss; that he was ignorant of the law governing his rights and appellee's obligations, while appellee both knew this rights and knew that he was ignorant of them, and with this knowledge, and intending to deceive and defraud him, fraudulently represented to him that, by reason of an incumbency on a part of the insured property his entire claim under the policy was forfeited; that these false representations were made to him by appellee for the purpose of deceiving and defrauding him; and that by these false and fraudulent representations, and through ignorance of his legal rights, he was induced to accept the sum of \$400 in satisfaction of a loss of \$800, when, except for these fraudulent representations and his ignorance, he would not have done so. These charges being admitted, it seems to us that the case presented involves something more than an effort to obtain relief purely on the ground of a mistake of law, or mere ignorance on part of appellant as to his legal rights under the contract of insurance. It becomes, in addition to this, a case of actual fraud, where, by fraudulent misrepresentations, made for the purpose and with the intent to deceive, the known ignorance of one of the parties to the contract has been willfully taken advantage of, and he has thereby been induced to surrender a valid, subsisting right without consideration. It is true that the ignorance relied upon is an ignorance of law, rather than of facts, and that this is not always or perhaps generally, and when standing alone, available as a ground of relief against an executed contract, no matter how inequitable it may be. On this point the decisions of the courts of this country, as well as the English courts, are by no means uniform; but, in our opinion, the weight of

authority and the decisions of this court would now forbid that a party who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, and made it the more dense by his own false and fraudulent misrepresentations, but has willfully deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the general doctrine that a mere mistake of law affords no ground for relief. This view seems to be upheld by many, if not all, of the modern text-writers who are recognized as authority on the question. Mr. Kerr, in his well-known work, in treating of this subject, says: "But if it appear that the mistake was induced or encouraged by the misrepresentations of the other party to the transaction, or was perceived by him, and taken advantage of, the court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake." Kerr, *Fraud & Mistake*, pp. 399, 400. And, in his work on Equity, Mr. Bispham lays down this doctrine in even stronger and less uncertain terms. He says: "Where ignorance of the law exists on one side, and that ignorance is known and taken advantage of by the other party, the former will be relieved. More particularly will this be so if the mistake was encouraged or induced by misrepresentations of the other party." Bispham, *Eq.* § 188. Under the admitted facts of this case and the circumstances surrounding and leading up to the mistake relied on here, it is clearly brought within the text above quoted; and many other authorities to the same effect, including reported cases in many of the states of this Union, might be cited, if it were necessary.

We fully recognize the wisdom of that rule which always inclines the courts to uphold and enforce the validity of voluntary compromises and adjustments between parties of their legal differences, when fairly arrived at. Nor would any mere ignorance of or mistake in the law governing any doubtful and disputed legal proposition, on part of either of the parties to the compromise, in the absence of evidence tending to show that he has been overreached or unfairly dealt with or taken advantage of, and where supported by a good consideration, be sufficient, in our judgment, to justify the rescission of a compromise settlement deliberately made between parties, standing upon an equal footing, and with full knowledge of all the facts. If every mistake of law were sufficient to warrant the interference of the courts, then no compromise of a disputed legal proposition would be final, for in every such case one party or the other to the controversy is mistaken as to the law of the case. Upon the record before us, there may be some question as to how far there was a controversy between these parties over any doubtful legal question that might have been litigated in court, or exactly what was the nature and extent of the same. It is alleged in the petition that appellee claimed that all rights of appellant under his policy of insurance were forfeited by reason of the existence of an incumbrance upon a part of the insured prop-

erty; but it is further alleged that appellee, at the time the contract of insurance was made, "had full knowledge of the same, and having such knowledge, made the contract, and issued the policy aforesaid." This allegation is admitted to be true, and, in the absence of anything further in the pleading pertaining to this point, we are unable to see in this the basis of a doubtful disputed legal proposition which might have been litigated in the courts, or to know exactly what controversy was settled by the parties. But waiving the question as to the nature and intent of the controversy between appellant and appellee, and reverting to the character of the compromises which courts will uphold, we now quote from another text-writer, who uses this language, to wit: "Voluntary settlements are so favored that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge or means of obtaining knowledge concerning the circumstances involving these rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they thus voluntarily enter must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been brought before it for decision. Of course, there must not only be no misrepresentation, imposition, or concealment; there must also be a full disclosure of all material facts within the knowledge of the parties, whether demanded or not by the others." Pom. *Eq. Jur.* § 850. Under the authorities quoted, it is manifest that the compromise contract sought to be rescinded here is within the control of a court of equity, and may be set aside. And now, referring to the decisions of this court, and to the doctrine established in this state, it seems to us still clearer that the contract complained of, and which was made under the circumstances set forth in the petition and admitted by appellee, cannot be sustained. In an exhaustive opinion, in which the authorities were ably reviewed, by Judge Robertson, after referring to the difficulty of determining in every case when a contract was, in fact, made under a mistake of law, it is said: "When it can be made perfectly evident that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and when there has been no fair compromise of bona fide and doubtful claims, we do not doubt that the agreement might be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality." *Underwood v. Brockman*, 4 Dana, 309, 29 Am. Dec. 407. In the case of *Ray v. Bank of Kentucky*, 3 B. Mon. 510, 39 Am. Dec. 479, this court referred to and approved the above case, and said: "Upon the whole, we would remark that whenever, by a clear and palpable mistake of law or fact, essentially bearing upon and affecting the contract, money has been paid without cause or consideration, which in law, honor or conscience was not due and payable, and which

in honor or good conscience ought not to be retained, it was and ought to be recovered back." Both of these cases are cited with approval in the case of *Louisville & N. R. Co. v. Hopkins Co.*, 87 Ky. 613, and the doctrine laid down therein has not been departed from by this court. It will be seen that the question of fraud did not enter into the decision of either of those cases, but that they are almost entirely based upon the fact that there was no good consideration to uphold the contracts; that it was not a fair compromise of bona fide and doubtful claims; and that the money was not in law, honor, or conscience payable, and ought not in honor or good conscience to be retained. If, for these reasons, a contract made under a clear mistake of law may be set aside, then how much stronger reason is there for annulling the contract under consideration? Not only was this con-

tract, according to this record, as it comes before us, wholly without consideration, and not only was the money surrendered by appellant on his claim not due in law, honor, or conscience, and surrendered only under a clear mistake of law, but it is further admitted by the demurrer that this contract was obtained, and that appellant was induced to surrender one half of his claim, by the actual false and fraudulent misrepresentations of appellee, knowingly made for the purpose of deceiving and defrauding appellant.

We are clearly of the opinion that the chancellor erred in sustaining the demurrer to the petition, and, for the reasons indicated, his *judgment dismissing appellant's petition is reversed*, and the action is remanded, with directions to set aside that order, and to overrule the demurrer, and give appellee leave to file an answer.

KENTUCKY COURT OF APPEALS.

LEVI, *Appt.*,
v.
City of LOUISVILLE,
and Six Other Cases.

(.....Ky.....)

1. The constitutional requirement that taxes shall be uniform upon all property subject to taxation and shall be assessed at its fair cash value (Const. §§ 171, 172) is violated by a municipal tax which applies the *ad valorem* system to real property and a license tax to personal property, although it is also provided (§§ 174 and 181) that taxation based on licenses or franchises may be provided for.
2. A tax levied on real property will not be restrained by injunction because personal property is not assessed in the proper mode when the legal part of the levy can be separated from the illegal part.
3. The court may compel a city government to correct an error in the mode of levying a tax although it cannot appoint an assessor or correct the error itself.
4. An assessment of personal property by the *ad valorem* system like that applied to real property may be ordered by the court on behalf of the owners of real estate where a city has illegally attempted to tax personal property in another manner, even if the illegal mode attempted would be as just as the other.

(May 4, 1895.)

NOTE.—While many authorities have held that a constitutional requirement of uniformity in taxation did not prevent the legislature from providing for license or privilege taxes, it will be noticed that the attempt in the present case was to make such taxes a substitute for an *ad valorem* tax on personal property, notwithstanding a constitutional requirement of assessment at "cash value."

That a license tax on business or occupation is not a tax on property, see *State v. Applegate* (Md.) post, —.

That a tax on an oyster tongman according to the amount of his weekly sales does not violate a constitutional requirement of uniformity, see *Com. v. Brown* (Va.) ante, 110.

23 L. R. A.

APPEALS by plaintiffs from a judgment of the Circuit Court of Jefferson County in favor of defendant in actions brought to restrain the collection of taxes. *Modified and affirmed.*

The facts sufficiently appear in the opinion.

Messrs. M. S. Barker, Phelps & Thum, Lane & Burnett, and J. D. Reed for appellants.

Messrs. Humphrey & Davis, with Messrs. H. S. Barker, Helm & Bruce, and Stone & Sudduth, for appellee:

The *ad valorem* tax, the system of taxation based on licenses apportioned to the product derived from the use of the property, and the license fee for protection in trades and professions, are recognized by the courts, as well as by political economists, as absolutely indispensable to secure uniformity and equality in distributing the burden of taxation.

Pacific Exp. Co. v. Seibert, 143 U. S. 851, 85 L. ed. 1039, 8 Intern. Com. Rep. 810; *Home Ins. Co. of New York v. New York*, 134 U. S. 603, 33 L. ed. 1030; *Cincinnati, N. O. & T. P. R. Co. v. Com.* 81 Ky. 494; *Rankin v. Henderson*, 9 Ky. L. Rep. 861.

Since the new constitution the old landmarks still stand, and the accumulated thought and wisdom of the courts and country have not been superseded.

Holzhauser v. Newport, 94 Ky. 407.

A new revision raises no presumption that any new principles were intended to be announced, or any settled rules disturbed.

Before any fundamental changes will be considered as intent "the intention must be expressed in an unequivocal manner and not to be left to inference or construction."

Nunnally v. White, 3 Met. (Ky.) 590; *Allen v. Ramsey*, 1 Met. (Ky.) 687; *Morgan v. Dudley*, 18 B. Mon. 716; *Lee v. Forman*, 3 Met. (Ky.) 114; *Overfield v. Sutton*, 1 Met. (Ky.) 624; *United States v. Ryder*, 110 U. S. 740, 28 L. ed. 812; *McDonald v. Hovey*, 110 U. S. 620, 28 L. ed. 269; *Endlich*, Stat. Constr. § 511; *Allegheny County v. Gibson*, 90 Pa. 406,

35 Am. Rep. 670; *Brown's App.* 111 Pa. 80; Endlich, Interpretation of Statutes, § 520.

The decisions rendered by this court and the supreme court stating the principles underlying a just taxation are still of binding force.

With regard to the precise mode of exercising the taxing power, the legislature, unless restricted by some constitutional provision, seems to be vested with entire discretion.

Cincinnati, N. O. & T. P. R. Co. v. Com. 81 Ky. 510, 115 U. S. 837, 29 L. ed. 419.

A system which imposes the same tax upon every species of property, irrespective of its nature, condition, or class, will be destructive of the principle of uniformity and equality in taxation.

Pacific Exp. Co. v. Seibert, 142 U. S. 351, 85 L. ed. 1039, 3 Inters. Com. Rep. 810.

The same property shall not be subject to double tax either directly or indirectly.

Livingston v. Paducah, 80 Ky. 658.

It is not necessary, or even practical, that the mode of taxing property shall be uniform.

Cincinnati, N. O. & T. P. R. Co. v. Com. 81 Ky. 506.

No one pretends to claim that railroads have to be first taxed *ad valorem*, and then taxed with a license or a franchise tax or income tax or a special tax in addition. All admit that this language with reference to "railroads" means that they need not be taxed *ad valorem*, but that there may be the same "special" tax, of so much per mile, imposed upon them hereafter, that has always heretofore been imposed upon them.

Cincinnati, N. O. & T. P. R. Co. v. Com. *supra*; *Louisville & N. R. Co. v. Louisville*, 16 Ky. L. Rep. 796; *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291; *Porter v. Rockford*, R. I. & St. L. R. Co. 76 Ill. 579; *Sterling Gas Co. v. Higby*, 184 Ill. 557; *State Railroad Tax Cases*, 92 U. S. 577, 23 L. ed. 669.

These provisions of the new constitution are not applicable to municipal taxation.

Louisiana v. Pillsbury, 105 U. S. 295, 26 L. ed. 1096.

The new constitution intended that the legislature should, under section 156, "enact laws for the government of such towns," and, by section 181, the legislature is prohibited from interfering with the discretion of the "proper authorities of such towns" as to how and in what way they may see fit to impose their local taxes, suitable to their respective local necessities, debts, and exigencies.

Washington v. State, 15 Ark. 752; *McGehee v. Mathis*, 21 Ark. 40.

It was held that this applies to state taxes only, and not to city taxation.

Hamilton v. Fort Wayne, 40 Ind. 492; *Gilkeson v. Frederick Justices*, 13 Gratt. 579; *Second Municipality of New Orleans v. Duncan*, 2 La. Ann. 182.

Nor did the legislature, in enacting the new charter for Louisville, intend to require double taxation.

Livingston v. Paducah, 80 Ky. 658; *Bamberger v. Louisville*, 82 Ky. 342.

The legislature could not have intended that the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time.

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Cooley, Taxn. 2d ed. 237; *Kimball v. Milford*, 54 N. H. 406; *Montgomery County Board of Revenue v. Montgomery Gas-Light Co.* 64 Ala. 269; *Coatesville Gas Co. v. Chester County*, 97 Pa. 476; *Cairo & F. R. Co. v. Hecht*, 95 U. S. 170, 24 L. ed. 424; *Taylor v. Taylor*, 10 Minn. 107; *State v. Mace*, 5 Md. 387; *Aldridge v. Williams*, 44 U. S. 8 How. 24, 11 L. ed. 476.

The appellant would have no right to bring this suit in any event.

Anderson v. Mayfield, 93 Ky. 230.

The omission to assess the taxes upon a portion of the property in a city, caused by error of law, is no ground for a citizen enjoining the tax as void.

Cooley, Taxn. 2d ed. 216; *Watson v. Princeton*, 4 Met. 602; *Wilson v. Wheeler*, 55 Vt. 446; *People v. McCreery*, 34 Cal. 432.

A private individual cannot come into equity to enjoin a tax levy, without first "doing equity," by paying his own taxes.

Louisville v. Louisville Board of Trade, 9 L. R. A. 629, 90 Ky. 410; *State Railroad Tax Cases*, 92 U. S. 576, 23 L. ed. 696.

Pryor, Ch. J., delivered the opinion of the court:

The appellants, Levi, Reed, and Ketchum, are the owners of real estate in the city of Louisville, and decline to pay the taxes on their realty, by reason of the discrimination made by the ordinance levying the tax between real and personal estate, applying the *ad valorem* system to the one (realty) and a license tax to the other. Levi and Reed, two of the appellants, filed a petition, seeking an injunction to prevent the collection of tax on their real estate, upon the ground that the levy ordinance imposing the license tax on personal property made the entire ordinance or levy void. A demurrer was filed to their petition by the city, and, on the hearing, the chancellor adjudged the levy as made unauthorized and invalid, but refused to grant the injunction, on the ground that this irregularity in the imposition of the tax, if illegal, afforded no reason for the chancellor's interference. The appellant Ketchum filed his action in a different branch of the Jefferson circuit court, asking relief on the same grounds assigned by Levi and Reed, and to this petition the appellee, the city of Louisville, instead of demurring, filed an answer, alleging, in substance, that the burden of taxation had been equalized by the additional tax imposed by the city upon trades and occupations and professions, and therefore nothing was lost to the city or the burden of taxation on realty increased by reason of the discrimination made, as to the manner only of imposing the burden. To this answer a demurrer was filed by Ketchum, and overruled, and his petition dismissed, and all three of the taxpayers have brought the cases here for revision. The relief sought is based on the ground that the ordinance levying this tax is void, for the reason the city council failed and refused to follow the mandate of the constitution requiring all taxation to be uniform within the territorial limits in which the burden is imposed, and for the still greater reason of

their failure to levy an *ad valorem* tax upon the personal as well as the real estate located within the city, and subject to taxation. It is alleged in the petitions of Levi and Reed that the system of assessing personal property adopted by the city, by imposing upon it a mere license tax, increased the burden upon the realty, and in effect relieved from taxation personal property of the value of fifteen or twenty millions, that, under the *ad valorem* system, would be required to discharge its portion of the burden. It is insisted by the city that no provision of the constitution is mandatory as to the mode of assessing personal property for taxation, and that the *ad valorem* system is to be applied alone to the assessment of real estate; that the power to classify property for taxation exists now, with those authorized to impose the burden, as it did under the former constitution, and therefore, as to personalty, the substitution of a license tax in lieu of the *ad valorem* system upon the goods, wares, and merchandise of the wholesale and retail merchants in the city, as well as other business associations owning such property liable to taxation, may, by ordinance, be required to pay a license tax upon all their property except their realty. It is further contended by the attorney for the city that the provisions of the constitution in relation to the general system of taxation apply only to taxation for state and county purposes, and not to cities of the first class, and that as to the municipal government of the first class the mode of imposing the tax is left (except as to real estate) to the judgment and discretion of the general council, the latter having the right to apply the *ad valorem* system to the one and the license tax to the other.

The questions arising in these cases are of the highest importance to both the state and municipal governments, and, if the system and mode of the assessment of property for taxation is to be followed as it existed under the former organic law of the state, there is then but little difficulty in sustaining the right of the city to substitute as to personalty the license tax instead of the *ad valorem* system; while, on the other hand, if there has been a fundamental change in the mode of assessment, in ascertaining the value of real and personal property it must be followed; and the suggestion or argument that the mode adopted, differing from the provisions of the organic law, will produce the same result,—that of uniformity and equality in imposing the burden,—cannot be permitted to control the decision of this question, were it more just and equal in its results. The present constitution is more definite and specific in its provisions in relation to taxation than our former constitutions, and to such an extent as to leave but little for the legislature to do in having them executed. The exercise of legislative power is dispensed with as to the mode of assessment, and the mode of taxation regulated by constitutional enactments, that under former constitutions was left to the will of the legislature. There is but one general system of assessments as to all property under the present constitution for the purposes of gov-

ernment, whether state or municipal; and, in addition, taxation may be based on income, on licenses, and on franchises, and a head or poll tax. The *ad valorem* system relates to the assessment and taxation of all property; the income tax, to the product or income from property or from business pursuits. The license tax is one imposed on the privilege of exercising certain callings, professions, or avocations, that, when collected, goes into the state treasury, and, when applied to municipal taxations, is termed a "license fee." A license based on franchises includes the ascertainment of its value, and the mode of determining that value. The power to impose an income tax, a license or franchise tax, is expressly given by the constitution to the legislature,—and the exercise of such power by municipal governments must be derived from legislative enactments; but there is no authority, express or implied, conferred by the constitution on either the state or municipal legislatures to substitute a license tax in lieu of the *ad valorem* system. No income tax has been imposed by the legislature, but a license tax has been imposed for state and county purposes, and the power conferred upon municipalities to enact license fees, which is in effect a license tax.

The contention, however, is that the city government, by certain provisions of the constitution, can impose a license tax upon personalty, and, if legislative authority is required, the general provisions of its charter confer such power; and it becomes therefore necessary to examine the ordinance under which this license tax has been imposed by the city, and the provisions of the organic law from which it is claimed this power is derived, as well as the various sections of the constitution directing the mode of assessment and taxation. The ordinance relating to the taxes for the fiscal year ending August 31, 1894, is as follows: "Be it ordained by the general council of the city of Louisville, that the following *ad valorem* tax is hereby levied for the fiscal year ending August 31, 1894, on lands and improvements, and on such personalty as is not used and employed in business, paying a license tax for such business, and in each case on each \$100 in value, but shall not be levied on any property exempt from taxation." The ordinance then proceeds to enumerate the purposes to which the tax is to be applied, and the rate upon each \$100 on value of property to raise the necessary revenue. The following sections of the constitution have a direct bearing on the question involved in this case. Section 171 provides: "Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws." Section 172 provides: "All property, not exempted from taxation by this constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale." And the section then proceeds to impose penalties on those authorized to assess values for a willful neglect of duty. Section 174 pro-

vides: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the general assembly from providing for taxation, based on income, licenses or franchises." Section 181 provides: "The general assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The general assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations, and professions." It is argued that from these several provisions of the constitution, and particularly sections 174 and 181, is derived the authority to impose a license tax on the personal estate of those engaged in mercantile or business pursuits, and relieving it from that mode of assessment as to valuation claimed by the appellant to apply to all kinds of property, whether real or personal. In support of the position taken by the learned judge of the law and equity court, that uniformity and equality in taxation may be reached by diversity of taxation as to the various kinds of property, reference is made to the constitutions of other states, where, under provisions requiring that all property shall be subject to taxation according to its value, and shall be equal and uniform, such provisions have been held by the courts of those states to apply to the methods of taxation for the state, and not to municipalities. The sections of the constitutions of Indiana, Virginia, Louisiana, and Arkansas, from which the questions originated, are given, and the cases of *Gilkeson v. Frederick Justices*, 18 Gratt. 577; *Washington v. State*, 18 Ark. 752; *Hamilton v. Fort Wayne*, 40 Ind. 491, and *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. ed. 1090, all well-considered cases, would sustain the contention of the city if the respective constitutions were similar to those of this state. In the state of Arkansas the value of property is to be ascertained in such manner as the general assembly may direct, and the provision of each constitution referred to on that subject confers, in express terms, upon the legislature, the power of prescribing the mode of reaching a just valuation for taxing property,—a power that existed with the legislature of this state under the former constitution, because not prohibited, and the exercise of which was not doubted, or, if questioned, the legislature was sustained by this court. The power to prescribe the mode of assessment or ascertaining the value of property has been taken from legislative control, and fixed by the constitution; so there is nothing

left but to follow its provisions, and no authority is given to the legislature to value or have property valued, but in one mode; with the right to impose an income tax, a license tax, and a franchise tax; and if the provisions on the subject of taxation were taken from the constitution, and inserted in legislative enactments, it would not be contended that the power to ignore the *ad valorem* system could be abandoned as to personalty, and a license tax substituted.

Under the former state constitution, the right to impose one rate of taxation on one class of property and a different rate on another class was well understood, but, in considering the provisions of the present constitution, we find the mode of assessment prescribed by that instrument requiring in plain terms that all property shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. It would do violence not only to the intention of the framers of this instrument, but its letter and spirit, to hold that the system adopted by its provisions could be disregarded, and another selected, better suited to the business of the municipality, and more just and uniform in its terms. Nor do we find in the constitution a provision of any kind conferring on a municipal government the power to assess property for the purposes of revenue by imposing a license tax; nor has the legislature the power to authorize the imposition of a tax on the amount of property, whether real or personal, in any other mode than that provided in the organic law. The power of the legislature to tax a franchise is expressly conferred, and for that reason the mode of determining its value is pointed out by that body; and, after creating a board of valuation to value every and all corporations, associations, or companies having or exercising any exclusive privilege or franchise not allowed by law to natural persons, the power of this board is confined to the invisible estate of the corporation, and its real and tangible property, such as can be seen and valued by the assessor, is required to be omitted, or rather deducted, from the value of the franchise as found by the board, because this species of property is required to be assessed in the county or place where located or its franchise exercised. The legislature was careful, when adopting a mode of valuing a franchise, to omit from its valuation the tangible property, that must, under the provisions of the constitution, be assessed where located by the state, county, or municipal authorities, at its fair cash value; and whether or not this mode is nearer uniformity and equality than the mode contended for is not for this court to determine, nor can these provisions, so plain and unmistakable in their purpose, be made the subject of judicial consideration. It must be conceded that if the mode of valuing a franchise had been fixed by the constitution, as is found in the statute, no power would exist with the legislature to adopt any other mode.

If, as contended by counsel for the city, this mode of assessment applies alone to the state, it would be difficult to determine un-

der what provision of the constitution municipal governments derive the power to classify property for taxation, or even to impose taxes for any purpose; nor can it be assumed that in prohibiting the legislature from imposing taxes on or for municipalities the constitution intended to leave the entire mode of assessment to the discretion of the general council, and give to such bodies the exercise of a power expressly denied to the representatives of the people. The object of such a provision as placed the city government beyond legislative control as to imposing taxation was to prohibit the latter body from determining the amount to be imposed and the objects to which it should be applied. The words "license tax" imply a burden on that which is not property, but results from its enjoyment or the conduct of the business or calling; and the legislature assembling after the adoption of the constitution, and composed of some of the leading members of the constitutional convention, understood the meaning attached to the phrase "license tax," and under the title of "Revenue and Taxation," in subdivision 4 of chapter 108, imposed a license tax on certain kinds of business, such as a license on taverns, retailing spirituous liquors, on saloons, selling pistols, bowie knives, ten-pin alleys, peddlers, insurance companies, circuses, and so on, showing plainly that its imposition as a tax upon property was not even considered. Its meaning is therefore clearly ascertained by its application, as understood by the legislature, and made still more so by the debates in the convention by every member who spoke upon the subject, and still plainer by the provisions of the constitution we are now considering. The convention doubtless saw, after they had adopted a general system for assessing and taxing property, that the legislature should be clothed with a power that might be required to be exercised in imposing burdens for the exercise of these privileges under the police power of the state, and that such intangible rights as those of franchises and incomes should be made the subjects of taxation, and therefore provided, in section 174, that nothing shall be construed to prevent the general assembly from providing for taxation based on incomes, licenses, or franchises; and while this character of tax might be upheld, even without express constitutional authority, it was doubtless thought best to be more specific on the subject. The members of the convention had no thought that, when annexing to section 174 the power to the legislature to impose a license tax, they were destroying the structure they had already constructed in regard to the taxation of property, and that constituted the governing feature of taxation in that instrument, and by addenda had delegated the same power to the legislature and municipalities to classify property for taxation as under the former constitution. Under the title of "Municipal Corporations" (Ky. Stat. § 2980), the legislature, in creating charters for cities of the first class, provided: "Each city shall raise a revenue from *ad valorem* taxes, and a poll tax and license fees, and to that end the com-

mon council of each city is hereby authorized and empowered to provide each year, by ordinance, for the assessment of all real and personal estate within the corporate limits thereof, subject to taxation for state purposes, and shall levy an *ad valorem* tax on same, not exceeding the rates and limits prescribed in the constitution," etc., and may impose license fees on stock used for breeding purposes, or on franchisees, trades, occupations, and professions, and provide for the collection thereof. And in section 2984 it is further provided that the assessor shall assess at its fair cash value, as of the 1st of September of every year, all the lands, improvements, and personalty subject to an *ad valorem* tax under this act. These license fees may be granted, as the charter provides, for no longer period than one year, but may be granted for a shorter time. It is apparent, therefore, that these license fees cannot be imposed in lieu of the tax for revenue, as required by law, not only by reason of the provisions of the constitution, but the amount and the period for which they may be granted repel such a conclusion. The framers of the constitution left no discretion with the legislature as to the assessment and valuation of either real or personal property, or as to what property shall be taxed or exempted from taxation; and, however wise or unwise the system may be, it is the mandate of the constitution that all must obey. It results, therefore, that the imposition of a license tax upon personalty, whether used or not in a business for the exercise of which license fees are paid or license tax imposed, is not warranted by the constitution.

As the judgments in these cases were for the city, and all relief denied the taxpayer, it is for this court to determine the remedy they have, if any, and the solution of the question is not free from difficulty. If it involved a question only as to local improvements and an assessment for such a purpose, we would have but little trouble in holding that the constitution did not affect such questions when the burden is imposed by reason of local benefits, for in such a state of case a wrongful levy or assessment would authorize the interference of the chancellor by injunction; but in these cases the assessment, or rather the levy, made by the ordinance, is for the revenue upon which the maintenance of the city government depends, and to say to one taxpayer, "You are not required to pay your taxes under such an ordinance," would in effect become a release for all taxpayers, and leave the city without any revenue or power to collect it. The chancellor should well hesitate before staying, by a judicial order, the tax collector from recovering or collecting these public dues. This levy ordinance is not, however, void; and while, in levying an *ad valorem* tax for the fiscal year ending August 31, 1894, on land and improvements, and on such personalty as is not used and employed in a business not paying a license tax for such a privilege, the general council has omitted to tax the personalty (*ad valorem*) where it is used in a business upon which a license tax has been imposed, it is not such an irregularity or

mistake as renders the entire ordinance void, but does produce a discrimination between taxpayers, and is such an immunity from taxation as compels the chancellor to afford the complaining taxpayer some relief; and that relief must consist in the chancellor requiring the city government to comply, in imposing such a burden, with the organic law of the state and the charter creating the municipal government.

The legal part of this levy can be separated from the illegal, and the omission to assess certain personal estate in the proper mode will not render the entire ordinance inoperative. 1 *Desty, Taxn.* p. 468. The chancellor has no power to appoint an assessor or to correct the error, but has the power to compel the city government to do so, in order to remedy the wrong resulting from a mistaken construction by the council of the constitutional provision affecting this question. The appellants have been legally taxed, and are complaining that the property of others, entitled to bear a part of the burden, has in effect been exempted; and, if the averments of the petition are true, the failure to impose the tax on this personalty must necessarily increase the tax on those who have been compelled to pay on the same kind of property under the *ad valorem* system. Nor is it necessary that the chancellor should be satisfied that such a discrimination exists. The fact that a license tax is imposed on the personalty, in the one case, and the *ad valorem*, in the other, is sufficient, as, when imposed as a part of the license tax, it is a violation of the charter of the city as well as the constitution, and it is no answer to say that the one mode is as just as the other.

Mr. Cooley, in his work on Constitutional Limitations (5th ed. p. 279), says: "There is and must be an inherent power in every town to bring the money necessary for the purposes of its creation into the treasury, and, if its course is obstructed by ignorance or mistakes of its agents, they may proceed to enforce the end and object by correcting the means." The existence of the municipality itself depending upon the collection of this revenue, the chancellor should require some steps to be taken by the council to collect this tax as if the ordinance had been without error in the first place; that is, the council should amend the ordinance, and have this property assessed, applying the *ad valorem* system as of the date at which the property under the ordinance was required to be assessed. The chancellor cannot, it is

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true, lessen the amount of tax levied by the ordinance by reason of the future collection of tax from this omitted personal property; but it must be assessed and taxed, the taxes when collected forming a part of the revenue of the city, and redounding to the benefit of all the taxpayers. The chancellor has properly refused to grant the injunction, but to say that such a taxation can be imposed and no relief granted would be to sanction not only an unjust discrimination, but a plain violation of the constitution, and no remedy afforded. A court of equity, under such circumstances, must afford some relief, and we perceive no reason why this omitted property should not be required to pay this tax. The charter of the city, in order to provide against such mistakes or omissions on the part of the general council, and to correct such errors, provides: "If any year the general council shall fail to pass a levy ordinance, or if the levy ordinance in any year shall be invalid or inoperative, the rate of taxation for that fiscal year shall be the same as it was the year before, item for item." While this section of the charter may apply as to the rate of taxation, there must be difficulty in proceeding under it without an assessment. The rate of tax is fixed, and the property omitted from taxation assessed by correcting the levy ordinance, and then, with the proper assessment, the tax may be collected. While license fees cannot be imposed so as to embrace the value of the property, and the amount to be imposed is with the council, where this has been done, in such a state of case the council should be directed to credit the amount paid, if any, on the tax bill when collecting on the *ad valorem* system. This suggestion is made in view of the fact that some of the license fees authorized to be imposed, as appears from the statute, indicate an amount approximating values; and, if so, the sum should be deducted from the tax bill, and of this the council must be the judge. The city being the defendant, its common council should be required to correct the levy ordinance, and to have assessed the personal property (omitted from the *ad valorem* system) existing at the date of the assessment under the ordinance in which the error was committed, its value to be ascertained as of the date at which the original amount was required to be made. This mandate is based on the idea that no steps have been taken to correct the error of the council.

TENNESSEE SUPREME COURT.

Louis BAMBERGER, Admr., etc., of Samuel
Bamberger, Deceased, Appt.,
v.

CITIZENS' STREET R. CO.

(.....Tenn.....)

1. In case a child is struck by a street-car while in a dangerous and exposed situation the plaintiff in an action for the death of the child has the burden of proving a want of negligence on the part of the child or its custodian.
2. An instruction that certain concurring facts constitute negligence which assumes nothing as facts but presents a hypothetical case raised by the evidence and applies the law thereto, is not an invasion of the province of the jury.
3. Instructions as to the negligence of a motorman in failing to stop his car promptly enough to avoid an accident are not erroneous because of an assumption that it was his duty to endeavor to stop when there are no facts in the case showing that an increase of speed might have been a proper means to avoid the accident.
4. Negligence of a parent contributing to the death of his infant child will defeat a recovery by him as administrator of the child when he is the sole beneficiary of the action.

(May 16, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Shelby County in favor of defendant in an action brought to recover damages for the alleged negligent killing by defendant of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Meers. William H. Carroll and Edgington & Edgington, for appellant:

The burden of proof is not on the plaintiff to establish his freedom from contributory negligence.

1 Whart. Ev. 361; Cooley, Torts, 673, note 3; 1 Greenl. Ev. 74; Shearm. & Redf. Neg. § 108, and authorities cited; 2 Thompson, Trials, § 1679.

The jury have the right to infer negligence from the circumstances of the case.

Burke v. Louisville & N. R. Co. 7 Helsk. 451, 19 Am. Rep. 618.

No presumption of negligence arises from the mere proof of injury.

Louisville & N. R. Co. v. Manchester Mills, 88 Tenn. 659.

But where all the circumstances are disclosed by the proof, then, from those circumstances, the jury may draw their inferences; and with that province the trial judge has nothing to do.

NOTE.—For review of the authorities respecting the duty of street railway companies to avoid injuring children on tracks, see note to *Wallace v. City & Suburban R. Co.* (Or.) 25 L. R. A. 663.

For contributory negligence of parent or guardian to defeat recovery for injury to child, see note to *Chicago City R. Co. v. Wilcox* (Ill.) 21 L. R. A. 76, also *Bottoms v. Seaboard & R. R. Co.* (N. C.) 26 L. R. A. 784.

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Meers. Bell & Horn, also for appellant: Negligence is as much a fact to be found by the jury as are the circumstances from which it is to be inferred, and for the court to state a fact or a group of facts, and charge the jury that if they find them to exist that it is negligence, is an invasion of the province of the jury, and is such an error as will entitle the injured party to a new trial.

Grand Trunk R. Co. of Canada v. Ives, 144 U. S. 408, 36 L. ed. 485; *Saltonstall v. Birtwell*, 150 U. S. 417, 37 L. ed. 1128; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall 663, 21 L. ed. 749; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 122; *Ireland v. Oswego, H. & S. Pl. Road Co.* 13 N. Y. 533; *North Pennsylvania R. Co. v. Heileman*, 49 Pa. 63, 88 Am. Dec. 482; *International & G. N. R. Co. v. Dyer*, 76 Tex. 160; *Missouri Pac. R. Co. v. Lee*, 70 Tex. 501; *Texas & P. R. Co. v. Hill*, 71 Tex. 459; *Galveston, H. & S. A. R. Co. v. Briggs*, 4 Tex. Civ. App. 518; *Stokesbury v. Swan*, 85 Tex. 573; *Colhoun v. Gulf, C. & S. F. R. Co.* 84 Tex. 226; *Chicago, B. & Q. R. Co. v. Olson*, 40 Neb. 891; *Missouri Pac. R. Co. v. Baier*, 37 Neb. 252.

The following are some of the cases which support the position of the plaintiff:

Patterson v. Wallace, 1 McQ. H. L. Cas. 748; *Carsley v. White*, 21 Pick. 256, 32 Am. Dec. 259; *Rindge v. Coleraine*, 11 Gray, 157; *Langhoff v. Milwaukee & P. du Ch. R. Co.* 19 Wis. 497; *Macon & W. R. Co. v. Davis*, 13 Ga. 68; *Renwick v. New York Cent. R. Co.* 86 N. Y. 132; *Cumberland Valley R. Co. v. Mangans*, 61 Md. 53, 49 Am. Rep. 88; *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542; *New York, P. & N. R. Co. v. Coulbourn*, 1 L. R. A. 541, 69 Md. 360; *Lucas v. Detroit City R. Co.* 92 Mich. 412; *Beems v. Chicago, R. I. & P. R. Co.* 53 Iowa, 150; *Washington & G. R. Co. v. Tobriner*, 147 U. S. 571, 37 L. ed. 284; *Hobbold v. Chicago Sugar Ref. Co.* 44 Ill. App. 418; *Arkansas Teleph. Co. v. Ratteree*, 57 Ark. 429; *Brown v. Brooks*, 21 L. R. A. 255, 85 Wis. 290; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96; *Grand Trunk R. Co. of Canada v. Ives*, 144 U. S. 408, 36 L. ed. 485; *Housatonic R. Co. v. Waterbury*, 23 Conn. 101; *Trou v. Vermont Cent. R. Co.* 24 Vt. 497, 58 Am. Dec. 191; *Lynch v. Nurdin*, 1 Q. B. 29; *Cotton v. Wood*, 8 C. B. N. S. 668; *Vinton v. Schwab*, 82 Vt. 612; *Pennsylvania R. Co. v. Ogier*, 35 Pa. 71, 78 Am. Dec. 322; *Gardner v. Michigan Cent. R. Co.* 150 U. S. 849, 37 L. ed. 1107; *Jamison v. San José & S. O. R. Co.* 55 Cal. 593.

Few men would find in the conduct of Miss Bamberger any modicum of responsibility for the death of this child.

Mangum v. Brooklyn R. Co. 38 N. Y. 461, 98 Am. Dec. 66; *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 3 Am. Rep. 628.

If the act permitting deceased to play on the sidewalk in view of its aunt was not negligent in itself, the fact that the child afterwards went into the street did not make it so.

It is not, as a matter of law, negligence for a parent to permit a child three years old to play on the sidewalk.

Birkett v. Knickerbocker Ice Co. 110 N. Y. 507; *Meagher v. Cooperstown & C. V. R. Co.* 75 Hun, 459; *Kunz v. Troy*, 104 N. Y. 852, 58 Am. Rep. 608; *Huerzeler v. Central Cross Town R. Co.* 139 N. Y. 494; *Atchison, T. & S. F. R. Co. v. Calvert*, 52 Kan. 552; *Citizens Street R. Co. v. Stoddard (Ind.)* 37 N. E. Rep. 725; *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 367; *Ihl v. Forty-Second Street & G. Street Ferry R. Co.* 47 N. Y. 322, 7 Am. Rep. 450; *Rosenkrans v. Lindell R. Co.* 108 Mo. 15; *Strutzel v. St. Paul City R. Co.* 47 Minn. 545; *Weissner v. St. Paul City R. Co.* Id. 471; *Gunn v. Ohio River R. Co.* 36 W. Va. 176; *Slattery v. O'Connell*, 10 L. R. A. 653, 153 Mass. 96; *Dudley v. Westcott Exp. Co.* 40 N. Y. S. R. 506; *Creed v. Kendall*, 156 Mass. 291; *Buck v. People's Street Railway, Electric Light & Power Co.* 48 Mo. App. 555; *Tobin v. Missouri Pac. R. Co. (Mo.)* 18 S. W. Rep. 996; *Gunderson v. Northwestern Elevator Co.* 47 Minn. 161; *Avey v. Galveston, H. & S. A. R. Co. (Tex.)* 17 S. W. Rep. 81; *Gibbons v. Williams*, 135 Mass. 833; *Narland v. Murray*, 148 Mass. 91; *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 71; *Platte & D. Canal & Mill Co. v. Dowell*, 17 Colo. 876; *Aurora v. Seidelman*, 34 Ill. App. 285; *Westerfield v. Lewis*, 43 La. Ann. 63; *Johnson v. State*, 2 Humph. 234, 36 Am. Dec. 823.

The fact that the father inherits the estate of the child and will receive the benefits of this judgment does not affect the question.

Wymore v. Mahaska County, 6 L. R. A. 545, 78 Iowa, 896; *Williams v. Texas & P. R. Co.* 60 Tex. 205.

In an action for negligence as in other actions it is for the judge to say whether there is any evidence of negligence; it is for the jury to say whether that evidence proves negligence.

The judge may declare negatively that there is no evidence of negligence to go to the jury, but cannot charge affirmatively that the facts prove the issue of negligence.

Gee v. Metropolitan R. Co. L. R. 8 Q. B. 161, 43 L. J. Q. B. 105; *Metropolitan R. Co. v. Jackson*, 47 L. J. C. P. 303, 3 App. Cas. 193; *Dublin, W. & W. R. Co. v. Slattery*, 3 App. Cas. 1155.

Eleven states have held that the burden of disproving contributory negligence is on the plaintiff, to wit:

Button v. Frink, 51 Conn. 842, 50 Am. Rep. 24; *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Slosson v. Burlington, O. R. & N. R. Co.* 51 Iowa, 294; *Pennsylvania Co. v. Gallentine*, 77 Ind. 823; *Moore v. Shreveport*, 3 La. Ann. 645; *State v. Maine Cent. R. Co.* 76 Me. 857, 49 Am. Rep. 622; *Copley v. New Haven & N. R. Co.* 136 Mass. 6; *Vicksburg v. Hennessy*, 54 Miss. 891; *Teipel v. Hilsendegen*, 44 Mich. 461; *Owens v. Richmond & D. R. Co.* 88 N. C. 502; *Walsh v. Oregon R. & Nav. Co.* 10 Or. 250; *Greany v. Long Island R. Co.* 101 N. Y. 419.

The following authorities hold that the burden of proof is not on the plaintiff to show that he was not guilty of contributory negligence, but is on the defendant.

Hough v. Texas & P. R. Co. 100 U. S. 313, 25 L. ed. 612; *Daniel v. Metropolitan R. Co.* L. R. 5 H. L. Cas. 45, L. R. 8 C. P. 591; *Mobile & M. R. Co. v. Crenshaw*, 65 Ala. 569; *Lopez v. Central Arizona Min. Co.* 1 Ariz. 464; *MacDougall v.* 38 L. R. A.

Central R. Co. 63 Cal. 431; *Sanderson v. Frazier*, 8 Colo. 79, 54 Am. Rep. 544; *Thompson v. Central R. & Bkg. Co.* 54 Ga. 509; *Kansas City, L. & S. R. Co. v. Phullibert*, 25 Kan. 583; *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208; *State v. Baltimore & P. R. Co.* 58 Md. 482; *Hocum v. Weitherick*, 22 Minn. 152; *Buesching v. St. Louis Gaslight Co.* 73 Mo. 219, 39 Am. Rep. 503; *Lincoln v. Walker*, 13 Neb. 244; *Smith v. Eastern Railroad*, 35 N. H. 386; *New Jersey Exp. Co. v. Nichols*, 83 N. J. L. 166; *Philadelphia & R. R. Co. v. Boyer*, 97 Pa. 91; *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 637; *Cassidy v. Angell*, 12 R. I. 447, 84 Am. Rep. 690; *Carter v. Columbia & G. R. Co.* 19 S. C. 20, 45 Am. Rep. 754; *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427, 48 Am. Rep. 297; *Bill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 618; *Fowler v. Baltimore & O. R. Co.* 13 W. Va. 579; *Hoth v. Peters*, 55 Wis. 405; *Grant v. Baker*, 13 Or. 329; *Hopkins v. Utah Northern R. Co.* 2 Idaho, 277; *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599.

This child was incapable of negligence.

4 Am. & Eng. Encyclop. Law, p. 42, note 2; *Whirley v. Whiteman*, 1 Head, 610.

Plaintiff sues here as administrator of the deceased child, whom the law says is incapable of negligence. Hence because the plaintiff happens to be the father of the child, the negligence of the father cannot be imputed to the child.

16 Am. & Eng. Encyclop. Law, pp. 447, 448; 4 Am. & Eng. Encyclop. Law, p. 88, note 1; *Government Street R. Co. v. Hanton*, 53 Ala. 70; *Bay Shore R. Co. v. Harris*, 67 Ala. 6; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Bronson v. Southbury*, 37 Conn. 199; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Frick v. St. Louis, K. C. & N. R. Co.* 75 Mo. 542; *Boland v. Missouri R. Co.* 36 Mo. 490; *Battishill v. Humphrey*, 64 Mich. 494, 57 Am. Rep. 474, note; *Bellegfontaine & I. R. Co. v. Snyder*, 18 Ohio St. 400, 98 Am. Dec. 175; *Cleveland, C. C. & I. R. Co. v. Manson*, 30 Ohio St. 451; *St. Clair Street R. Co. v. Eadie*, 43 Ohio St. 91; *Erie City Pass. R. Co. v. Schuster*, 113 Pa. 412, 57 Am. Rep. 471; *Philadelphia & R. R. Co. v. Long*, 75 Pa. 257; *Smith v. O'Connor*, 48 Pa. 218, 86 Am. Dec. 582; *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 8 Am. Rep. 638; *Whirley v. Whiteman*, *supra*.

Messrs. Turley & Wright, for appellee:

The burden of proving there was no contributory negligence on the part of the deceased, or his father, was on the plaintiff.

Shearm. & Redf. Neg. §§ 106, 108; *Beach, Contrib. Neg.* §§ 417, 418; *Butterfield v. Forrester*, 11 East, 60.

If the custodian of a child permits it to stray off from under her control, so that in the exercise of ordinary care she could not have prevented it from going into a place of danger, and as a reasonably careful and prudent person ought to have known that it was liable to go into such place, then that was negligence on the part of such custodian.

Booth, Street Railroads, § 387; *Beach, Contrib. Neg.* §§ 417, 418; *Shearm. & Redf. Neg.* §§ 106, 108.

Mr. E. Eldridge Wright, also for appellee:

Contributory negligence upon the part of

little children is not to be taken away from the jury, except in cases where the child is so young that reasonable men cannot see but one conclusion with regard to negligence upon its part.

In suits where the child has been injured and killed, and under the statutes of the various states allowing a recovery on the part of the next of kin for such damages and injuries, where the party for whose benefit the suit has been brought, has been guilty of negligence, then, although the child itself is too young to have been guilty of contributory negligence, yet such negligence upon the part of the parent will be imputed to the child, and likewise the negligence upon the part of the child will be imputed to the parent and there can be no recovery.

Hartfield v. Roper, 21 Wend. 618, 34 Am. Dec. 278; *Tiffany, Death by Wrongful Act*, §§ 68-72; *Smith v. Hestonville, M. & F. Pass. R. Co.* 92 Pa. 450, 37 Am. Rep. 705; *Pennsylvania R. Co. v. Bock*, 93 Pa. 427; *Westbrook v. Mobile & O. R. Co.* 68 Miss. 580; *Glassey v. Hestonville, M. & F. Pass. R. Co.* 57 Pa. 172.

Whether the parents are present or not, if by their culpable negligence they permit the child to be in a place of danger, whereby it sustains injuries, their conduct is, in law, a proximate cause of the accident. The doctrine of contributory negligence is applied as fully to the conduct of those who have a pecuniary interest in the personal safety of another, as to the acts of those who are interested in their own preservation.

Glassey v. Hestonville, M. & F. Pass. R. Co. *supra*; *Reed v. Minneapolis Street R. Co.* 84 Minn. 557; *Cumming v. Brooklyn City R. Co.* 38 Hun, 362; *O'Flaherty v. Union R. Co.* 45 Mo. 70, 100 Am. Dec. 848; *Mack v. Lombard & S. Street Pass. R. Co.* 8 Pa. Co. Ct. Rep. 805, 18 Wash. L. Rep. 894; *Roller v. Sutter Street R. Co.* 66 Cal. 280; *Smith v. Hestonville, M. & F. Pass. R. Co.* 92 Pa. 450, 37 Am. Rep. 705; *San Antonio Street R. Co. v. Cavilloutte*, 79 Tex. 841; *Williams v. Texas & P. R. Co.* 60 Tex. 205.

Although the benefit would result to several parties, some of whom were innocent of negligence, still, if any of them were guilty to whom he had entrusted the care of the child, this would bar any recovery.

Strutzel v. St. Paul City R. Co. 47 Minn. 471, 545; *McMahon v. New York*, 38 N.Y. 642; *Shierhold v. North Beach & Mission R. Co.* 40 Cal. 447; *Chicago City R. Co. v. Robinson*, 4 L. R. A. 126, 127 Ill. 9; *Ili v. Forty Second Street & G. Street Ferry R. Co.* 47 N. Y. 317, 7 Am. Rep. 450; *Dahl v. Milwaukee City R. Co.* 62 Wis. 652; *Birkett v. Knickerbocker Ice Co.* 110 N. Y. 504.

The jury under all the facts and circumstances of the case, should say whether the custodian of the child exercised what would under the circumstances have been reasonable care and prudence.

Cumming v. Brooklyn City R. Co. 38 Hun, 362; *Farriss v. Cass Ave. & F. G. R. Co.* 80 Mo. 325; *Pittsburgh, A. & M. R. Co. v. Pearson*, 72 Pa. 169; *Roller v. Sutter Street R. Co.* 66 Cal. 280; *Rosenkrans v. Lindell R. Co.* 108 Mo. 15; *Ames v. Broadway & Seventh Ave. R. Co.* 24 N. Y. S. R. 818; *Schierhold v. North Beach & M. R.* 28 L. R. A.

Co. 40 Cal. 447; Tiffany, Death by Wrongful Acts, p. 84; *Shearm. & Redf. Neg.* § 70.

Wilkes, J., delivered the opinion of the court:

This is an action for personal injuries resulting in the death of Samuel Bamberger, a child about three years of age. The suit is brought by the father of the child, as administrator, for the benefit of the father, as next of kin of the deceased. It was tried before the judge and a jury in the court below and resulted in a verdict and judgment for the defendant company; and the plaintiff has appealed, and assigned errors. On a former trial the same verdict and judgment were had, which, on appeal, were set aside by this court on account of errors in the charge of the trial judge.

The facts necessary to be stated are that the deceased was left by his father in charge of the grandmother of the child, at her place of business, and she left him temporarily in custody of her daughter, Miss Harriet Bamberger. Just prior to the accident, the child, with a companion some year or two older, were playing on the street in front of the place of business of the grandmother, in the presence of the aunt, who was standing in the doorway of the grandmother's store, watching the playing of the children, who were running up and down the street. The deceased, running diagonally on the sidewalk, made a sudden break, and ran onto the street, either at, on, or near a bridge. The street-car was going about eight miles an hour, down grade, approaching the bridge. The exact facts connected immediately with the accident are somewhat confused. Miss Bamberger says she was standing in the doorway of her mother's store, watching the child; that she saw Sammie, just at the bridge, run out into the street, and she ran out into the street; that when she got halfway between the car track and the house she heard a car coming, looked, hallooed to the motorman, and ran as fast as she could, and just as the car got on the bridge, as nearly as she could remember, the little boy ran across, in front of the car, and the car ran over him; that this occurred on the west side of the bridge, and that the boy was three years old. She says that the motorman paid no attention to her at all; she noticed no slacking of the speed; and that, by actual measurement, it was 105 feet from where the car struck the child to where it was taken out, in front of Mrs. Cole's premises. This, however, is controverted. The motorman discloses in his testimony that he first saw the child on the street, east of the bridge, and that the child ran some distance, diagonally, on the street, and, when his car was about 10 feet from him, suddenly cut across the track, in front of the car, and was killed. Mrs. Magnus says that the accident occurred when the child was about the middle of the bridge. The width of the street, between curb lines, is 46 feet; from house line to house line, is 66 feet.

The errors assigned are to the charge of the court.

The trial judge gave, among others, the

following instructions to the jury: "Defendant railroad company pleads not guilty, and pleads that the negligence of the parent and the child contributed to produce the accident. This pleading puts upon the plaintiff the burden of making out his case, on every material point, to your satisfaction, by a preponderance of evidence. Now, as to the first material fact, you should be satisfied that neither Louis Bamberger nor his child, Sammie, were negligent to such a degree as to cause, or contribute to causing, the injury complained of. Second, you should be satisfied that the motorman running car No. 86 at the time of the accident was negligent, and that it was his negligence that caused the injury to Samuel Bamberger, deceased." This charge presents the question as to where the burden of proof rests in cases when the defense is contributory negligence; in other words, is the burden upon defendant to show contributory negligence on the part of the plaintiff, or upon the plaintiff to show the absence of such negligence? Upon the abstract question there is an irreconcilable difference of opinion. Mr. Beach, in his work on Contributory Negligence, attempts to lay down certain rules to determine this question. He says, when the circumstances of the case raise no presumption of either care or want of care on the part of the plaintiff, it is necessary for him to prove that he exercised ordinary care. When the circumstances raise a presumption that the plaintiff was in the exercise of ordinary care, then the burden is on defendant. When the circumstances raise a presumption that there was a want of ordinary care on the part of plaintiff, then the burden of proving freedom from contributory negligence is upon him. Section 417. In *Shearman & Redfield on Negligence* (section 106), it is said: "Practically all the courts agree that the fact of contributory negligence is fatal to the plaintiff's case, unless changed by statute, no matter how it appears,—whether by affirmative evidence on the part of the defendant, or by inference from the evidence on the part of the plaintiff. It is quite immaterial who proves the fact, so long as it is proved." We think we need not, in this case, pass upon the question as an abstract proposition. Taking the entire charge together, we think the court did instruct the jury that the plaintiff must make proof of want of contributory negligence. They were told, it is true, that, if the entire evidence did not preponderate in favor of the view that defendant's negligence caused the accident and injury, then the case must fall, but this did not change the previous instruction. Looking to the facts in this case, we find that the street-car was legitimately upon its own track, running its usual, ordinary line, where it had a right to be, and the child, when the injury occurred, was upon the track, where it ought not to have been, and was, in consequence, killed. Under these circumstances, no matter what the rule may be, as an abstract proposition, it would be incumbent on the father to show that the presence of the child upon the track, or in a dangerous and ex-

posed situation, was without negligence or want of proper care on his part, or the part of the child's custodian, if the negligence of either can be held to bar the right of recovery in this case; and upon that point the charge of the court was specific, that the father could not recover if there was such contributory negligence on his part, or the part of the custodian. In 4 Am. & Eng. Encyclop. Law, p. 93, it is said, "The burden of proving contributory negligence must, in every case, depend largely upon the facts of the particular case."

It is assigned as error that the trial judge asserted that certain concurring facts constituted negligence, and invaded the province of the jury, and, moreover, charged a greater degree of diligence on the part of the plaintiff and the child's custodian than the law requires. The portion of the charge objected to is this: "If you believe from the evidence that this child was in the custody of its aunt, and you further find that she allowed it to go onto the street in front of the Bamberger grocery, on the sidewalk on the south side of Poplar street, in front of which the street-car company was running and operating its cars regularly every ten or fifteen minutes, and you further find that she allowed the child to stray off, from under her control, to a point so far distant from her that, in the exercise of ordinary care and prudence, she could not have prevented the child from getting into a place of danger, and it did go into such place, and was run over and killed, then this would be such negligence on the part of the aunt as would defeat a recovery, unless you believe that the motorman had time to stop the car and prevent the accident after the child left the sidewalk and started towards the track." The substance of this charge is that if the custodian of the child permitted it to stray away from her control, so that, in the exercise of ordinary care and prudence, she could not have prevented it from going into a place of danger, when she might have reasonably apprehended it would do, then it would be negligence; and we do not think it subject to the exceptions made. It assumes nothing as facts, but presents a hypothetical case raised by the evidence, and applies the law in such case, but does not lead the jury to infer or believe such facts to be proven. Contributory negligence is generally a question of mixed law and fact, and in such cases it is the duty of the court to tell the jury what facts, if proved, will constitute contributory negligence. It is the duty of the jury, in such cases, to determine the facts, and apply the law, as laid down by the court, to such facts. 4 Am. & Eng. Encyclop. Law, p. 95; *Thomp. Neg.* § 10, p. 1235.

It is also objected that the court erred in the following charge: "To state it differently, before you can find that the motorman who ran car No. 86 was negligent at the time of the accident and injury to Sammie Bamberger, you must find from the evidence the speed at which the car was running, and the point it was at on the track, when the child left the sidewalk, gave the motorman time to stop his car before he would arrive at the

point where the child ran onto the track in front of the car. To illustrate, if the evidence satisfies you that when the child left the sidewalk the car was at a point, say, forty feet west of where the child ran onto the track, and you find from the evidence that a car running at the speed this one was could have been stopped within forty feet, then it was carelessness or negligence not to have stopped this car within that forty feet, and the railroad would be liable; but, if the car could not have been stopped within the forty feet, then it was not negligence on the part of the motorman not to stop within forty feet, and the railroad would not be liable for this accident. I do not mean to say that the evidence shows that the car was forty feet from the child, but only to illustrate. It is your duty to find from the evidence the speed at which the car was running, where the car was when the child left the sidewalk, and where the car was when it struck the child." The argument is that this instruction limits the inquiry of the jury, and rests the question wholly upon the assumption that the duty of the motorman is to endeavor to stop the car to prevent an accident. The duty of the motorman is to exercise that degree of care, under the circumstances, as will prevent an accident; and if the distance between a point where a child would come onto a track, running in a particular direction so as to bring the child on the track in front of an approaching car, is such as to render the stopping of the car before the accident impossible or improbable, then his duty is to increase the speed of the car and not attempt to stop, and thereby avert the accident. To attempt to stop the car, under such circumstances, inevitably produces an injury. To hasten the speed of the car inevitably leads to the prevention of an accident. We think there is no error in this portion of the charge of which plaintiff can complain. There are no facts in this case showing that by an increase of speed the accident might have been avoided. It is possible such case might arise, but it is not presented by this record.

Four special requests were made, which we need not set out in full. They were all, we think, covered by the general charge, in so far as they were applicable. It is said that the general charge limited the duty of the motorman by stating that, if he saw the child leave the pavement to cross the track, then he should have acted at once, whereas it was his duty to act whenever the child was or could have been exposed to danger or in a position where it might rush into danger, whether leaving the sidewalk, or in the streets, or wherever it might be situated. We think the charge fairly embraced this view of the case, and did not so limit the duty of the motorman as to confine him to the time and place of the child's leaving the sidewalk and starting towards the track. This cause was before this court at a former time, when it was reversed, with instructions as to certain defects in the charge, all of which were corrected on the last trial, and their proper effect and scope were not limited.

The only remaining question of importance is whether this action can be defeated by

proof of contributory negligence of the plaintiff, who is the administrator, and at the same time the father, of the deceased boy. It is evident that no negligence can be charged to the deceased, on account of his tender years. *Bishop, Noncont. L. § 586; Chicago City R. Co. v. Wilcox*, 138 Ill. 870, 21 L. R. A. 76; *Whirley v. Whiteman*, 1 Head, 610; 4 Am. & Eng. Encyclop. Law, p. 43, note 2. But whether the negligence of the father or custodian can be imputed to the child, so as to bar its right to recover is a question on which there is a conflict of decision. The cases are too numerous to mention, and we only refer to books where they may be found collated. *Nisbet v. Garner*, 75 Iowa, 314, 1 L. R. A. 153, and note; *Chicago City R. Co. v. Robinson*, 127 Ill. 9, 4 L. R. A. 126, and note; *Wymore v. Mahaska County*, 78 Iowa, 396, 6 L. R. A. 545, and note, 16 Am. St. Rep. 451, and note; *Chicago City R. Co. v. Wilcox* (Ill.) 8 L. R. A. 494, 496, and note; *Id.* 21 L. R. A. 76-84, and note, 188 Ill. 370; *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 699, 25 L. R. A. 784-794, and note, 41 Am. St. Rep. 799, 811, and notes; *Grant v. Fitchburg*, 160 Mass. 16, 39 Am. St. Rep. 450, and notes; *Winwell v. Doyle*, 160 Mass. 42, 39 Am. St. Rep. 451, and note; 4 Am. & Eng. Encyclop. Law, pp. 87, 88, and notes; *Beach, Contrib. Neg.* §§ 41-44, 128; *Shearm. & Redf. Neg.* §§ 70-83, and notes; *Wood, Railway Law*, § 322; *Bishop, Noncont. L. § 582; Whart. Neg.* §§ 312-314; *Pollock, Torta*, § 299; *Cooley, Torta*, § 681; 2 *Thomp. Neg.* § 1184.

As will appear from an examination of these authorities, the better doctrine is that the negligence of the parent or custodian is not imputable to the child, so as to bar its right of recovery; and our own court, in *Whirley v. Whiteman*, 1 Head, 610, adopts this view, and characterizes the leading case holding the contrary (*Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273), as no less opposed to the current of authority than to every principle of reason and justice. Mr. Bishop, in his work on *Noncontract Law* (sec. 582), says: "This new doctrine of imputed negligence, whereby the minor loses his suit, not only when he is negligent himself, but when his father, grandmother, or mother's maid, is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his father was poor or shiftless, or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it. By the new doctrine, after a child has suffered damages which confessedly are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any of the several defendants who may have contributed to them, he cannot have them if his father, grandmother, or mother's maid happens to be the one liable for the contribution; the idea, in such cases, being that the child had its remedy against the father or other custodian. In this connection the case of *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 71, is suggestive, in which it is held that, when

the parents have exercised reasonable and ordinary care, there is no good reason why the negligence of the person in actual charge of the child should be imputed to them, and through them to the child. In *Kay v. Pennsylvania R. Co.*, 65 Pa. 269, 8 Am. Rep. 628, the doctrine of *Hartfield v. Roper* is said to be "repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil." Mr. Beach says that the doctrine is an anomaly, and in striking contrast with the case of a donkey exposed in the highway, and negligently run down and injured, or with oysters in the bed of a river, injured by the negligent operation of the vessel, in both of which cases actions have been maintained; and he adds, if the child were an ass or an oyster, he would secure a protection denied him as a human being. He is not the chattel of his father, but has a right of action for his own benefit, when the recovery is solely for his use. While this is the general rule, and we think the correct one, there is a broad distinction taken between cases in which the suit is brought in the name of the child, and for the use of the child, and cases where the suit is brought by the father for damages suffered by him in his own right, and he is entitled to the recovery, and not the child. In the latter case it is uniformly held that the negligence of the father will bar his right to recover. 4 Am. & Eng. Encyclop. Law, p. 88, and note; *Grant v. Fitchburg*, and *Wymore v. Mahaska County*, *supra*; *Westbrook v. Mobile & O. R. Co.* 66 Miss. 560, 14 Am. St. Rep. 590, and note; *Westerberg v. Kinsua Creek & K. R. Co.* 24 Am. St. Rep. 510, and notes, 142 Pa. 471, and many other cases too numerous to cite.

The case at bar is, however, different from these. In this case the plaintiff is the father of the deceased child, but brings the suit, not in his right as father, but as administrator, of his deceased son. In case of recovery he will, under the statute, be the sole beneficiary, as next of kin; and the right of action is so stated in the declaration, and necessarily so, for it has been held, under our statute, that the recovery is personal to the next of kin, and when there is no next of kin there can be no recovery, and if the next of kin die after suit instituted the suit abates. The suit being brought in the name of the father, as administrator, and for the use of the father, as sole beneficiary the question presented is, Shall the action be defeated by contributory negligence on the part of the father, or his agent, the custodian of the child or shall he be allowed to recover notwithstanding such negligence, as the child might do? This question was presented in the case of *Wymore v. Mahaska County*, 78 Iowa, 396, also reported in 6 L. R. A. 545, and in 16 Am. St. Rep. 451, and was there discussed, and directly passed upon. In that case the court held that the suit was brought in the right of the child, and not of the father, and that if the facts were such that the child could have recovered, had its injuries not been fatal, his administrator might recover the full damages sustained by the child's estate, even though the parent was

sole beneficiary of the recovery. The question was also passed upon in the case of *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267, in which the court said: "When a suit is by a parent, for loss of services caused by an injury to a child, the contributory negligence of the plaintiff is a good defense; but such negligence is not imputable to the child, and is consequently not to be considered when the suit is by the child, or its personal representative;" citing *Shearm. & Redf. Neg. § 48a*; *Glassey v. Hestonville, M. & F. Pass. R. Co.* 57 Pa. 172. It continues: "Hence, when the facts are such that the child could have recovered, had his injuries not been fatal, his administrator may recover, without regard to the negligence or presence of parents at the time the injuries were received, and although the estate is inherited by the parents. . . . The parents' negligence is no defense, because it is regarded, not as a proximate, but as a remote, cause of the injury. And the reason lies in the irresponsibility of the child, who, itself being incapable of negligence, cannot authorize it in another. . . . There is no principle, then, in our opinion, on which the fault of the parent can be imputed to the child. To do so is to deny to the child the protection of the law." Virtually, the question was presented in the case of *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 641, 15 Am. Rep. 683. The action in that case was prosecuted, under the statute of Ohio, for the benefit of the next of kin of the intestates. The next of kin were children, three of whom were with their parents, in the wagon, at the time of the collision. On the trial, defendant requested the court to charge the jury that if the persons for whose benefit the actions were brought were guilty of a want of ordinary care, which contributed to the injury, a recovery could not be had for their benefit. This request the court said was properly refused, because, first, the statute gives the right of action to the personal representative upon the same condition that would have entitled the party injured to an action, if death had not ensued. In the case of *Westerfield v. Lewis*, 48 La. Ann. 64, the court held that the statutes of Louisiana allowed two elements of damages: (1) The right of action for the damages suffered by the child, and which passes to the surviving parents by inheritance; (2) the action for damages suffered by the parents on account of the loss of the child. The parents inherit the first element of damages from the child, and it must be treated as though the child was alive, and suing for an injury to himself. That the contributory negligence of the parents would not be a bar to the first element or cause of action, and that the second element of damage, being personal to the parents, and not inherited from the child, they must be free from negligence contributory to the death of the child. On the other hand, in the cases of *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Chicago v. Starr*, 42 Ill. 174, 89 Am. Dec. 422; *Chicago v. Heising*, 83 Ill. 204, 25 Am. Rep. 378,—it is held that in such cases the negligence of the parent will bar a recovery by the adminis-

trator, when such parent is the sole beneficiary. In these cases the doctrine appears to be assumed as correct, rather than controverted and adjudicated, though necessarily involved. So, likewise, are the cases of *Grant v. Fitchburg*, 160 Mass. 16; *Wiswell v. Doyle*, 160 Mass. 42. The reasoning and inclination of several of the recent text-writers is in the same direction. *Booth, Street Railways*, § 391; *Jones, Neg. Mun. Corp.* 422; *Beach, Contrib. Neg.* § 131. There are many other cases bearing more or less directly upon this question, but they need not be cited, and cannot be considered as controlling. Necessarily, the peculiar provisions of the statute must exercise an important, if not controlling, influence in the decisions of each state. Mr. Tiffany, in his work upon *Death by Wrongful Act* (secs. 68-72), gives the statutes of several states, and discusses the rules announced by the court under them. His conclusions are that in the Iowa, Virginia, and Louisiana cases, the reasoning of the judges who delivered the opinions above referred to is defective; that in two of the cases no negligence was to be imputed to the plaintiffs, and in some the benefit of recovery is not confined to the single person guilty of the contributory negligence, as in Iowa and Louisiana, under their statutes, both parents are entitled to recover, and a similar rule prevails in Ohio. In Virginia the recovery is for the benefit of all parties interested, to be distributed among the near relatives, and if there is no next of kin the administrator may still recover for the estate; and only where there is a widow, husband, parent, or child is the recovery free from creditors' claims. By our statutes (Mill. & V. Code, § 8130), it is provided that the right of action of the injured intestate shall not abate by his death, but shall pass to his widow, and, if no widow, to the children, or to the personal representative, for the benefit of the widow or next of kin, free from the claims of creditors; and by section 8133 it is further provided that, if the deceased had commenced an action before his death, it shall proceed without a revivor. By section 8134 (Act 1883), the elements of damage are fixed on the basis of mental and physical suffering, loss of time, and necessary expenses, and also the damage resulting to the parties for whose use and benefit the right of action survives. Under this statute, in *Loague v. Memphis & O. R. Co.*, 91 Tenn. 461, it was held that the mother, as administratrix of her son, was entitled to recover whatever the deceased might have recovered, and also any damages sustained by her, as mother, for the loss of her son's services. In the unreported case of *Andrews v. Railroad Co.* (decided by this court at its December term, 1893, at Nashville), it was held that the elements of damage recoverable under section 8134 embraced, not only all that the administrator might be entitled to recover, but also all that might be recovered by the father in his own right; and, recovery having been had as administrator, it was a bar to any further action by the father, in his own right, for loss of his son's services. It is said the right to recover by the admin-

istrator is the same right that the intestate had if he had lived; but this is not (construing the statutes together) strictly accurate, for the right is not only as administrator, but as father, and the damages are given in view of both aspects of the case, and embrace both rights. The right is not strictly a descendible or inheritable right, but one arising out of the special statute, and as to its scope is governed by the statute.

The underlying principle in the whole matter is that no one shall profit by his own negligence, and to allow the father, who has been guilty of negligence, to recover, notwithstanding that negligence, when he brings the suit as administrator, although he could not do so in his own right, would defeat this underlying principle by a mere change of form, when the entire recovery, in either event, goes to him alone. Upon principle, we think that, no matter how the suit is brought,—whether as administrator or as father,—it can be defeated by the father's contributory negligence, when he is sole beneficiary.

It follows, there is no error in the charge of the court on this point, nor in the record; and the judgment of the court below is affirmed, with costs.

We are well content with the result thus reached, upon the grounds already stated, and the decision is placed on these grounds. Upon a careful examination of the whole testimony, we have not been able to find any evidence of negligence on the part of the street-car company; and the verdict of the jury might very well have been based upon this view of the case, and at the same time the jury may have believed there was no contributory negligence on the part of the father or custodian of the child.

AMERICAN NATIONAL BANK

v.

JUNK BROS. LUMBER & MFG. CO., App't.

(94 Tenn. 624.)

1. An indorser for whose benefit an accommodation note was made being bound to provide funds to meet it at maturity is not released by lack of presentment, protest, or notice.
2. An assignee of the indorser under a general assignment for creditors so far stands in the shoes of his assignor that notice to him of non-payment of the indorsed paper will bind the indorser.

(May 3, 1895.)

A PPEAL by defendant from a judgment of the Chancery Court for Davidson County in favor of plaintiff in an action to enforce defendant's liability as indorser of a promissory note. *Affirmed.*

NOTE.—The sufficiency of notice of dishonor of negotiable paper given to an assignee for creditors of an indorser is a question that has been but little before the courts. The above case presents the few authorities upon the subject.

The facts are stated in the opinion.

Mr. A. N. Grisham for appellant.

Messrs. J. M. Grant and J. S. Pilcher, for appellee:

Inasmuch as all the notes were owned by the American National Bank, that being the bank at which they were payable, it was unnecessary even to present them for payment.

Cox v. National Bank of New York, 100 U. S. 704, 25 L. ed. 789.

Not only was presentment for payment unnecessary, but protest itself was unnecessary. Inland bills need not be protested, at common law, and this rule prevails in Tennessee as to domestic promissory notes.

Dan. Neg. Inst. §§ 926, 927; *Young v. Bryan*, 19 U. S. 6 Wheat. 146, 5 L. ed. 228; *Union Bank v. Hyde*, 19 U. S. 6 Wheat. 573, 5 L. ed. 333; *Burke v. McKay*, 43 U. S. 2 How. 66, 11 L. ed. 181; *Wood River Bank v. First Nat. Bank of Omaha*, 36 Neb. 744; *Townsend v. Auld*, 8 Misc. 516.

The notary's certificate is prima facie evidence.

Wheeler v. State, 9 Heisk. 398; Dan. Neg. Inst. §§ 926, 927.

It therefore appears from the notary's certificate and extrinsic proof that the company received the notice of dishonor of the notes in question, because in this case the assignee, who received actual notice, was for that purpose the agent of the indorser.

Even if the notices were not received by the defendant corporation, due diligence is shown to have been exercised in the endeavor to give notice. If due diligence is used in sending the notice to the indorsee, it is immaterial whether it is received or not.

Bank of Columbia v. Lawrence, 26 U. S. 1 Pet. 578, 7 L. ed. 269; *Dickins v. Beal*, 35 U. S. 10 Pet. 572, 9 L. ed. 538; *Harris v. Robinson*, 45 U. S. 4 How. 386, 11 L. ed. 1000; *Saco Nat. Bank v. Sanborn*, 63 Me. 840, 18 Am. Rep. 224; *Harris v. Memphis Bank*, 4 Humph. 519; *Dunklap v. Thompson*, 5 Yerg. 67; *Bank of Utica v. Phillips*, 3 Wend. 408; *Rawdon v. Redfield*, 2 Sandf. 178; *Winans v. Davis*, 18 N. J. L. 376; *Wood v. Corl*, 4 Met. 203; *Cabot Bank v. Russell*, 4 Gray, 169.

Even if there was no express or implied authority to leave the notices at the office where they were left, and if there was no agency on the part of the assignee, still the notice was sufficient as against the corporation, because the office of the company will be considered as the proper place to give notice.

Bliss v. Nichols, 12 Allen, 443; *Importers & Traders Nat. Bank v. Shaw*, 144 Mass. 421; *Bank of Utica v. Phillips*, and *Saco Nat. Bank v. Sanborn*, *supra*.

The assignee was apparently acting for the company. This was sufficient as against the company.

Kellogg v. Pacific Box Factory, 57 Cal. 327; *McFarland v. Pico*, 8 Cal. 626; *Pierce v. Schaden*, 55 Cal. 406; *Thompson v. Williams*, 14 Cal. 160.

Notice of dishonor sent to former place of business of the indorsers, an insolvent firm, where it was received by the trustees for creditors, is sufficient.

Casco Nat. Bank v. Shaw, 79 Me. 376; *Bank of America v. Shaw*, 142 Mass. 290.

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If an indorser abandons his place of business or residence (a corporation has no residence apart from its place of business), no notice at all need be given.

Blakely v. Grant, 6 Mass. 386; *Story, Prom. Notes*, § 316; *Walker v. Stetson*, 14 Ohio St. 90, 84 Am. Dec. 862; *Blodgett v. Durgin*, 33 Vt. 361; *Fugitt v. Niron*, 44 Mo. 299; *Upham v. Prince*, 12 Mass. 14; *Bateman v. Joseph*, 2 Campb. 461.

When the assignee of an indorser continues in business at the same place, it may be inferred that the assignee had authority from the indorser to receive notice of protest sent there.

Importers & Traders Nat. Bank v. Shaw, supra; *Berridge v. Fitzgerald*, L. R. 4 Q. B. 641; *Bank of America v. Shaw, supra*.

The notice to the assignee is quite sufficient. *Bynum v. Apperson*, 9 Heisk. 643; *Gardner v. Bank of Tennessee*, 1 Swan, 420; *Story, Prom. Notes*, § 290; *Story, Bills*, § 348; Dan. Neg. Inst. 1173; *Wade, Law of Notice*, § 769; *Fassin v. Hubbard*, 55 N. Y. 465; *Bliss v. Nichols*, 12 Allen, 443; *Callahan v. Bank of Kentucky*, 82 Ky. 231.

Beard, J., delivered the opinion of the court:

This suit was instituted against the Junk Bros. Lumber & Manufacturing Company, a corporation, with its *situs* in Nashville, as the indorser for value of certain domestic negotiable notes. The defendant resisted recovery on the ground that notice of dishonor of the paper was not given as the law requires. A decree having been pronounced against the corporation, it has filed the record in this court, and the action of the court below in overruling this defense is assigned as error.

Before coming to the general question raised by the assignments, it is proper to dispose of five of these notes, which are shown by the proof to have been made for the accommodation of this corporation, and afterwards indorsed by it to the complainant. As to these notes, their makers stood in the situation of sureties to the indorser, and it was the latter's duty to provide funds to meet the maturity, and it was therefore bound to the holder without presentment, protest, or notice. 2 Am. & Eng. Encyclop. Law, p. 899; 2 Dan. Neg. Inst. § 1085; 3 Randolph, Com. Paper, § 1205; *Black v. Fizer*, 10 Heisk. 43. Thus disposing of those five notes, the question recurs as to the liability of the defendant as indorser of the remaining thirty-five. The facts disclosed in the record are that for a considerable period of time the Junk Bros. Lumber & Manufacturing Company was engaged in manufacturing in Nashville, with its business office located at the corner of First and Woodland streets in that city. Its books were kept there, and there its mail, with that of the principal officers and its various employes, was delivered. On the 28th of May, 1892, the corporation, being insolvent, made a general assignment of all its property, both real and personal, to one Stainback, as assignee, for the benefit of all its creditors. This assignment was a full surrender to the assignee, and by its terms "vested him with all powers and authority

to do all acts and things which may be necessary in the premises to the full extent of the trust" created, and it authorized him "to ask, demand, recover, and receive of and from all and every person or persons all property, debts, and demands due, owing, and belonging to" said assignee, and "to give acquittances and discharges for the same," "to execute and deliver deeds," and to use the name of the assignor whenever the purpose of the trust required. Immediately on the execution of the assignment the assignee took charge of the property covered by it, and went into possession of the office of the corporation, with its books, iron safe, etc., and employed at this office a young man to do such clerical work as was required in the administration of the trust. For a limited time after the day of the appointment with the old employés of the corporation, he continued to run its machinery, for the purpose of converting its raw material into manufactured goods. In winding up the affairs of this trust he took into his service as such assignee one Spain, who was a stockholder, as well as the director and general manager of this corporation at the date of the assignment, and who continued, according to the testimony in the case, to sustain these relations to it after that date. It is true, the duties imposed by the assignee upon Spain made it necessary for him to be principally in the yard and about the plant; but the proof is that he was in this office every day, and sometimes more than once during the day. The mail of the corporation was delivered there as before, and, assuming to be entitled to the control of it, the assignee opened it personally or by his clerk, and gave it such attention as it required; and no officer of the corporation ever called in question his right to control it, although, in the nature of things, all the officers must have known that he was receiving it, and so dealing with it. After the assignment, the corporation abandoned business, and all of its executive officers (with the single exception of the general manager) were scattered, and each one pursued his own private affairs at other points in the city of Nashville. After that time it had no other office, and there were but two meetings of the board of directors, and these were held in private offices, and with regard to past and unimportant transactions. Beginning with the date of the assignment, and for several months thereafter, the paper sued on matured, and payment on proper demand having been refused, it was protested by the notary public, and notice of the protest in each instance save two was directed by him to the corporation by name, and was left by him at the office heretofore mentioned. In the two excepted cases or instances the notices were addressed to "George W. Stainback, Assignee of the Junk Bros. Lumber and Mfg. Co." In all these cases, as notices were received, the clerk of the assignee entered a memorandum of the protest in the books of the corporation, kept by him, and generally deposited these notices in the safe. The officers of the corporation insist that they did not receive these notices. Conceding this to be true, is the

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defendant bound as indorser under the foregoing facts, notwithstanding the lack of actual receipt of these notices? Where the indorser has failed to receive notice, he is discharged, unless the holder can show that he has used due diligence in his effort to communicate notice. Where this can be shown, however, it is immaterial that the notice does not reach the indorser. *Harris v. Robinson*, 45 U. S. 4 How. 336, 11 L. ed. 1000. So it is that legal notice is not necessarily actual notice. *Saco Nat. Bank v. Sanborn*, 63 Me. 340. Thus, an indorser who changes his residence without the knowledge of the holder of the protested paper is bound by notice sent to his former place of residence, if the holder is not guilty of negligence in his failure to have knowledge of the change. In such a case the holder, in the absence of any fact to put him on inquiry, can well assume that the indorser's residence continues where it formerly was. He is not bound to go upon the street to ascertain a fact which he has the right to assume he already knows. *Saco Nat. Bank v. Sanborn*, *supra*; *Bank of Utica v. Phillips*, 8 Wend. 408; *Requa v. Collins*, 51 N. Y. 148; 2 Dan. Neg. Inst. § 1083; 3 Randolph, Com. Paper, § 1281; *Harris v. Memphis Bank*, 4 Humph. 519. The well-established rule is that, where personal notice is not given, the notice must be sent to the place where the indorser will be most likely to receive it, and if there is reasonable diligence exercised by the holder in ascertaining this place, this is all the law demands. *Bank of America v. Shaw*, 142 Mass. 290, is in many respects similar to this case, and will serve to illustrate this rule. The facts in that case were that F. Shaw & Co. had done business at 268 Purchase street, in Boston, and while so engaged indorsed the paper in question. Before its maturity the firm became insolvent, and made a general assignment to one Wyman for the benefit of their creditors. The assignee took possession of the office of the firm, and used it in the administration of his trust, but he permitted the sign of the firm to remain tacked to the door. At the maturity of the paper, F. Shaw was a fugitive from Massachusetts, and in hiding in Canada. The notice of protest, addressed by the notary to the firm by its proper name, was left by him at this office. F. Shaw, when subsequently sued on this paper, defended upon the ground that this notice was not sufficient to bind him, but the court held that it was good, "because it was sent to what had been the place of business of the firm, where its affairs were actually in process of settlement under the trust." It is true that in the opinion announced the fact of Shaw being a fugitive at the time of the notice is given its due weight by the court, but this was not by any means controlling in the conclusion reached. So in *Ex parte Baker*, L. R. 4 Ch. Div. 795, the facts were that Bellman & Co., who had done business at "Oak Brewery," but were no longer doing so, drew drafts on one Hay, which were dishonored. Before their maturity, Bellman had become bankrupt, and a trustee had been appointed for his estate. Notice of dishonor was directed to the

drawers at "Oak Brewery," and yet, in the absence of proof that the trustee was in possession of the old place of business of the firm, the notice was held to be sufficient. Again, in *Casco Nat. Bank v. Shaw*, 79 Me. 876, upon facts like those considered in *Bank of America v. Shaw*, *supra*, and in an action against the indorsers, the court says: "Notices were addressed to them at their former place of business, where their affairs were being settled by a trustee to whom they had made an assignment for the benefit of their creditors, and we have no doubt that the notices were received by the latter. Notices so sent and mailed are sufficient." It is unnecessary to extend the discussion of this question. It is sufficient to say that, in view of all the facts of this case, as well as in the light of the authorities, we have no hesitation in holding that the corporation is liable as indorser on all this paper where notices of protest were addressed to it in its corporate name.

But it is insisted, however, that at least the corporation is not liable on the two notes, the notices of the protest of which were addressed by the notary to "G. W. Stainback, Assignee of the Junk Bros. Lumber and Mfg. Co." Whether notice of protest to the trustee of a bankrupt's estate or to the assignee of an insolvent assignor making a general assignment is sufficient, has been the subject of uncertainty of opinion with some of the text-writers and of conflict among others. Mr. Byles in his work on Bills (Wood's ed.) p. 294, says: "If the drawer of a bill becomes bankrupt, notice must nevertheless be given to him, whether a trustee be appointed or not." A number of English cases are cited by the author in his note to this text, some of which support it and others do not. Parsons says: "If a person entitled to notice be bankrupt, notice should be given to him, if the assignees are not yet appointed. If they are, notice, perhaps, should be given to them," etc. 1 Parsons, Notes & Bills, 500. Judge Story says: "If the party entitled to notice be a bankrupt, and assignees have been appointed, and the holder knows it, notice should be given to them." Story, Prom. Notes, § 307. Mr. Daniel says: "If the party be a bankrupt, it is best to give notice to him, and to his assignee also." If, however, "given to the assignee alone, it would probably be sufficient." 2 Dan. Neg. Inst. § 1002. On the other hand, Mr. Chitty says: "If the party entitled to notice be a bankrupt, notice should be given to him before the choice of assignees, and after such choice to them." Chitty, Bills, p. 228. The author of the article on bills and notes (Mr. Charles Merrill Hough, of the New York bar) in 2 Am. & Eng. Encyclop. Law, p. 412, says: "Upon the bankruptcy of an indorser, and before the appointment of an assignee, the

bankrupt himself is the proper person to notify; but the assignee, when appointed, should receive all notices of dishonor." Mr. Tiedeman says: "If the drawer or indorser be bankrupt, notice should be given to the assignee, if there be one, particularly if the party has absconded." In one of the latest, and perhaps the most elaborate, of the treatises on the subject of commercial paper—that of Mr. Randolph—the author says: "After the drawer or indorser of a bill has become bankrupt, notice of its dishonor must be given to him or to his assignee. If an assignee has been appointed, and his appointment is known, the notice should be given to him." 3 Randolph, Com. Paper, § 1243. Mr. Wade, in his work on Notice, says: "When the indorser or drawer becomes bankrupt subsequent to drawing or indorsing the bill or note, the notice should be given to the assignee, when one has been selected prior to the dishonor of the instrument." This question seems to have been considered and determined in only three of the American courts. The supreme court of Kentucky, in *Callahan v. Bank of Kentucky*, 82 Ky. 231, in the case of a voluntary general assignment for the benefit of creditors, after a full and careful consideration of the authorities, announced as the law of that state that notice to the assignee in such an assignment would bind the indorser and his estate, and this upon the ground that by this act of the assignor he was under the assignor, in a qualified sense at least, the general representative of his indebtedness. On the other hand the supreme court of Ohio in *House v. Vinton Nat. Bank*, 43 Ohio St. 846, 54 Am. Rep. 818, by a majority opinion, declined to recognize the authority of this case, making a distinction between an assignee under a voluntary general assignment and an assignee in bankruptcy. In this latter case, however, there is a strong dissenting opinion by two of the judges of that court, in which the soundness of the rule as announced by the Kentucky court is earnestly insisted upon. The case of *Casco Nat. Bank v. Shaw*, 79 Me. 876, is in harmony with the rule in *Callahan v. Bank of Kentucky*, *supra*, although the latter case is not mentioned in the opinion of the court. This question has been heretofore undetermined in this state, and we are at liberty, therefore, to establish that rule which is most in accord with what we conceive to be the weight of authority and reason. We are satisfied, therefore, to hold the law to be that, whenever a general assignment is made as contemplated by our law, the assignee in such assignment so far stands in the shoes of his assignor that notice to such assignee of the nonpayment of indorsed paper will bind such indorser.

The judgment of the court below is affirmed.

ARKANSAS SUPREME COURT.

City of LITTLE ROCK, *Appt.*.

Edward FITZGERALD.

(50 Ark. 494.)

The power to require grading for sidewalks is not included in the statutory power to require lot-owners to build and maintain sidewalks.

(October 27, 1894.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County reversing a judgment of the Police Court of the city of Little Rock convicting defendant of violating a city ordinance in reference to the laying of sidewalks. *Affirmed.*

Statement by Wood, J.:

The Act of March 21, 1885, provides (sec. 3): "That in order to better provide for the public welfare, safety, comfort, and convenience of their inhabitants, the following enlarged and additional powers are hereby

conferred upon cities of the first class, viz.: To regulate the use of sidewalks, and all structures and excavations thereunder, and to require the owner or occupant of any premises to keep the sidewalks in front or alongside the same, free from obstruction, and to build and maintain suitable pavement or sidewalk improvements therealong whenever the same may become necessary to the safety or convenience of travel, and to designate the kind of sidewalk improvement to be made and the kind of material to be used by such owner or occupant, and the time within which such improvement is required to be completed. Provided the kind and character of sidewalk improvement for the same street and block shall be uniform. Such sidewalk improvement shall be ordered either by a general ordinance for all property owners or occupants on a certain street or streets, or within a certain quarter where the necessity therefor is general to that extent or by a resolution or order adopted by the city council, and notice served upon the particular individuals owning or occupying premises

NOTE.—Charging expense of grading for sidewalk upon abutting owner.

In the case of *LITTLE ROCK v. FITZGERALD* it was held that the city had no power to require the owner of abutting property to grade for sidewalks under Act March 21, 1885, providing that the city might require the owner or occupant "to build and maintain suitable sidewalk improvements," as the power to require grading, not being granted in express terms, should not be included by interpretation unless reasonably or necessarily implied. Therefore an ordinance under that statute requiring the abutting owner to build a sidewalk and excavate seven or eight feet would be partial, unfair, unreasonable, and void.

This strict construction of such statutes has been uniformly adopted.

In *Ryan v. Altschul*, 108 Cal. 174, it was held that under Cal. Stat. 1885, § 2, p. 147, authorizing an assessment on property on one side of the center line of the street, except for grading, curbing, etc., an assessment for macadamizing and for sidewalk which included grading, was held void, where the work was begun prior to the Amendment of 1889, repealing the exception.

And grading for sidewalks cannot be imposed against the abutting owner under an ordinance providing for the assessment for paving a sidewalk, and "that the expense of its construction shall be assessed against abutting owners, but no part of grading the streets, setting the curbstones, or paving the gutters." *Dickinson v. Worcester*, 138 Mass. 555.

Even where the charter seems to give the power to require the grading by the abutting owner, some cases hold that the city must grade, as under a charter giving the city a lien on abutting lands where the owner neglects to perform "the things required by an order of the common council for making, raising, grading, paving or flagging any sidewalk in the city adjacent to said land." *Hillhouse v. New Haven*, 62 Conn. 344; *Yale College v. New Haven*, 37 Conn. 1.

In *Lewis v. New Britain*, 52 Conn. 568, where the charter was similar to that of New Haven, it was said that the owners of abutting land may be compelled, at their own expense, to grade the front of their land for sidewalks.

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But the question involved in that case was the right to add the cost of future grading and sidewalk to damages in laying out a street. And in reference to this decision the court in *Hillhouse v. New Haven*, *supra*, says the court had no occasion to draw the line of distinction stated in *Yale College v. New Haven*, *supra*, between such grading as is involved in the construction of the street "for its entire width at the proper grade" and such as is incident to the construction of the sidewalk upon the sides of the street, and at the required level above the roadway, since either would be grading, though the latter would be, more strictly speaking, what the charter prescribed a grading for sidewalks, and the latter alone was in the mind of the court.

So under a power to construct sidewalks giving a lien "for the construction of such sidewalk or pavement," the cost of grading cannot be assessed against the abutting owner. *Smith v. St. Louis Mut. L. Ins. Co.*, 3 Tenn. Ch. 681.

And where the charter provided for grading and paving a sidewalk and assessment to be made against the lot or block abutting thereon, it was held to be contrary to the Illinois constitution requiring a public improvement to be assessed upon all the property benefited by the improvement, and in proportion to the benefits received. *Ottawa v. Spencer*, 40 Ill. 211.

So in New Jersey a charter provision that the whole expense of a street improvement shall be imposed on the abutting owners, making no limitation in respect to the matter of benefits, is held void as applied to assessments for a wooden pavement. *Bogert v. Elizabeth*, 27 N. J. Eq. 568.

Under a charter providing that the council may require grading and sidewalks to be done by the owners or occupants of lots fronting on, or adjoining the streets, it is held that the city may order a street to be regulated, graded, and paved at the expense of the owners or occupants of the lots fronting on it, and a tax for such grading and sidewalks was sustained but the mode of apportionment was not shown. *State v. New Brunswick*, 30 N. J. L. 595.

In *Steelfon v. Booser*, 162 Pa. 630, it was held that the term "grading" in a city charter is construed to mean "ordinary filling," a foot or two, perhaps

where the special necessity exists, and in either case the city shall have power to enforce obedience to such sidewalk ordinance, order, resolution or notice by the imposition of fines upon such owner or occupant failing or refusing to obey the same, upon conviction thereof in the police court, in like manner and with like consequences and effect as for a violation of any other ordinance of such city, and each day that such failure or refusal is continued shall constitute a separate offense; and in case such sidewalk improvement shall, after the owner, or his agent, upon notice has failed to fix the same, be constructed by an occupant who holds the premises as a tenant or lessee, he shall have the right to deduct the cost thereof from the rent that may be due or to become due from him, or to hold the possession of the premises for such time as the rental value thereof shall be sufficient to reimburse him for such cost; but nothing herein contained shall be so construed as to prevent such city from proceeding by civil action, or in any other manner provided by existing laws." Accordingly the city council of the city of Little Rock passed Ordinance No. 81, which provides: "Whereas, it has become necessary for the safety and

convenience of travel upon the streets of said city of Little Rock that sidewalks be built, constructed, and maintained; therefore, be it ordained by the city council of the city of Little Rock: Section 1. That the owner or owners respectively, and in their default the tenants or occupants, by lease of each and every lot or block or any part thereof abutting on any street in the city of Little Rock are required to build, construct, and maintain hereafter, a sidewalk along each and every lot or block or part thereof held by them where the same abuts upon any street in the said city, of the kind and material as by this ordinance required." Section 2 names the streets on which sidewalks are to be built, and designates the kind of material to be used on these streets, and provides that the sidewalks are to be "properly laid, well built, subject to the approval of the city engineer." Section 4 provides "that all the sidewalks mentioned in this ordinance shall be built, constructed, and maintained at the proper grade established by the city engineer," and specifies the width for the sidewalks. Section 5 makes a failure or refusal to comply with the provisions of the ordinance within a certain time a misdemeanor,

more, but the question involved was as to the right to recover from the abutting owner the cost of a retaining wall; and it was said that it would be unjust to grade the public driveway at the public expense, and then compel the abutting owner to grade the public footway at his own expense.

In *Wistar v. Philadelphia*, 80 Pa. 505, 21 Am. Rep. 112, it was held that Pa. Pamph. Laws, 626, authorizing regulation at the expense of the adjoining owner, and to grade, pave, and repair, curb and recurb footways or sidewalks, did not authorize the city to rebuild a good sidewalk.

And in *Philadelphia v. Henry*, 161 Pa. 38, it was held that changing the grade will not authorize an assessment for grading and repairing, where there was a good pavement already built, made two years before the grade was established, as the power to tax in such cases is based on special benefits.

But in *Greensburg v. Young*, 58 Pa. 290, it was held that an abutting owner was liable for grading and paving the sidewalk in front of his property, under a city charter authorizing the burgesses to keep the streets in repair and to assess and collect a tax for such purpose and the Pennsylvania Borough Act of 1851, giving the authorities the right to require sidewalks to be graded and paved by lot owners; and it was said that "in those cases where property owners are required by ordinances to do it,—the expense of grading and paving the entire street in front of their respective properties,—no constitutional difficulty in the way of legislation has been judicially sanctioned in any case."

In Iowa it was held that the legislature can authorize municipalities to impose upon abutting lots the cost of street improvements and this power is upheld in a case where the assessment was for the cost of sidewalks including the grading therefor. *Warren v. Henly*, 31 Iowa, 31.

But under the charter of Lebanon, Ohio, providing that the town council shall have the power to require "all owners of a lot . . . to make pavements or sidewalks . . . in conformity with such grade as the town council shall direct," and on failure to comply, the town may construct the same and recover the costs and expense against the proprietor, it was said: "The least onerous way in which the improvements can be made, in our small towns, is to impose upon the proprietors of lots,

more immediately benefited by the work, the duty of grading and paving the walks, etc., contiguous to their own premises, and such mode of assessment is not contrary to the constitutional provision against taking private property for public benefit without compensation. *Bonsall v. Lebanon*, 19 Ohio, 418.

Other cases hold that the assessment for improvement in filling, grading, excavating for sidewalks should be assessed by prorating the same against the property abutting thereon which pro rata is to be on the lot, block, or street improved, according to the provisions of statute or charter. In these cases the question was as to the manner of assessment, and if a prorating is required in a certain manner any other prorating or apportionment will render the assessment void.

So under a charter providing for paving streets and apportionment of costs "equally on the lot holders" on the square, the assessment on a lot for grading and paving sidewalks cannot exceed the proportionate cost of the entire work done opposite to the lots respectively on the same square although by reason of a deep cut and stone wall the cost of work in front of that lot exceeded the average charge upon the entire square. *Lexington v. McQuillan*, 9 Dana, 514, 35 Am. Dec. 159.

So an assessment charging the entire expense in front of a lot on the same is void, under a charter providing for grading and making sidewalks, and requiring that the section ordered improved shall be treated as a whole and that when the whole amount of tax to be raised for that work is ascertained, it shall be equalized among the various lots according to their front or size. *State v. Portage*, 12 Wis. 569 14 Wis. 551.

Where the city charter authorized the city to construct sidewalks, the cost of which was to be defrayed by the owners of the lot fronting thereon, and the ordinance provided that the cost of filling, raising, curbing, and paving each separate sidewalk should be assessed as soon as each sidewalk in each separate block is completed by prorating the cost of filling, raising, curbing, and paving against each separate lot, and it was objected that the assessment for paving was not valid, it was said that if the contract had been to fill in the sidewalk, at a uniform price per square foot without regard to

and fixes the penalty, upon conviction in the police court, at a fine of \$2.50, each day's failure or refusal constituting a separate offense.

The defendant, Edward Fitzgerald, was fined in the police court for a violation of this ordinance. He appealed to the circuit court, where he was acquitted, and the city appealed to this court.

The cause was tried upon the following facts, as agreed to by the parties: "First. The defendant is the owner of the property in block 299, abutting on Water street, in the city of Little Rock, and said block is not in the fire limits. Second. At the time of the beginning of this prosecution the city of Little Rock had fixed the grade of Water street in front of said property by ordinance duly passed. Third. The defendant, by ordinance duly passed, was required to construct and maintain in front of his property a sidewalk according to the terms of the ordinance. Fourth. That at the time of the beginning of this prosecution the defendant had not complied with said ordinance, although duly notified to do so by the proper authorities. Fifth. That before the defendant could lay and maintain a sidewalk on the grade established by the plaintiff it would be necessary to excavate about 150 cubic yards of earth in order to reduce the sidewalk to the grade, and that the cost of such excavation would amount to thirty-five cents per cubic yard, unless the contractor

could sell the dirt, in which case the cost would be reduced to ten or fifteen cents per cubic yard. That the profile made by G. P. C. Rumbough shall be taken as evidence in this case. Sixth. The territory east of Cross to Gaines street on Water street is mostly upon grades subject to ordinary cuts and fills, and on portions of Water street east of Cross there are no cuts or fills necessary. The sidewalk in front of defendant's premises is now in its natural state." There was proof also that on the north side of Water street, opposite defendant's property, it would be necessary to fill in 7 or 8 feet in order to build a sidewalk and to make an embankment of 22 feet wide at the base. On the south side of defendant's block, on Markham street, a cut of 10 or 12 feet would be necessary to reduce the sidewalk to the grade. The owners of property on the north side of Water street, opposite defendant's property, had not built sidewalks, and there were no prosecutions against them for failing to do so. The defendant was tried in circuit court on appeal from the police court, and acquitted. The city appeals.

Mr. J. W. Blackwood, for appellant:

When the act requires a lot owner to build a suitable sidewalk it requires him to do everything that is necessary in the construction and building of a safe structure suitable for the uses to which it is to be put.

This act is constitutional.

the different amount or depth of filling in different localities, and the assessment had followed the contractor, then it might well be claimed that the lot owners were not assessed as authorized by the charter with the "cost" of the sidewalk fronting their lots. *Galveston v. Heard*, 54 Tex. 420.

But under the charter of the same city where the city built a retaining curb wall and passed an ordinance requiring the filling and completion of the sidewalk, and the owner sued for damages from the wall, it was held that it was his duty to have caused the fill to be made, and if the contractor abandoned the contract and the owner was damaged he could not recover. *Highland v. Galveston*, 54 Tex. 627.

Under a charter authorizing the assessment *pro rata* according to the frontage of the abutting property, of one third the cost of grading and paving for streets and sidewalks, the power to charge upon abutting owners their *pro rata* according to the front foot, of the cost of grading and making sidewalks on the streets improved having been recognized as valid prior to the adoption of the state constitution, must be regarded as embraced in the law of the land to which the constitution refers. *Mauldin v. Greenville* (S. C.) 27 L. R. A. 284.

As to constitutionality of frontage rule of assessment for street improvements generally, see *note* to *Raleigh v. Peace* (N. C.) 17 L. R. A. 380.

Under a city charter providing "that the whole cost and expenses of grading and paving a street, are to be defrayed by an equal assessment on the feet front of the property abutting thereon" the cost of grading and sidewalks for the whole street may be apportioned against the blocks by an equal assessment against the feet front, and it was said the act does not contemplate that where more excavating or filling is done in front of one lot than on another, an allowance shall be made therefor in making the assessment. *Schenley v. Com.* 38 Pa. 29, 78 Am. Dec. 369.
28 L. R. A.

A city may construct sidewalks before the street is graded under Kan. Gen. Stat., p. 160, providing for making sidewalks and assessing the costs on abutting owners. *Parker v. Obalies*, 9 Kan. 155.

And may cause the sidewalk to be built on posts above the ground. *Challies v. Parker*, 11 Kan. 384.

The assessment for grading of sidewalks has been recognized in other cases in which the question involved was not the apportionment of such assessment.

In *McNamara v. Estes*, 22 Iowa, 246, it was said that the charter of the city of Keokuk (1853) gives the city council power to levy and collect a special tax on lots, or the owners, for the purpose of curbing, paving, or grading the sidewalks in front of their respective lots, but that this refers alone to sidewalks as distinguished from streets and gives the power to levy a special tax to grade, pave, and curb. The next section applies to streets, but omits the power to grade. The question involved was as to a tax for trimming, curbing, and guttering the streets.

In *Wiles v. Hoss*, 114 Ind. 371, under Ind. Laws Special Session 1899, p. 33, providing that towns may grade and improve streets, the grading for and making sidewalks was charged against the abutting owners in proportion to the cost of the whole length per running foot, but the question in that case was as to the power to construct sidewalks under authority to improve streets and whether a former statute applied.

In *Taber v. Grafmiller*, 109 Ind. 206, the ordinance provided for grading for sidewalks and constructing the same, and assessing the costs against abutting owners, but the question of the mode of assessment for grading was not made or discussed in that case, but it was whether the resolution was sufficient to authorize the improvement, and it was said that "under an authority to improve streets a municipal corporation may improve sidewalks."

In *O'Brien v. Markland* (Ky.) 6 S. W. Rep. 712, a

James v. Pine Bluff, 49 Ark. 199.

The power to pave streets includes the power to furnish and to do all that is necessary, usual, or fit for the paving.

Schenley v. Com. 36 Pa. 29, 78 Am. Dec. 359. Macadamizing of streets includes "trimming" and "guttering."

McNamara v. Estes, 23 Iowa, 246.

A charter providing for paving a street includes sodding a part of it.

Murphy v. Peoria, 119 Ill. 511.

In Michigan the authority of the council was for paving only, but it was held that this included "grading, curb, gutters, cross streets and crosswalks."

Williams v. Detroit, 2 Mich. 562. See also *State v. Elizabeth*, 30 N. J. L. 366; *Steckert v. East Saginaw*, 23 Mich. 113.

A sidewalk can be ordered on one side of a street, and for cause omitted on the other, as where there is a bluff, a gorge, a mountain, etc.

Oakland Paving Co. v. Rier, 52 Cal. 275.

Improvements of streets must of necessity be left largely to the discretion of city authorities.

Murphy v. Peoria and Oakland Paving Co. v. Rier, *supra*.

Messrs. Sterling R. Cockrill and George H. Sanders for appellee.

Wood, J., delivered the opinion of the court:

This court has sustained the Act of 1885 as a proper delegation of the police power. *James v. Pine Bluff*, 49 Ark. 199. Therefore the only question for our consideration is:

provision in a city charter providing for grading, paving, curbing, or guttering one side of a street and making the cost a lien proportionately on the property fronting on the improvement according to the front foot was sustained where one side only was improved, but no question was made as to grading.

In *Dugger v. Hicks* (Ind.) 36 N. E. Rep. 1085, 37 N. E. Rep. 284, under Ind. Rev. Stat. 1894, § 4239, providing that the board of trustees shall state the kind, size, etc., of such improvement, and the ordinance required grading and graveling of the public streets and sidewalks, and the sidewalks to be graded, the assessment against the abutting owner for the improvement was sustained, but the question made in that case was not the right to collect the cost of grading or of the mode of assessment, but whether or not the sidewalk had been made on private property.

In *Birmingham v. Klein*, 8 L. R. A. 360, 39 Ala. 461, an act, providing among other things that the mayor and aldermen shall have power to cause all sidewalks to be graded, leveled, curbed, . . . paved, and to assess the cost upon abutting owners in proportion to the amount of benefit accruing to such abutting owner, was held not to be a tax under Ala. Const., art. 11, requiring that "all taxes levied on property in this state shall be assessed in exact proportion to the value of the property," and limiting the amount of taxes that can be levied or collected in any one year. But in this case there was no question raised as to grading apart from the whole improvement.

In *Buckley v. Tacoma*, 9 Wash. 263, under Wash. Gen. Stat., § 520, providing that a city of the first class shall have power by ordinances to provide for making local improvements and to levy special assessments on contiguous property or others spe-

cially benefited thereby, the city of Tacoma ordered grading and sidewalks at the expense of owners affected, but the question in that case was as to resolution, diagram, and notice and the assessment was invalid for want of notice, and it was said that the charter required assessment by the lineal front foot in proportion to the actual cost.

In *Norwich v. Hubbard*, 22 Conn. 588, the charter of the city of Norwich, Conn., provided that the city may order the proprietor of "lands fronting such sidewalk" at their own expense to level, raise, or form such sidewalks, and on failure of owner to do as required the council may have the same done and the cost should be a lien on the property, but the question involved in this case was as to the effect of a sidewalk improvement lien, including grading as against a mortgagee, and notice to him.

In *Palmer v. Way*, 6 Colo. 100, the grading was done by the city and the only question was as to the assessment for sidewalk tax.

In *Port Huron v. Jenkinson*, 6 L. R. A. 54, 77 Mich. 414, it was said that the charter of the city of Port Huron provides that the city council may prescribe the grade, width, and character of all sidewalks and materials of which the same shall be constructed and may provide punishment by fine or imprisonment for failure to comply, but the question involved was as to the constitutionality of criminal procedure rather than the validity of a charge for grading.

The right to charge upon abutting property the cost of the specific part of street improvements in general on which it fronts is considered in a note to *Davis v. Litchfield* (Ill.) 21 L. R. A. 563.

For the necessity of special benefit to sustain an assessment for a local improvement, see note to *Re Madera Irrigation Dist. Bonds*, (Cal.) 14 L. R. A. 755.

the owner or owners of any lot or land, or on lots or lands through or by which a street . . . shall pass, for the purpose of defraying the expenses of constructing, improving, repairing such streets, such charge to be in proportion to the value of such lot or land as assessed for taxation under the general law of the state." "To provide for the improvement of the streets, sidewalks, etc., they shall have power to direct and require that any or all male persons between the ages of eighteen and forty-five, residents of the city, shall be subject to street duty performable by work, and labor in or upon the streets, sidewalks," etc. Sandel & H. Dig. § 5179. See also sections 5321 *et seq.*, Id., in regard to local improvement districts.

We think it clear that the removing of embankments and filling gulches for the whole of the street, including sidewalks, in order to conform to the established grade, is to be done under some of the above provisions. Abutting owners or occupants may be required only to lay sidewalk or pavement. This includes "all that is necessary, usual, or fit, for laying a pavement." 2 Dill. Mun. Corp. § 794. Mere surface grading, such as removing inequalities of the surface, after the sidewalk has been brought to the general grade of the other part of the street, may be required; for a sidewalk of the kind prescribed could not be laid properly without smoothing and leveling the surface. But such a thing as cutting down hills and filling hollows,—substantial grading,—in our opinion, is not included in the grant of power, and was never contemplated. We are not without authority to support this conclusion. The legislature of Connecticut vested exclusive power in the court of common council of the city of New Haven to construct and maintain streets within its limits. The court of common council ordered proprietors on either side of a certain street to construct a sidewalk in front of their lands respectively. The charter of New Haven provided, among other things, for "the placing of a lien on the land of any proprietor of land or buildings fronting on any highway or street in the city who should neglect or refuse to perform the thing or things required by an order of the court of common council for the making, raising, grading, paving, or flagging any sidewalk or gutter in said city adjacent to the said land or building in the manner and within the time specified in such order." A certain corporation, under the above order, proceeded to construct a sidewalk. Extensive repairs had to be made in a sea wall which supported the walk, before same could be properly laid. In a suit to recover for the costs of the repairs and walk the supreme court of Connecticut says: "Before a court of common council can legally require an owner abutting upon a street to construct a sidewalk in front of his premises, the city must construct the street for the entire width at the proper grade." *Yale College v. New Haven*, 57 Conn. 1. And in a late case, where the plaintiff was seeking to set aside a lien claimed by the city for the expense of cutting down 10 or 12 feet lower than the original grade of plaintiff's land, the con-

tention was that under the charter provisions owners of abutting lands should be required to grade and construct sidewalks at their own expense. The court quoted the language used in *Yale College v. New Haven*, *supra*, and reiterated with emphasis the doctrine there announced. *Hillhouse v. New Haven*, 62 Conn. 344. A statute of Tennessee granted power "to regulate and construct sidewalks and foot pavements," the same as ours, and gave a lien on abutting lots for cost of same. The ordinance made it the duty of lot owners to construct good and substantial "sidewalk or foot pavement." In a suit seeking to enforce the lien for cost of pavement, including an amount for an "embankment, or fill made in order to bring the grade of the sidewalk to the established grade of the street," *Chancellor Cooper* said: "It is obvious in the case before us that neither the law nor the ordinance contemplates any charge upon the owner of the lot beyond the cost of improvement." Only the cost of the sidewalk proper was allowed. *Smith v. St. Louis Mut. L. Ins. Co.* 8 Tenn. Ch. 631. The cases cited by *Judge Dillon* in his second volume, at page 798, § 797, when critically examined in view of the statutes upon which they are based, we believe will not discover any conflict with the opinion we have expressed. *Schenley v. Com.* 86 Pa. 29, 78 Am. Dec. 859; *McNamara v. Estes*, 23 Iowa, 246; *State v. Elizabeth*, 80 N. L. 365. We should decline to follow them if they were *contra*.

The Act of 1885, on which the ordinance is founded, contravenes every principle of criminal jurisprudence in giving power to cities to require the performance of an act which in some instances may be possible, and to treat such failure as a criminal offense, and punish accordingly. In every case we have been able to find upholding such legislation as a proper exercise of the police power, the city has proceeded under the power by civil proceedings, and not criminal. All the cases cited by *Judge Smith* in *James v. Pine Bluff*, *supra*, are cases of this kind. Generally it is sought to subject the property for the cost of the improvement. But this act is highly penal; also the ordinance, in that it seeks by criminal process to subject the party failing or refusing to the payment of a fine, and makes each day of such failure or refusal a separate offense. We think the act approaches the very verge of constitutional sanction. The supreme court of Connecticut, in *Hillhouse v. New Haven*, *supra*, uses this language: "*Judge Cooley* says in his work on Constitutional Limitations: 'Lots above and below an established grade are usually less benefited than the others, because the improvements subject them to new burdens in order to bring the general surface to the grade of the street which the others escape.' So that, if the contention of the defendant were sanctioned, . . . he to whom the improvements would be of the least benefit would be subjected to the greatest expense in making them." So we say in the present case, if the city's contention could be maintained the defendant, according to the proof, would have to cut down the sidewalk 7 or 8 feet to bring it to the grade of the rest of the

street, while those opposite him on Water street would have a deep gulch to fill, requiring an embankment of earth 22 feet wide at the base; all this expense to the lot owners thus situated, in addition to the laying of the sidewalk, while their near neighbors on the same street, whose lots happen to be on the level of the grade established, have only the expense of laying the pavement. An ordinance which operates thus partially and unfairly would be unreasonable and void as to the locality thus affected, even if grading were included in its terms. 1 Dill. Mun. Corp. § 322. Since the legislature has not in express terms conferred the power to require grading, and since we do not find that it is fairly or necessarily implied in the power to "build and maintain sidewalks or pavements," we will not by intendment say that they contemplated the laying of such unequal and oppressive burdens upon abutting property owners. 1 Dill. Mun. Corp. § 321.

The judgment of the Pulaski Circuit Court is therefore affirmed

ST. LOUIS SOUTHWESTERN R. CO.,

Appt.,

v.

Pleas BERRY and Wife.

(80 Ark. 483.)

1. Money sufficient for personal use on the journey may be included in baggage for which the carrier will be liable as an insurer if no more is taken than is necessary or usual for persons of like station, habits, and condition in life on similar journeys.

2. A carrier is liable for the transportation in baggage of money in an amount more than is needed for use on the journey where the passenger in ignorance of the carrier's rules and instructions to the contrary delivers it to the baggage agent and informs him of the amount and he accepts it to ship the baggage.

(April 20, 1895.)

APPPEAL by defendant from a judgment of the Circuit Court for Monroe County in favor of plaintiffs in an action brought to recover money lost while in defendant's possession for transportation. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Sam H. West and J. C. Hawthorne*, for appellant:

The term "personal baggage" does not embrace money.

Davis v. Michigan, S. & N. I. R. Co. 23 Ill. 278, 74 Am. Dec. 151; *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767; *Jordan v. Fall River R. Co.* 5 Cush. 69, 51 Am. Dec. 44; *Dunkley v. International S. B. Co.* 98 Mass. 371; *Merrill v. Grinnell*, 30 N. Y. 594.

Will the statement made to the agent, while he was checking the trunks, that one of them contained the money sued for, without any

consideration, constitute a contract to transport it safely?

The agent was not employed to receive or transport money, he was employed to perform other duties.

St. Louis, I. M. & S. R. Co. v. Hecht, 88 Ark. 868; *Lambreth v. Clarke*, 10 Heisk. 82.

A carrier of one species of property is not necessarily a carrier of all other species of property.

Thomson-Houston Electric Co. v. Simon, 10 L. R. A. 251, 20 Or. 60; *Wiggins Ferry Co. v. East St. Louis Union R. Co.* 107 Ill. 450; *Romar v. Maxwell*, 9 Humph. 620, 51 Am. Dec. 682.

When one delivers baggage to an agent of a carrier engaged in the transportation of money with notice at the time of delivery and purchase of ticket that a certain amount of money is contained in the baggage, and pays the usual charges for such transportation, the carrier would no doubt be liable for its safe delivery; but where the carrier is not engaged in the transportation of money or notice of the contents of the trunk is not given at the time of procuring the transportation, or the usual compensation for transporting such sums of money is not paid, the carrier would not be liable for the loss of money undertook to be carried as baggage under such circumstances.

Perley v. New York Cent. & H. R. Co. 65 N. Y. 874; *Orange County Bank v. Brown*, 9 Wend. 85, 24 Am. Dec. 129; *Weed v. Saratoga & S. R. Co.* 19 Wend. 585; *Parlee v. Drew*, 25 Wend. 459; *Stimson v. Connecticut River R. Co.* 98 Mass. 83, 98 Am. Dec. 140; *Swall v. Allen*, 6 Wend. 335; *Wilcox v. Steamboat Philadelphia*, 9 La. 80, 29 Am. Dec. 436.

Messrs. M. J. Manning and David A. Gates for appellees.

Wood, J., delivered the opinion of the court:

The appellant asked the following instructions: (1) "The jury are instructed that a railway company is not liable for the loss of money shipped as baggage, in excess of an amount necessary to be used while on a journey." (2) "If the jury find from the evidence that the defendant is not engaged in transmitting money, it would not be liable for the loss of money, when shipped as baggage, even if its agents were informed that money was contained in the trunk shipped as baggage." The court refused these, and, in effect charged the jury that if a passenger who had no notice of the company's instructions to its agents forbidding the taking of money for transportation as baggage, delivered to the agent of the railway company a trunk containing money, to be transported as baggage, and informed the agent who checked the trunk that it contained money, and the agent, after being so informed, received the same, that then in case of loss the carrier would be liable. The requests given and refused present the only question for our determination.

The carrier is liable, as insurer, for money which the passenger, bona fide, includes in his baggage to pay traveling expenses, and for personal use on his journey, provided no more is taken than is necessary or usual for

NOTE.—Some authorities on the question of the carrier's liability for money of a passenger as baggage are found in the note to *Carpenter v. New York, N. H. & H. R. Co.* (N. Y.) 11 L. R. A. 750.

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passengers of like station, habits, and condition in life, while on similar journeys. Hutchinson, Carr. §§ 682, 685, 688; Schouler, Bailm. §§ 669-671; Story, Bailm. § 499; 3 Wood, Railway Law, § 401; *Jordan v. Fall River R. Co.* 5 Cush. 69, 51 Am. Dec. 44; Rorer, Railway Law, 988; Angell, Carr. § 115; 2 Beach, Railways, § 901; 2 Redf. Railways, 59. For any amount in excess of this,—which is a question for the jury,—the carrier is not liable, as such, unless he receives it with notice that the quantity is greater than is usually carried by passengers under the same or similar circumstances. And the passenger must observe the utmost candor and good faith in presenting his baggage for transportation, for the carrier is only required to transport according to appearances. If the passenger presents his baggage in a closed receptacle, such as is ordinarily carried as baggage, in order to lay upon the carrier the extraordinary responsibility of insurer the passenger must inform him if it contains any articles which the carrier is not bound to transport as baggage. This for the reason that the carrier, when thus notified, may refuse to carry altogether, or accept and charge an additional sum to the passenger's fare for the onerous liability he thus assumes. Schouler, Bailm. §§ 669, *et seq.*; Hutchinson, Carr. § 685; Edwards, Bailm. § 529; 3 Wood, Railway Law, §§ 401, 406, 408; *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531; 2 Beach, Railways, 902; *Davis v. Michigan, S. & N. I. R. Co.* 22 Ill. 278, 74 Am. Dec. 151; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; 1 Rapalje & M. Dig. of R. R. Law, "Baggage," 538, and authorities there cited. The baggage master is not out of the scope of his employment when he receives more money for transportation as baggage than, by the rules of the company or instructions from his employer, he is authorized to receive, for the carrier does carry some money as baggage. And the agent whose business it is to receive and check for baggage has the implied authority, by virtue of the nature of his employment, and the duties incident to it, to bind his employer, the carrier. Hutchinson, Carr. § 688; 3 Wood, Railway Law, § 408; *Minter v. Pacific Railroad*, 41 Mo. 503, 97 Am. Dec. 238; *Strouss v. Wabash,*

St. L. & P. R. Co. 17 Fed. Rep. 209. As was said by a distinguished judge of New York: "The contract to carry the baggage of passengers, as incident to the contract to carry the person, does not become defined, as to particular baggage, its amounts, or other incidents, until the baggage is delivered to the baggage master." *Isaacson v. New York Cent. & H. R. R. Co.* 94 N. Y. 278, 46 Am. Rep. 142. We conclude that where a passenger, who is ignorant of the rules of instructions of railway companies forbidding their agents to receive money for transportation as baggage, delivers to the baggage agent more money than the carrier is required to transport, and informs the agent of the amount, if he accepts it to ship as baggage, and a loss occurs, the carrier's common-law liability will attach. We are aware that a different rule prevails in some of the states, notably Massachusetts. *Blumantle v. Fitchburg R. Co.* 127 Mass. 322, 84 Am. Rep. 376; *Aling v. Boston & A. R. Co.* 126 Mass. 121, 30 Am. Rep. 667; *Jordan v. Fall River R. Co.* 5 Cush. 69, 51 Am. Dec. 44. See also, *Bomar v. Maxwell*, 9 Humph. 620, 51 Am. Dec. 682; *Collins v. Boston & M. Railroad*, 10 Cush. 506. But the weight of authority is with the rule as we have announced it. *Camden & A. R. Co. v. Baldauf*, 16 Pa. 67, 55 Am. Dec. 481; Hutchinson, Carr. § 685; *Jacobs v. Tutt*, 33 Fed. Rep. 412; *New York Cent. & H. R. R. Co. v. Fraloff*, *supra*; *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30; *Minter v. Pacific Railroad*, *supra*, and other cases cited in brief of counsel for appellee. See Rapalje & M. Dig. of R. R. Law, pp. 536-539, and cases cited. While most of these cases have reference to merchandise in some form, yet the *rationale* of the doctrine, as to it, is equally applicable to money where it is carried as baggage. As to what would be the rule if the money was accepted and carried as freight is nowhere presented. The proof on the part of plaintiffs showed that the agent who checked the trunk was informed of the amount of money it contained before he checked it for transportation.

The instructions, therefore, being in harmony with the law, and the verdict of the jury having evidence to support it, *the judgment of the Monroe Circuit Court is affirmed.*

MONTANA SUPREME COURT.

E. S. STACKPOLE

v.

D. F. HALLAHAN.

(.....Mont.)

1. An election law imported from a monarchy to a republic should not be

NOTE.—The above case makes a noticeable departure from the doctrine laid down in the earlier case of *Price v. Lush* (Mont.) 9 L. R. A. 487, in refusing to hold that all provisions of a ballot law are mandatory in such sense that any failure to comply therewith will necessarily defeat an otherwise valid election. See, on the general subject, *Bowers v. Smith* (Mo.) 16 L. R. A. 754, and *note*, also *Ellis v. May* (Mich.) 25 L. R. A. 323.
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subjected strictly to the rule that the importation of the statute imports also its construction.

2. All the provisions of the Australian Ballot Law are not mandatory to the extent of invalidating an election if some detail as to the nominating certificate is omitted, although they may be mandatory in a direct proceeding to enforce them.

3. An election in which the voters have fully, fairly, and honestly expressed their will is not invalid under the Montana Australian Ballot Law of March 13, 1899, because the certificate of nomination of the successful candidate, who was selected to fill a vacancy, did not show that fact or the fact that the committee nominating him had power to fill the vacancy, or because no declination of the person previously

nominated was filed, where the officer with whom the certificates were filed had never been notified of any previous nomination, and the committee in fact had full power to fill the vacancy.

4. The failure of a certificate of nomination to specify as required by statute the business address of the candidate and the chairman and secretary of the committee who make the certificate, is not material where it states the names, address, and business of each, which is in fact the same as that given for him in the certificate.

(April 15, 1895.)

A PPEAL by both plaintiff and defendant from a judgment of the District Court for Deer Lodge County in an election contest over the office of treasurer of Deer Lodge County; the plaintiff appealing from so much of the decision as held that no one was elected, and the defendant appealing from so much as refused to recognize his title. *Reversed on defendant's appeal.*

Statement by De Witt, J.:

This is an election contest, a statutory proceeding brought by E. S. Stackpole, asking that it be determined that he, and not D. F. Hallahan, was elected treasurer of Deer Lodge county, at the general election in November, 1894. It was determined by the district court that neither Stackpole nor Hallahan was elected. Each party appeals.

For convenience in this statement, and in the opinion below, instead of speaking of the parties as appellant or respondent, or contestant or contestee, we will simply use their personal names. The case was tried to the court without a jury. Very ample findings of fact and conclusions of law were made by the court. There is no question here as to the evidence, and our consideration of the case is simply whether the judgment upon the findings was correct. The facts, as they appear in the findings, are as follows: At a convention of the Republican party of Deer Lodge county, held September 1, 1894, Stackpole was nominated for county treasurer. A certificate of his nomination was duly filed with the county clerk and recorder. No question is made as to his certificate. The People's party of Deer Lodge county regularly held their convention on the 23d day of June, 1894. That convention duly nominated J. R. Whitmire for county treasurer. No certificate of Whitmire's nomination was ever made by the officers of the convention, or filed with the county clerk. That convention named a county central committee. It also passed a resolution authorizing that committee to fill any and all vacancies on the ticket of the People's party for county officers that then existed, or that might thereafter occur from any cause. No certificate of Whitmire's nomination being filed, he declined to be a candidate for county treasurer, and notified the county committee of his declination of said nomination, and his refusal to be a candidate. The county committee thereupon duly met on September 5, 1894. The whole committee was present. They met for the purpose of nominating a candidate of their party for the office of

county treasurer, to fill the vacancy caused by the declination of Whitmire. At that meeting D. F. Hallahan was nominated for the office of county treasurer, to fill the vacancy. The chairman and secretary of the committee were duly instructed to file the proper certificate of his nomination. They thereupon made and filed with the county recorder the following certificate: "Deer Lodge, Mont., 10/3, 1894. At a regular meeting of the county central committee of the People's party of Deer Lodge Co., held at Anaconda, Mont., Sept. 5th, 1894, the following nominations were made for county treasurer: D. F. Hallahan, of Anaconda, Mont., wholesale liquor dealer. For county surveyor, J. P. Mitchell, of Deer Lodge, Mont., surveyor and assayer. Chairman, Dr. A. H. Mitchell, physician, Deer Lodge, Mont. E. B. Hasford, bookkeeper, Anaconda, Mont. E. B. Hasford, Sec. A. H. Mitchell, Chairman." This was filed on October 8d, within the time required by law. The clerk and recorder of Deer Lodge county made up the official ballot for use at said election from the nominations on file in his office. On that ballot he placed the names of E. S. Stackpole, Republican; D. F. Hallahan, Populist; and James B. McMaster, Democrat,—as candidates for county treasurer; also all the candidates of the different parties for various offices. He caused the same to be published daily for more than ten consecutive days immediately prior to the said election, in the Anaconda Standard, a daily newspaper of general circulation, published in the county. Stackpole had knowledge of this publication. Hallahan's name was printed on the official ballot used at that election, and his name was not written thereon by any elector. At that election Stackpole received 1,554 votes; Hallahan, 1,794; and McMaster, 1,181. All these ballots were duly and regularly counted and canvassed, and the returns duly made to the clerk and recorder within the time allowed by law. They were counted and tabulated by the canvassing board, which declared that Hallahan had received the highest number of votes for county treasurer, and declared him elected, and issued him a proper certificate. Hallahan qualified for taking said office by filing his oath and bond. The Republican party, People's party, and Democratic party are each political organizations existing in said county. The business of D. F. Hallahan is that of wholesale liquor dealer, and his residence and business address is Anaconda, Mont. The business of the chairman of the county committee of the People's party is that of physician. His name is A. H. Mitchell, and his business address and residence is Deer Lodge, Mont. The business of the secretary of the committee, E. B. Hasford, is that of bookkeeper, and his business address and residence in Anaconda, Mont. Contestant, E. S. Stackpole, resides at the town of Deer Lodge, which was his business address, and his business was, at the time said convention was held and certificate filed, that of justice of the peace. That the residence of the chairman of the said Republican convention was Anaconda, Mont; his business, merchant;

his business address, Anaconda, Mont. That the residence of the secretary of said Republican convention was Deer Lodge, Mont.; his business, hotel clerk; his business address, Deer Lodge, Mont.

Upon these findings the court filed the following conclusions of law: "(1) That the contestee, D. F. Hallahan, was not nominated for the office of treasurer of Deer Lodge county, Mont., to be voted on as a candidate at the general election held for county and other offices in the state of Montana, November 6, 1894, by any convention of delegates representing a party or principle, nor by any committee duly authorized for that purpose by such a convention, nor by the electors of said county. (2) That the name of the said Hallahan was improperly printed upon the official ballot prepared for said election by the clerk and recorder of said Deer Lodge county. (3) That the said Hallahan was not elected to the said office of treasurer of Deer Lodge county at said election, and is therefore not entitled to hold said office. (4) That E. S. Stackpole, the contestant, did not receive the highest number of legal votes, and is therefore not entitled to be declared elected, nor to hold said office of treasurer for said county of Deer Lodge. (5) That no other candidate or person received any greater number of votes than the said E. S. Stackpole, and there is therefore no other person entitled to be declared elected or to hold said office. (6) That no one was elected to the office of treasurer of Deer Lodge county at the general election held for county and other officers in the state of Montana on November 6, 1894, and said election was void as to said office. Let judgment be entered accordingly, each party paying his own costs." Judgment was then entered that neither Stackpole nor Hallahan had been elected treasurer of Deer Lodge county. As noted above, each party appeals.

The portions of sections 11 and 12 of the Act of March 13, 1889, commonly called the "Australian Ballot Law," which are applicable to this contention, are as follows:

"Sec. 11. Whenever any person nominated for public office, as in this act provided, shall, at least twenty days before election,

in a writing signed by him, notifying the officer with whom the certificate nominating him is by this act required to be filed, that he declines such nomination, such nomination shall be void.

"Sec. 12. Should any person so nominated die before the printing of the tickets, or decline the nomination, as in this act provided, or should any certificate of nomination be or become insufficient or inoperative from any cause, the vacancy or vacancies thus occasioned may be filled in the manner required for original nominations. If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, such committee may, upon the occurring of such vacancies, proceed to fill the same. The chairman and secretary of such committee shall thereupon make and file with the proper officer a certificate setting forth the cause of the vacancy, the name of the person nominated, the office for which 38 L. R. A.

he was nominated, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination. The certificate so made shall be executed in the manner prescribed for the original certificate of nomination, and shall have the same force and effect as an original certificate of nomination. When such certificate shall be filed with the secretary of the state, he shall, in certifying the nominations to the various county clerks, insert the name of the person who has thus been nominated to fill a vacancy in place of that of the original nominee. And in the event that he has already sent forth his certificate, he shall forthwith certify to the clerks of the proper counties, the name and description of the person so nominated to fill a vacancy, the office he is nominated for, the party or political principle he represents, and the name of the person for whom such nominee is substituted."

The People's party convention delegated to its county committee power to fill vacancies on the People's party county ticket. The county committee filed the vacancy caused by the declination of Whitmire by nominating Hallahan, and by filing a certificate of his nomination with the county clerk. That certificate was defective; and did not comply with the provisions of said sections 11 and 12, in the particulars as follows, which we will note *seriatim*: (1) Whitmire did not "decline the nomination as in this act provided." Section 12. To decline a nomination as in the act provided is to notify, in writing signed by the party declining, "the officer, with whom the certificate nominating him is by the act required to be filed, that he declines such nomination." Section. 11. (2) Hallahan's certificate itself does not show that he was nominated to fill a vacancy. (3) The certificate does not set forth the cause of the vacancy. (4) The certificate does not give the name of the person for whom Hallahan was to be substituted. (5) The certificate does not set forth that the committee had authority to fill the vacancy. (6) The certificate does not set forth in direct language the business address of Hallahan. (7) The certificate does not set forth in direct language the business address of the chairman or the secretary of the People's party committee. In these seven items, in making and filing of Hallahan's certificate, it did not technically comply with the provisions of sections 11 and 12 of the Australian Ballot Law. For these reasons the district court held that Hallahan was not nominated, and, not being nominated, was not elected, treasurer of Deer Lodge county.

Messrs. W. H. Trippet and Rodgers & Rodgers, for contestant:

The provisions of this act relative to the method of making nominations for public office and certifying the same for record are mandatory and not directory.

Price v. Lush, 9 L. R. A. 467, 10 Mont. 61. The nomination of Hallahan cannot be treated as an original nomination made by the

People's party convention, as was the nomination of Benton, adjudged to be in *State v. Benton*, 18 Mont. 308.

Powers v. Smith, 16 L. R. A. 754, 111 Mo. 45. *Messrs. T. O'Leary and Smith & Word*, for contestee:

Where no certificate of nomination had been made or filed by the convention, there was no danger of the county clerk being misinformed as to which one of two candidates of the same party was the proper one to place on the official ballot. If Whitmire's name had been certified by the convention to the county clerk, in order to inform the clerk and relieve him from the necessity of placing his name on the ticket, the certificate of Hallahan must have contained the information required by section 12.

Lucas v. Ringrud, 8 S. Dak. 355.

If *Price v. Lush*, 9 L. R. A. 467, 10 Mont. 61, is to be followed, then the certificate of Hallahan is defective; but if the doctrine in the later cases of *Simpson v. Osborn*, 52 Kan. 823, and *State v. Benton*, 18 Mont. 308, is correct, then the certificate of Hallahan conforms thereto.

Contestant knew Hallahan's name would be placed on the official ballot by the county clerk and recorder. If it were wrong to do so he should have made his objection known before election. It is too late now, and he as well as all others, under the provisions of section 19, Act Mar. 18, 1889, is estopped to contest the election now for technical defects in the certificate.

Allen v. Glynn, 15 L. R. A. 743, 17 Colo. 838; *Bowers v. Smith*, 16 L. R. A. 754, 111 Mo. 45; *State v. Sazon*, 18 L. R. A. 721, 30 Fla. 668; *Simpson v. Osborn*, *supra*; *Rathbourn v. Hamilton*, 53 Kan. 470; *Boyd v. Mills*, 25 L. R. A. 486, 53 Kan. 594.

The acts of any officers of registration or election, when free from fraud, will not vitiate an election or defeat the will of the voters.

McCrary, Elections, § 105.

The votes cast for each of the candidates for treasurer were all cast by legal and qualified electors, and contestee Hallahan received a plurality of 240, being the highest number of votes of the legal or qualified electors and hence legal votes, and under our Constitution, section 13, article 9, he was by the canvassing board declared elected, and should be so declared by the court.

McCrary, Elections, §§ 292, 298; *Com. v. Chulley*, 56 Pa. 270, 94 Am. Dec. 75; *Saunders v. Haynes*, 13 Cal. 145; *State v. Smith*, 14 Wis. 497; *Opinion of the Judges*, 83 Me. 587; *State v. Boal*, 46 Mo. 528; *State v. Vail*, 53 Mo. 97; *People v. Klute*, 50 N. Y. 451, 10 Am. Rep. 508.

De Witt, J., delivered the opinion of the court:

We are of opinion that the learned judge of the district court was justified in holding, as he did, as to Hallahan's certificate in this case, on the authority of *Price v. Lush*, 10 Mont. 61, 9 L. R. A. 467. We are also of opinion that while the judgment in *Price v. Lush* was perhaps correct, the doctrine of that case must be modified in some respects. *Price v. Lush* was one of the pioneer American decisions upon the Australian ballot law, and at the time of its rendition no American authority was at the command of this court. 26 L. R. A.

As to the decision of *Price v. Lush*, perhaps we may remark that we are willing, in the language of *Mr. Justice Field* in the case of *Barden v. Northern Pac. R. Co.*, 154 U. S. 322, 38 L. ed. 1000, to "take the responsibility of any conflict with the views now expressed. It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience." In what respect we shall modify the decision of *Price v. Lush* will appear as we treat the case before us. We shall proceed to examine the defects in Mr. Hallahan's certificate, as they are set forth and numbered in the statement preceding this opinion, and shall state our views as to what should be the result of these defects when they are brought to the consideration of the court at the time and under the facts and circumstances shown by a court's finding of facts in this case.

1. It is true that Whitmire did not decline his nomination in the manner provided by sections 11 and 12 of the Australian Ballot Law. That statute provides that a written declination shall be filed with the officer with whom the certificate of nomination of such person declining is required to be filed. The county clerk is that officer in this case. But Whitmire's certificate of nomination had never been filed. He refused the nomination before the time expired in which his certificate must be filed. The county clerk had no evidence filed with him showing that Whitmire had been nominated. He officially knew nothing about Whitmire's nomination. If a nominee declines a nomination, it certainly is an expedient provision of law that the officer holding the official record of the nomination shall have a formal written declaration of the declination of the candidate, that such officer may have substantial authority for leaving a nominee's name off of the ticket. But the county clerk needed no such authority in this case to leave Whitmire's name from the ticket. He never would have put his name on the ticket. He never had authority so to do. What is the substantial reason, then, of requiring the county clerk to have authority to leave Whitmire's name off of the ticket when he never had authority to put it on? It would be a ceremony wholly useless to any one, benefiting no one, securing no one any rights, and the omission of it working no one any wrong. Without holding fully, in this respect, that the reason of the law ceasing the law ceases, for there might perhaps be circumstances when the question could be raised in some connections, which do not now occur to us, where we might not be prepared to hold that the law ceased, yet we do hold that under the findings of fact in this case, which we shall more fully discuss below, the omission of Whitmire to file a declination with the county clerk was not such a substantial disregard of the statute as to wholly nullify Hallahan's nomination, in consideration of the other facts of this case, and the time and place and manner in which the objection was made for the first time.

2. Our view of this defect No. 1 disposes of defect No. 2. See statement of facts. Hallahan's certificate did not show that he was nominated to fill a vacancy, but, as Whitmire's certificate had never been filed, the information to the county clerk that Hallahan's nomination was to fill a vacancy was not useful or important. When Hallahan's certificate came to the county clerk it worked no change in the records as they were before the clerk. No nomination having been filed with the county clerk, he had no substitution to make. Hallahan was not to be put in the place of any one already on the records of the clerk. By no possibility could any one be injured upon the records with the clerk. Again, was this such a substantial disregard of the statute as should nullify Hallahan's nomination, when the question is raised as it is in this case?

Defects 8 and 4 are that the certificate does not set forth the cause of the vacancy, and does not give the name of the person for whom Hallahan was to be substituted. These defects fall under the same view as we have expressed as to those numbered 1 and 2.

5. The fifth defect is that the certificate does not set forth that the committee had authority to fill the vacancy. This is true. The law requires that this fact should be set forth. The certificate did not give this fact. It was a fact, however, that the committee did have authority to fill a vacancy. See the facts as set forth in the statement of the case. Therefore, the committee having full power to fill the vacancy, is the fact that they did not state this in the certificate such a defect as shall nullify the election, under the circumstances before us in this case?

6 and 7. The certificate does not set forth in direct language the business address of Hallahan, or that of the chairman or secretary of the People's party committee. The certificate gives the name and the address and the business of both Hallahan and the chairman and secretary of the committee. The statute says that the certificate shall give the business address also. We are of opinion that, when the name and business and address are given, it is an extremely technical objection to say that the business address is not, in effect, given. Such are the defects in the certificate of Hallahan's nomination. Technically, these defects are in disregard of the provisions of sections 11 and 12 of the Ballot Law. As we have shown, and as we think would be accepted by any one, none of these defects are extremely substantial matters, when first brought to the attention of a court, as in this case. But we wish here to guard our language carefully. We will state that it may be that there are times, circumstances, or places, or manner of raising the question where and when the defects described may, by a court, be considered, for some reasons, substantial. But in this inquiry we limit ourselves to the consideration of these defects as they are brought before the court at this time, in the manner and under the circumstances, and in connection with the facts as they appear by the findings of the court in this case. We believe that, from the point of view which we occupy,

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and which the district court occupied, as we shall demonstrate below, these defects in Hallahan's certificate are of the nature of the mint, the anise, and the cummin, and not of the weightier matters of the law. Gospel of Matthew, chap. xxiii. 23.

It is now important to note that the defects in Hallahan's certificate were simply the absence of statements of certain facts, and not the absence of the existence of the facts. While it is not stated in the certificate to be the fact, still it is the fact, that Whitmire declined his nomination in the only manner practicable for him to make his declination. Also it is the fact that Hallahan was nominated to fill the vacancy. It is the fact that the cause of the vacancy was Whitmire's declination. It is the fact that Whitmire was the person for whom Hallahan was substituted. It is the fact that the committee had authority to fill the vacancy. It is the fact that the business address of Hallahan and the chairman and secretary of the People's party committee was the same as the address of these persons given in the certificate. It is the fact that Hallahan was duly nominated by the committee having such authority. He was qualified to hold the office. He received 1,794 of the votes cast, a plurality of 240 over any other candidate. The ballots cast for him were regular, and were cast by legal voters. He was the choice of the nominating authority of his party. He was the choice of the voters of his party. His nomination, or his certificate of nomination, was never attacked, until after an election, the honesty and fairness of which have never been questioned. Therefore we come to this proposition: Under all the facts in this case, does the Australian ballot law contemplate that an election shall be declared null by reason of the defects in the nominating certificate such as exist in this case? We think not. In holding this view, we are constrained to depart, to some extent, from the doctrine announced in *Pries v. Lush*, *supra*. In that case it was said: "The statement of contest points out many particulars wherein the foregoing requirements of the statute have not been complied with. Are these provisions directory or mandatory? When this question is decided, the appeal will be determined." 10 Mont. 68, 9 L. R. A. 469. In the conclusion of the opinion it was said: "The principle which has called into being this law, that prescribes the conditions for the nominations of candidates for office before the day of election, demands the enforcement of every provision." 10 Mont. 72, 10 L. R. A. 479. That case has generally been thought to hold that every provision of the ballot law must be strictly complied with, or the election of a candidate not so complying will be void. But it was not necessary to so hold in that case. The case was decided upon the pleadings. It was held that the statement of the contest was sufficient in law. That statement set forth a violation of almost every provision of the ballot law. All that this court necessarily held in that case was that a motion to quash the statement should not have been sustained. But we are satisfied that the declination went

too far in holding absolutely (if it did so, as generally thought) that all the provisions of the ballot law are mandatory, to the extent of invalidating an election if some detail as to a nominating certificate is omitted. The law may be mandatory in this: that, as it requires certain things to be done, if the direct question arose as to their being done or left undone, in some proceeding to determine that question, a court might hold that they should be done. As, for instance, the issuing of some process forbidding the filing of the certificate which did not comply with the law. *Miller v. Pennoyer*, 23 Or. 364. But that is a different proposition from holding that, if such things are not done, the result must be disenfranchisement of a plurality or majority of the voters of the district. In this connection we cite as follows from the Oregon case, just above referred to: "But however this may be, and whatever may be the correct interpretation of section 49, we are all agreed that the mistake, if it was a mistake, in printing the name of Mr. Pierce on the 'official ballot,' in both the People's and Democratic groups of electors, did not deprive the voter who cast such a ballot of the elective franchise, or the candidate for whom it was cast, of the benefit of such vote. Under the law as it now exists, neither a voter nor candidate has any control or voice whatever in the arrangement and publication of the names or forms of the ballot, and the voter is either compelled to vote the 'official ballot,' as prepared by the county clerk, or not vote at all. In such case, in the absence of an affirmative declaration in the statute that a ballot containing the name of a candidate in more than one place is void, and shall not be counted, we are unable to agree to the doctrine that an error of the county clerk in construing a doubtful provision of the law should disenfranchise a large number of voters, who are in no way responsible for the error or mistake; and such is the effect of the decisions under similar ballot laws. *Bowers v. Smith*, 111 Mo. 45, 16 L. R. A. 754; *Allen v. Glynn*, 17 Colo. 338, 15 L. R. A. 743; *Northcole v. Pulaford*, 44 L. J. C. P. 217. The law is 'mandatory,' in the sense that it demands and requires the county clerks, in the preparation of the 'official ballot,' to strictly comply with all its provisions, but not in the sense that a voter's right to exercise its elective franchises will be lost because of some technical mistakes of the county clerk in printing the names of candidates upon the ballot. Such a construction of the law would not only render the election invalid on account of an honest mistake of a county clerk, but would open the door to the gravest fraud. It would place the power in the hands of a dishonest officer to disenfranchise the voters of his county, as well as cause the defeat of any particular candidate. To defeat the will of the people or a particular candidate, it would only be necessary to furnish the electors, or a part of them, with ballots slightly variant or differing from those prescribed by law. Unless the law is clearly mandatory, or in some way declares the consequences of a departure from its provisions, 28 L. R. A.

the court ought not to defeat the will of the people, when fairly expressed, because of some technical error or mistake in the form of the ballot, and in this case there is no claim or suggestion of fraud on the part of any one, or that the returns now in the possession of the secretary of state do not correctly represent the will of the people, as expressed at the polls."

As to the views which courts have taken of defects in certificates of nomination, and as to the spirit of the provisions of the Australian ballot law, we quote from the following decisions:

Simpson v. Osborn, 52 Kan. 328: "We are unable to see that very serious harm can come from the printing of the name of a candidate on the official ballot, even though the certificate of his nomination be informal. The people, on election day, will vote only for the candidates of their choice, and are not likely to be seriously misled by any fraudulent or unauthorized nomination. On the other hand, most deplorable consequences might ensue if contentions over the regularity of nomination papers are to be prolonged past the time when the officers charged with the duty of certifying to the nominations, and causing ballots to be printed, are required by law to act in preparing for the election."

State v. Allen (Neb.) 62 N. W. Rep. 35: "The grand design of the Australian ballot law was the purity of elections, and to protect the voter, and public at large, from the effects of fraud and intimidation; and the construction given the act should, if possible, be in harmony with its beneficent object. A cardinal rule for the construction of statutes is that, in case of ambiguity in an act, the courts will adopt that construction best adapted to promote the general object, and most conformable to reason and justice. See *Sedgw. Stat. & Const. L.* 196. We must not, however, be understood as holding the provision of the ballot law under consideration to be mandatory. Generally speaking, provisions which are not essential to a fair election will be held to be directory merely, unless the contrary clearly appears from the act itself. *State v. Russell*, 34 Neb. 116, 15 L. R. A. 740, and authorities cited."

State v. Saxon, 30 Fla. 668, 18 L. R. A. 721: "Statutes tending to limit a citizen in the exercise of the right to vote should be liberally construed in his favor, and exceptions which exclude a ballot should be restricted, rather than extended, so as to admit the ballot if the spirit and intention of the law is not violated, although a liberal construction would violate it. The result, as shown by the ballots deposited by legal electors, must not be set aside, except for causes plainly within the purview of the statute." "The object intended to be effected was the independence of the voter, and this was sought to be secured by prescribing to a certain extent the form of the ballot, and excluding from it whatever was within the prohibition of the provision, and thereby securing the secrecy of the ballot; inviolable secrecy as to the person for whom an elector may vote being the material guaranty of the

constitutional mandate that voting at popular elections shall be by ballot. *State v. Anderson*, 26 Fla. 240, 259. The nearer the lawful approach to a perfect uniformity of ballots, the more perfectly is the secrecy of the ballot, and consequently the independence of the voter, secured. The greater the uniformity, the less the possibility of distinguishing marks. It is, however, not to be lost sight of, that a ballot will never be vitiated by anything which is not clearly within the prohibiting words and meaning of the statute. The elector should not be deprived of his vote through mere inference, but only upon the clear expression of the law."

Boyd v. Mills, 58 Kan. 594, 25 L. R. A. 486: "The departure from the law in matters which the legislature has not declared of vital importance must be substantial in order to vitiate the ballots. This appears to be the general current of all the authorities. In *Bowers v. Smith*, 111 Mo. 61, 16 L. R. A. 754, it is said: 'If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declarations, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence as to prevent a full and free expression of the popular will.'"

Returning again to *Price v. Lush*, we observe that the doctrine was there invoked that, by the adoption of a statute of a foreign country, the subject of which was new to this jurisdiction, we impliedly adopted the construction given to such statute by the courts of such foreign country, provided our own statute, as enacted, was silent as to the matter of construction. Eminent authority was cited in support of that doctrine, as remarked in *State v. Barber* (Wyo.) 32 Pac. Rep. 14. That this general doctrine should obtain we have no doubt. It has often been declared by this court. *Lindley v. Davis*, 6 Mont. 453; *Territory v. Stears*, 2 Mont. 380; *First Nat. Bank of Butte v. Bell Silver & Copper Min. Co.* 8 Mont. 52.

But we think that in *Price v. Lush* the doctrine should have been taken with a modification, which escaped the attention of the court. The Australian ballot law was adopted from a monarchical government,—a limited monarchy, perhaps, but still of the nature of a monarchy. The law was brought from such a government to a republic. In the former the tendency is to limit and restrict the electoral franchise. In the latter the tendency is to extend the same. The particular form of ballot law known as the "Australian System" was new to our jurisdiction. But construction of election laws generally was not with us a new field of law; and, in the construction of election laws, the whole tendency of American authority is towards liberality, to the end of sustaining the honest choice of the electors. As said by *Chief Justice Groesbeck*, in *State v. Barber* (Wyo.) 32 Pac. Rep. 28: "Although our statute is a very faithful copy of the Australian ballot law, I see no reason for adopting the con-

struction of the British courts, which appears to be most rigid. I do not see why this law should be more strictly construed than any other statute, or why different rules of construction from those invariably followed by the courts should be adopted in construing the statute." See also cases above cited, and cases cited in the brief of counsel for Hallahan.

We are of opinion that an election law imported from a monarchy to a republic should therefore not be subjected strictly to the rule that the importation of a statute imports also its construction. In this respect, and for the reason suggested, we are of opinion that *Price v. Lush* extended the rule to an application not warranted by our history, our institutions, and the former decisions of American courts upon the construction of election laws. These views lead us to the opinion that the provisions of our Australian ballot law should not be construed as strictly mandatory, when the question of their observance or disobedience is raised under the facts and circumstances found in the case at bar. *Price v. Lush*, however, is distinguishable from the case at bar in this respect, as remarked above in this opinion, that that case was decided upon the pleadings and nearly the whole ballot system appeared to have been disregarded. It did not in that case appear that facts omitted to be stated in the certificate were absolutely existent; but in the case before us the defects in the certificate of nomination were simply omissions to state facts not particularly substantial, when indeed, the facts so omitted to be stated did exist, and were so found by the court on the trial. That was not the case in *Price v. Lush*.

As to whether the provisions, here under consideration, of the Australian ballot law, as to certifying a nomination, are to be considered directory or mandatory, we are of opinion that the correct view is this: That while courts may have held that such provisions are mandatory, when the question was directly raised in some proceeding demanding that such provision should be complied with, or in some proceeding asking that an officer be required to file a certificate which was defective, and he made such defect a defense for his refusal, yet they should not be held to be mandatory in a case like the one at bar, where the nomination has been duly made, a certificate filed, the name placed upon the ballot, the candidate voted for and elected by a plurality of all the legal votes cast, and the effect of giving a mandatory construction of the provision under consideration is absolutely to disenfranchise a plurality of the voters of the district, when no question is made that their will has not been fully, fairly, and honestly expressed at the polls. *State v. Barber* (Wyo.) 32 Pac. Rep. 28; *Lucas v. Ringrud*, 8 S. Dak. 355; *State v. Saxon*, 30 Fla. 668, 18 L. R. A. 721.

In this connection section 18 of article 11 of the Constitution is pertinent: "In all elections held by the people under this constitution, the person who shall receive the highest number of legal votes shall be declared elected." To hold such provisions of a law mandatory is not within the rules as

to mandatory and directory construction of statutes. We said in *First Nat. Bank of Helena v. Neill*, 18 Mont. 882: "As to whether language should be construed as mandatory, or directory, the doctrine is well stated in *Wheeler v. Chicago*, 24 Ill. 105, 76 Am. Dec. 736, as follows: 'The word "may" is construed to mean "shall" whenever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers. And so, on the other hand, the word "shall" may be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or the individual, by giving it that construction. But, if any right to any one depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit. But, where no right or benefit to any one depends upon the imperative use of the word, it may be held to be directory merely.' So in the case at bar. The moving party's right to his compensation given by statute for the trouble and expense of his motion depends upon giving the word 'shall' an imperative construction, and, as remarked in the Illinois case, 'the presumption is that the word was used in reference to such right or benefit.' See also *Blake v. Portsmouth & O. Railroad*, 39 N. H. 435; *Ex parte Jordan*, 94 U. S. 251, 24 L. ed. 125; Sedgw. Stat. & Const. L. 816-825."

We note the following from Endlich on Interpretation of Statutes: "When a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of noncompliance, the question often arises, What intention is to be attributed by inference to the legislature? Where, indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to the intention." Section 431. "It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience (and that, where an act requires a thing to be done in a particular manner, that manner alone must be adopted). But the question is in the main governed by considerations of convenience and justice, and when nullification would involve general inconvenience (or great public mischief) or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature." Section 433. "On the other hand, the prescriptions of a statute (often) relate to the performance of a public duty; and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those intrusted with the duty, without promoting the essential aims of the legislature. In such case, they are said not to be of the essence or the substance of the thing required, and, depending upon this quality of

not being of the essence or substance of the thing required, compliance being rather a matter of convenience, and the direction being given with a view simply to proper, orderly, and prompt conduct of business, they seem to be understood as mere instructions for the guidance and government of those on whom the duty is imposed or, in other words, as directory only. The neglect of them may be penal, but it does not affect the validity of the act done in disregard of them. It has often been held, for instance, when an act ordered a thing to be done by a public body or public officers, and pointed out the specific time when it was to be done, that the act was directory only, and might be complied with after the prescribed time. Such is, indeed, the general rule, unless the time specified is of the essence of the thing, or the statute shows that it was intended as a limitation of power, authority, or right." Section 436. "In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves, unless a contrary intention can be gathered from the statute, construed in the light of other rules of interpretation." Section 437.

Under these views of directory and mandatory statutes, we cannot hold that the matters omitted from Hallahan's certificate were mandatory, when the question is raised as it is in this case. The statute does not declare that noncompliance with these matters shall nullify the election. Endlich, Interpretation of Statutes, § 481; *Boyd v. Mills*, 53 Kan. 594, 25 L. R. A. 486; *Keller v. Touline* (Miss.) 7 So. Rep. 508; *People v. Onondaga County Board of Canvassers*, 129 N. Y. 895, 14 L. R. A. 624. The whole aim and object of the legislature are not defeated by such noncompliance. Endlich, Interpretation of Statutes, § 481. If the election is to be nullified, it would, as observed in Endlich, involve general inconvenience and great public mischief and injustice to innocent persons, without promoting the real aim and object of the legislature. Endlich, Interpretation of Statutes, § 433. We cannot believe that such was the intention of the act.

Referring again to the case of *First Nat. Bank of Helena v. Neill*, quoted above, we have to observe in the case at bar that the right of no one depends upon giving these provisions of the statute a mandatory construction. No right is preserved by such construction, but, on the other hand, a right would be destroyed: that is, the right of the person having the highest number of legal votes cast to be declared elected. Const. art. 9, § 13. But, by giving these provisions a directory construction, this same right is preserved. Surely, such construction should prevail in this case. Such are our views as to this important matter. It was claimed in the argument that our decision in *State v. Benton*, 13 Mont. 306, looked in the direction of the views now expressed. If it did, we are satisfied that it looked in the right direction. We said in that case: "The decision in this case is placed solely upon the ground

discussed hereinbefore, and all other questions are reserved." So, in this case at bar, we limit our remarks to the facts of the case, in this, namely, that when such defects in a nominating certificate as existed in the one which we have considered are brought before a court in a proceeding such as the one at bar, and with the facts as they are found here, we are of opinion that the said described requirements of the Australian ballot law, as to certifying nominations, must be held to be directory only. Any other construction of these provisions of the Australian ballot law would convert a great reform measure into a trap and a snare for the innocent and the honest, and would subject the will of the people in elections to the accidents of inadvertence and the tricks of the disingenuous. While the statute would seek to cast out one evil spirit, it would take into the political house thus swept and garnished seven other more dangerous spirits, and the last condition of the state would be worse than the first. Gospel of Luke, chap. xii. 24, 26. There need be no new trial in this case. The findings are all made, and are not attacked. They are sufficient upon which to enter judgment. *Woolman v. Garringer*, 2 Mont. 405; *Collier v. Ervin*, Id. 557; *Barkley v. Teleke*, Id. 435.

It is ordered that the judgment of the District Court be reversed, and that the case be remanded, with instructions to dismiss the con-

test, and adjudge that D. F. Hallahan is the duly elected treasurer of Deer Lodge county. Remittitur forthwith.

Femberton, Ch. J., concurs.

Hunt, J., concurring:

I concur in the conclusion and the reasoning of the learned opinion of *Justice De Witt*. But I regard the decision of the court as a reversal, rather than a modification, of the case of *Pries v. Lush*, 10 Mont. 45, 9 L. R. A. 487, and, so regarding it, I willingly concur. I have never believed that the doctrine in the case of *Pries v. Lush* could be sustained. In my judgment, it is contrary to the intent of the law itself, as well as the spirit of our government, and to the letter of the constitution of the state, providing that "in all elections held by the people under this constitution, the person or persons who shall receive the highest number of legal votes, shall be declared elected." Art. 9, § 13. Whatever may be the proper construction to be put upon the provisions of the Australian ballot law, where the regularity of the nominating certificate is questioned before election, I think that after the election is over, and no question of fraud or illegality of the returns, or other questions of that nature, are raised, the constitution is mandatory, and that the person who receives the highest number of votes must be declared to be elected.

RHODE ISLAND SUPREME COURT.

George E. WEBSTER *et al.*, Exrs., etc., of
Chase Wiggins, Deceased,
v.

John L. WIGGIN *et al.*

(.....R. L.....)

1. Real property acquired by a testator after the date of his will, including that acquired by foreclosure of mortgages which he held before such date, does not pass by his will in which there are no express terms referring to after-acquired property.
2. A gift to promote the efficiency of public schools, or in the alternative to establish schools for the education of children residing in tenements, is charitable.
3. A provision for a charitable gift contingent on an accumulation which may not take place within the time permitted by the rule against perpetuities, is not within that rule if the fund in the meantime is devoted to charity.
4. The immediate and unconditional devotion of a fund to charity, and not the time or manner of the administration or distribution of the fund, is the test of the validity of its creation.
5. A charitable trust, in a legal sense, is one

which originates from a gift, and which limits its property to any public use to which it is lawful to devote property forever.

6. A trust for the erection of convenient and healthful tenements for the laboring classes, and their maintenance in proper repair and in a clean and tidy condition, providing that no intemperate, disorderly, or filthy person shall be allowed to occupy them, although they are to be let to laborers for rent and not gratuitously furnished to them, creates a charity.
7. An act or a resolution of the general assembly of another state accepting a legacy given to the state and according to its conditions, is a sufficient assurance to executors to justify payment of the legacy.
8. Specific portions of a legacy to a town or school district being given for designated purposes may be severally accepted or rejected.
9. A bond need not be required in case of legacies in trust accepted by a town or school district, and legally established, which will be under the supervision of the equity courts of another state.

(April 20, 1895.)

NOTE.—That a free-mason's home is not a "purely public charity," see *Philadelphia v. Masonic Home (Pa.)* 23 L. R. A. 545.

For numerous other cases on the question what are charities, see *Crerar v. Williams (Ill.)* 21 L. R. A. 454, and cases there referred to.

28 L. R. A.

PETITION for the construction of the will of Chase Wiggins, deceased.

The facts sufficiently appear in the opinion. *Mr. C. M. Van Slyck*, for complainants: The question to be determined is, Does the title vest in the corporation within the pre-

scribed period? not, At what time does the enjoyment commence?

Loring v. Blake, 98 Mass. 283.

No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.

Gray, Perpetuities, § 201.

That is the rule applies only to contingent interests; it does not apply to vested interests.

Gray, Perpetuities, § 205; *Philadelphia v. Girard*, 45 Pa. 9; *Yard's App.* 64 Pa. 95.

The title to this gift vested in this corporation, as trustee, at the decease of the testator; only the enjoyment of actual possession was postponed.

Gray, Perpetuities, § 415; *Bacon v. Proctor*, Turn. & R. 81; *Williams v. Lewis*, 6 H. L. Cas. 1013.

A charity in a legal sense is a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting and maintaining public buildings or works or otherwise lessening the burdens of government.

Jackson v. Phillips, 14 Allen, 539; *Kelley v. Nichols*, 19 L. R. A. 418, 18 R. I. —.

Whatever is given for the love of God,—the love of your neighbor in the catholic and universal sense,—given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish.

Ould v. Washington Hospital for Foundlings, 95 U. S. 303, 24 L. ed. 450; *Pell v. Mercer*, 14 R. I. 412.

Gifts for the promotion of education are especially mentioned in the Statute, 43 Eliz., chapter 4, and have always been considered to be charitable in the legal sense.

Russell v. Allen, 107 U. S. 163, 27 L. ed. 397.

A bequest to trustees to purchase land to let out to the poor, at a low rent, is a good bequest to charitable uses.

Crafton v. Frith, 15 Jur. 737, 20 L. J. Ch. N. S. 198.

In 1893 the historical bequest of Benjamin Franklin to the city of Philadelphia, of £1,000, to afford loans of not more than £60 at interest, to any married artificers who have served an apprenticeship, to add them in settling themselves up in business, has been established as a charity.

Franklin v. Philadelphia, 13 Pa. Co. Ct. Rep. 241; *Franklin's Estate*, 150 Pa. 437, 439.

The gift is immediate in the sense that there is no antecedent gift of the property, to or for the benefit of any private person or corporation.

Atty-Gen. v. Bishop of Chester, 1 Bro. Ch. 444; *Henshaw v. Atkinson*, 3 Madd. 306; *Sinclair v. Herbert*, L. R. 7 Ch. 282; *Chamberlayne v. Brockett*, L. R. 8 Ch. 206; *Odell v. Odell*, 10 Allen, 1; *Inglis v. Sailors Snug Harbor Trustees of New York*, 28 U. S. 3 Pet. 99, 7 L. ed. 617; *Russell v. Allen*, *supra*; *Woodruff v. Marsh*, 63 Conn. 125.

The court will exercise the judicial powers 38 L. R. A.

inherent in it as court of chancery jurisdiction, and will direct a *cy pres* application, where the trust, legal in itself, by reason of changed circumstances or other matters, cannot be practically carried out in the form expressed by the creator of the trust.

Pell v. Mercer, 14 R. I. 412.

In this state a testator may devise after-acquired realty, provided that the intention appears in direct and explicit terms on the face of the will.

R. I. Pub. Stat. chap. 183, § 1; *Church v. Warren Mfg. Co.* 14 R. I. 539.

At common law the deviser must be seised of the same estate at the time of his death as at the date of the will, to make it a good devise.

Ballard v. Carter, 5 Pick. 112, 16 Am. Dec. 377.

If a mortgagee after making his will forecloses the mortgage or obtains a release of the equity of redemption, the mortgaged lands will not pass inclusively under the general words, "lands, tenements, and hereditaments," but will go as a purchase subsequent to the will, to the testator's heirs-at-law.

Ibid.; *Brigham v. Winchester*, 1 Met. 390; *Swift v. Edson*, 5 Conn. 531; R. I. Pub. Stat. chap. 185, §§ 7-16; *Steel v. Steel*, 4 Allen, 417.

There is a possibility that the rule may be different, however, where the foreclosure is by sale under a power contained in the mortgage.

Hall v. Bliss, 118 Mass. 554, 19 Am. Rep. 476.

In Rhode Island a mortgagee has such an estate, that, for condition broken, he may maintain ejectment, if refused possession.

R. I. Pub. Stat. chap. 216, § 7; *Carpenter v. Carpenter*, 6 R. I. 542; *De Wolf v. Murphy*, 11 R. I. 680.

The equitable fee was devisable, and was devised by the broad descriptions contained in the residuary clause of the will.

Stump v. Gaby, 2 DeG. M. & G. 623; *Gresley v. Mowley*, 4 DeG. & J. 78; 1 Jarman, Wills, 5th Am. ed. 157.

Messrs. E. K. Parker, James B. Richardson, Herbert Almy, and Joseph C. Ely for respondent.

Douglas, J., delivered the opinion of the court:

The scheme of the will upon which the questions suggested to us arise is briefly as follows: The testator, after directing payment of his debts and funeral expenses, and the purchase of a place for his burial, makes a specific bequest of certain property, used by him in the practice of his medical profession, to one of his nephews. He then directs his executors to collect his book accounts and other credits, and to manage his other estate, real and personal, and out of the proceeds of the book accounts and credits, and the income of the estate, to pay the expenses of administration, and seven legacies, in the following order: (1) To each of five nephews, \$500,—\$2,500. (2) To Charles D. Wiggins, in trust for three of the testator's grandnieces, \$1,500. (3) To the town of Meredith, N. H., upon certain trusts, \$4,000. (4) To the state of New Hampshire,

upon certain trusts, \$500. (5) To the Rhode Island Medical Society, upon certain trusts, \$4,000. (6) To Brown University, upon certain trusts, \$2,000. (7) To Dartmouth College, N. H., upon certain trusts, \$2,000. In all, \$16,500. The rest, residue, and remainder of his estate,—that is to say, the capital of the whole estate, excepting so much of the proceeds of book accounts and other credits which have been collected by the executors as may have been used by them for the payment of legacies,—he gives to the Providence Building, Sanitary & Educational Association, to constitute a fund to be called the "Providence Building, Sanitary, and Educational Fund," which is to be held and administered by said corporation upon certain trusts. Power is given to the executors, while they are in control of this estate, to change the investment of it, and to sell and reinvest the proceeds for that purpose. All the legacies and devises are made conditional upon the acceptance of the conditions attached to each gift within six months after notice from the executors. The bequests to the town of Meredith and the school districts thereof, and to the state of New Hampshire, are to be paid only after formal acceptance by the legatees of such legacies, and satisfactory assurance to the executors of the execution of the trusts attached to them. The debts and funeral expenses of the testator, and the legacies to his nephews, and in trust for his nieces, have been paid, and a surplus of personal estate and income remains in the executors' hands. A corporation of the name designated in the residuary clause was chartered by the general assembly June 1, 1883, and was organized during the lifetime of the testator, with the testator and three of the executors originally named in his will among the incorporators, and this corporation claims to be entitled under the residuary clause.

The questions raised by the bill are of three classes: The eighth question relates to the condition of the estate, as affecting the application of the will; the seventh relates to the validity of the residuary clause; the first six relate to the construction of the direction to the executors to give notice to, and demand assurance from, the legatees. It appears that the testator died February 23, 1891, seised and possessed, besides his personal estate, (1) of real property acquired by him prior to the date of his will, of the value of about \$4,000; (2) of real property situated in the state of Rhode Island, acquired by him subsequently to the date of said will, of the value of about \$6,400; (3) of real property situated in the state of Massachusetts, acquired by him subsequently to the date of said will, of the value of about \$1,000; (4) of real property situated in the state of Rhode Island, acquired by him subsequently to the date of said will, at foreclosure sales made by virtue of powers of attorney contained in mortgages acquired by him prior to the date of said will, of the value of about \$6,500; (5) and also of a certain tract of land situated in said Providence,—which was conveyed in fee and in mortgage to said Chase Wiggin by deed

dated August 15, A. D. 1874, and recorded August 17, A. D. 1874, and sold, by virtue of the power of attorney contained in said mortgage deed, to the defendant Charles D. Wiggin, by deed dated April 3, A. D. 1875, acknowledged June 28, A. D. 1883, and recorded June 29, A. D. 1883, and conveyed by said defendant Charles D. Wiggin to said Chase Wiggin by deed dated, acknowledged, and recorded June 30, A. D. 1888,—of the value of about \$1,500.

The heirs-at-law contend that the lands in classes numbered 2 and 4, above, did not pass by the will, but that as to these lands, and the income of them, the testator died intestate, and that the land in class 3, not being within the jurisdiction of the court, cannot be affected by this proceeding. We are constrained to agree with this contention. While it may be inferred from the whole scheme of the will that the testator designed to dispose of all the estate which the law gave him power to affect by his will, we do not think he has availed himself of the privilege which our statute gives to a testator to dispose of after-acquired real estate in the manner pointed out by the statute. There are no express terms in this will referring to property which he might acquire after the execution of it. The description of the property devised is as general as possible, but it is no more comprehensive than what might well have been used if he had intended only to convey what he then possessed. Pub. Stat. chap. 182, § 1; *Church v. Warren Mfg. Co.* 14 R. I. 539; *Lorillard's Petition*, 16 R. I. 254. As to the property in class 4, it seems plain that it was acquired as real estate after the making of the will. As a debt secured by a mortgage, it would have passed under the will as personal property; but the testator changed its character, and so we think exempted it from his testamentary provisions. *Ballard v. Carter*, 5 Pick. 112, 16 Am. Dec. 377; *Brigham v. Winchester*, 1 Met. 390; *Yardley v. Holland*, L. R. 20 Eq. 428; *Strode v. Russel*, 2 Vern. 624.

As in *Clarkson v. Pell*, 17 R. I. 646, we express no opinion as to the property in class 3.

The property in class 5 was owned by the testator at the date of the will. The legal title was in his trustee, who was under obligation to transfer it at any time, and who held it for the testator's benefit or convenience, subject to the testator's absolute dominion. It was in no real sense acquired afterwards, when the legal title was conveyed. We conclude, therefore, that it is included in the estate affected by the will.

The heirs-at-law contend that the residuary clause is void because the trusts imposed upon the legatee are not those which the claimant is authorized by law to administer; because these trusts are not charitable; because the time when the gift is to become effectual is too remote. There can be no doubt that the testator intended the corporation which claims this gift to be the recipient and administrator of it. No such corporation was in existence at the date of his will, but he expressly says that "it is to

be incorporated, and will be incorporated before the devise and bequests to it herein provided shall take effect;" and before his death he, together with his friends, organized the claimant corporation under a charter which he procured from the general assembly, in which the objects of this clause of the will are substantially stated as the purposes of the corporation. This was an ancient method of founding a charity. "In other cases," says Mr. Tyssen, "the founders of charitable institutions procured for them charters of incorporation from the crown, with licenses to take lands in mortmain, and then conveyed or devised land to them." Tyssen, *Charitable Bequests*, 248. The residuary clause of the will, and the charter, were evidently conceived by the same mind, and were designed to correspond to each other in the trusts declared by the testator and the trusts to be executed by the recipient. We find no discrepancy between them. Certain directions for the administration of the trusts in the will, not in any way repugnant to the provisions of the charter, are not repeated in it; and the direction for accumulation before commencing the building of houses, being optional, is not prescribed in the act. These differences, however, as well as the variations in expression between the two instruments, are only such as would naturally occur between a testamentary clause establishing a trust and a charter providing for a corporation for the purpose of administering it, and are appropriate to the different structures of the two instruments. The intention of the testator was, then, to convey his property to this corporation, to be managed as it might be under the terms of this charter, and under the trusts specified in the will. Does the law forbid such a disposition of his estate in the manner he desires, or can his expressed intention be carried out? The trusts annexed to the gift to the residuary legatees are: First. To purchase land or real estate in such localities in the city of Providence as shall be most convenient for residences for the laboring classes, and to build thereon such convenient and healthful tenements as shall be suitable, in amount of room and cost of construction, for such tenements. This employment of the fund may be made by the trustees, either at once, or when the fund invested in other ways by them shall amount to \$500,000 in value. Certain directions as to the mode of administering the trust are added. A sufficient number of these tenements shall be built in one locality to require most of the time of one suitable person to supervise and take charge of them; to keep them in proper repair; to see that they are not abused by the occupants, and that they are kept clean and tidy at all times; to collect rents; to attend to all sanitary matters connected with them; and to otherwise oversee and direct in all matters relative to such tenements and their tenants which may be intrusted to him by the corporation. No intemperate, disorderly, or filthy persons shall be allowed to occupy any tenement built or provided by this fund. These directions imply that the tenements so directed to be built may be let to laborers for rent, not

gratuitously furnished to them. Secondly. When the trust fund, with its accumulations, amounts to \$500,000 in value, one half of the future income is to be devoted to the payment of salaries of additional teachers in the public schools of Providence, or, if the city refuses to co-operate with the trustees in that design, then the trustees may devote it to the establishment of schools for the education of the children residing in the tenements controlled by the trustees.

We think the second branch of the trust is charitable, in the light of all the precedents. *Atty-Gen. v. Earl of Lonsdale*, 1 Sim. 105; *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 897; *Pell v. Mercer*, 14 R. I. 489, and cases cited. It is for the purpose of promoting the efficiency of the public schools, and seems wisely designed for that purpose; or, in the alternative, to establish schools under the powers granted to the trustee by its charter. But it is objected to on the ground that the application of income for the promotion of education, in either way, is contingent upon such an accumulation as may not take place within the time permitted by the rule against perpetuities. It must be conceded, however, that this rule has no application if the fund, in the meantime, is devoted to charity. *Gray, Perpetuities*, § 597; *Christ Hospital v. Grainger*, 16 Sim. 83, 1 Macn. & G. 460; *Odell v. Odell*, 10 Allen, 1; *Jones v. Habersham*, 107 U. S. 174, 27 L. ed. 401; *Chamberlayne v. Brockett*, L. R. 8 Ch. 206; *Russell v. Allen*, *supra*. Prof. Gray criticises the reasons given for Lord Cottenham's decision in *Christ Hospital v. Grainger* as assuming that the object of the rule against perpetuities is to prevent property from becoming inalienable. *Gray, Perpetuities*, §§ 599, 600 *et seq.* The avoidance of an indefinite suspension of the right of alienation is at the root of the rule against perpetuities, and cannot be ignored, but we may suggest that the doctrine of the case may be supported on another ground. Where property is well given in trust for a charity, and, upon a remote contingency, this first trust is to terminate, and a second charitable trust to begin, the intention of the testator is that the first trust shall be benefited so long as, in his opinion, its provisions can be usefully carried out, and then that the fund shall still be devoted to charity in some other way; that is to say, he makes a case for the *cy pres* disposition of the fund. The first trust failing to be practicable or useful, he points out another charitable object of his bounty, and so does, in advance, what the court would do if he had omitted the second provision. In the case at bar the testator supposed that, after the fund in question should have increased to the value of \$500,000, one half of the accruing income would be enough for the primary branch of this trust, and so has directed a different disposition of one half the income from that time. This is substantially what the court would have done when it became apparent to them that the whole income of the fund could not usefully be expended for the purposes of the first charity. In making a *cy pres* disposition of a fund, the court follows the supposed wish of the donor.

Why should it not confirm his express direction? But, upon whatever ground the doctrine may be based, it has met with universal approbation as a rule of law.

The crucial test, therefore, of the validity of the whole residuary clause, is whether or not the first trust declared is a valid charitable trust. The objections to the validity of the trust which have been urged upon us are: First, that it is not charitable; and, secondly, that, not being charitable, it is void, under the rule against perpetuities. If the residuary legatee were a private person, and the gift were not affected by a trust, he would take in the corpus of the estate, at the death of the testator, either a vested estate in fee, charged with the term given to the executors, or an absolute equitable fee, postponed in its enjoyment to a later time; and in the latter case the legal estate would pass to the executors in trust, first to raise legacies, and then to convey to the residuary legatee. The legal estate, in the first construction, or the equitable estate, in the second, being surely given to a definite person, are equally exempt from the rule against perpetuities. Gray, *Perpetuities*, § 205. We think that the estate given by this will to the residuary legatee in trust is a legal estate in fee simple in the real estate, and a vested interest in the personal property and surplus book accounts and credits. The rents and income are, it is true, given to the executors, and such a general gift, standing alone, is undoubtedly a gift of the fee itself. 1 Jarman, *Wills*, *741, and cases cited. But here the income is separated from the estate for a temporary purpose, and the intention of the testator is plain that the corpus of the estate should be reserved for the residuary legatee. In *Buchanan v. Harrison*, 8 Jur. N. S. 965, 81 L. J. Ch. 74, Wood, *V. C.* says: "The first contest was that those who take the indefinite gift of income were entitled to the actual corpus of the property. As to that, I hold, quite independently of general authorities, which are numerous on the subject, that on this will it was clear that there was a gift of income, limited entirely by the period when he took upon himself to dispose of the corpus." The provisions for changes of the fund by the executors are powers not necessarily implying a legal interest. If the power of sale of any part of the estate is exercised, the new investment must immediately take the place of the old, and come into the ownership of the residuary legatee. 1 Chance, *Powers*, p. 53, §§ 141, 142; *Buchanan v. Harrison*, *supra*. And so in regard to any income coming to the manual possession of the executors after the charges on the income are satisfied. The power and control of the executors cease the moment the income accrued, together with the book accounts and credits, has amounted to enough to pay the legacies. The future income at once accrues to the owner of the corpus of the estate, and so there is no need of transfer of title by the executors. It belongs to the residuary legatee the moment it comes into existence. If, however, the residuary legatee takes only in trust to pay over to a private person, or for a private

purpose, upon a contingency which may happen beyond the time limited by the rule against perpetuities, such trust is void, and the legatee takes, if at all, only in trust for the heirs-at-law. Equitable rights in individuals are subject to the rule against perpetuities, as well as legal estates. Gray, *Perpetuities*, §§ 202, 323. Where the gift is upon a private trust, the beneficial interest must vest, or the application to the beneficial object must begin within the time prescribed for contingent remainders at common law to vest; and so, in ascertaining the validity of a private trust, we must inquire at what time the beneficiaries, as well as the trustee, are to acquire their interest. Perry, *Tr.* 883; Gray, *Perpetuities*, §§ 246, 413; *Mainwaring v. Baxter*, 5 Ves. Jr. 458. It is argued that this is the present case; that though the legatee takes, by the terms of the will, a vested legal interest in the corpus of the estate, the trust is to devote the fund to certain purposes, not charitable, at some time in the future, after its income, together with book accounts and credits, has been sufficient to pay the seven preceding legacies. It is certain that, if this be a private trust, no individual to be benefited by it can be ascertained until after the earning of the preceding legacies; and even if the legacies are paid out of book accounts and credits, without resort to the income, no one of these individuals can enforce upon the trustee an execution of the trust in his favor until the lapse of the further time required for the fund to grow to \$500,000. It is those persons, of the laboring classes, who shall desire to live in Providence when the preceding legacies are earned, and the accumulation of the fund is completed, who are to be the beneficiaries under the trust. But if the trust is charitable, and no remote condition precedent is imposed to its operation, it is lawful and valid, whatever may be the time fixed for its enjoyment to begin,—the immediate and unconditional devotion of the fund to charity, and not the time or manner of the administration or distribution of the fund, being the test of the validity of its creation. *Chamberlayne v. Brockett*, L. R. 8 Ch. 206; *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397. This rule is inevitable, from the nature of charitable trusts. The fund must be set aside in perpetuity, and the beneficiaries are a succession of persons, in each of whom the beneficial interest vests from time to time, in the future, to remote ages. To apply the rule against perpetuities to such a fund would destroy the trust during the second generation. Such trusts are guarded from misuse by being placed under the special control and direction of courts of equity, and the investment of their funds and the mode of their administration may be altered, within the limits of the foundation, as circumstances require. There is no condition precedent to the legacy we are considering, except that it shall be accepted by the trustee within six months after notice. The direction for accumulation is optional, and in no sense a condition precedent. We come, then, to the vital question, whether it is a private trust, and so

void, or what is called in the law a "charitable or public trust," and so valid.

It is urged that the trust is not a charity, because its benefits are not gratuitous, and its special beneficiaries are not required to be poor. But these are not necessary characteristics of a charitable trust. It is enough that the fund shall originally be a gift if it possess the other qualities of a charity. *Atty-Gen. v. Heelis*, 2 Sim. & Stu. 67, 77. In *Atty-Gen. v. Shrewsbury*, 6 Beav. 220, a grant of right to keep a toll bridge, and to apply the tolls to keeping up bridges, gates, towers, and wall of the town, is held a valid trust. Gifts to colleges where tuition fees are charged have been invariably sustained. The general benefit to the community derived from the diffusion of knowledge, which such institutions promote, is enough to justify their foundation and permanent endowment. So in this trust the building of a colossal fund, as a monument to the founder, is not its object; but, as he expresses it, it is, "to improve the moral, physical, and intellectual condition of the youth of this city." We cannot doubt that the erection and control of such tenements as the donor contemplates will promote the health, morality, and intelligence of those classes of citizens who are to occupy them, and, by example and competition, will tend to improve the sanitary conditions of other estates, whose accommodations are now limited by private interest to mere obedience to the compulsions of law. But the donor has seen fit to intrust this fund to the administration of a special corporation, and this is, in effect, to adopt its methods and aims. *Incorporated Soc. in Dublin v. Richards*, 1 Dru. & W. 258, 294. And so we are to take the provisions of the charter as amplifying and explaining the trust in the will. Various definitions, more or less exact, of the legal term "charity," have been given by courts and jurists, e. g.: by Judge Gray in *Jackson v. Phillips*, 14 Allen, 589, at page 556; by Mr. Binney in the *Girard Will Case (Vidal v. Philadelphia)*, 43 U. S. 2 How. 127, 11 L. ed. 205, quoted with approval in *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 24 L. ed. 450, and in *Price v. Maxwell*, 28 Pa. 23, 35; by Lord Camden in *Jones v. Williams*, Ambler, 651, approved in *Coggeshall v. Pelton*, 7 Johns. Ch. 292, 294, 7 L. ed. 297, 298. 11 Am. Dec. 471, and in *Perin v. Carey*, 65 U. S. 24 How. 465, 506, 16 L. ed. 701, 711; by Sir John Leach in *Atty-Gen. v. Heelis*, 2 Sim. & Stu. 67, 76; and by Durfee, Ch. J., in *Pell v. Mercer*, 14 R. I. 412, 444; and many others. These are all generalizations of the provisions of the Statute 43 Eliz., chap. 4. The twenty-one classes of trusts referred to in this statute have been taken by the courts as *criteria* in passing upon the character of trusts claimed to be charitable. But the enumeration of that statute is not exhaustive. Colleges are expressly excluded from its provision, though the courts for a long time strained its language to include them. Other trusts, with objects quite remote from any known to the subjects of Queen Elizabeth, have been sustained as analogous, or, upon general principles, have been deduced from 38 L. R. A.

that statute by broad generalization. And it is instructive, in the present connection, to note the principle upon which the Statute of Elizabeth is taken as a guide. "It is treated," says Mr. Tyssen, "as an expression by the legislature that all such purposes are lawful charitable purposes, and a guide to the courts in deciding upon the legality of other purposes." Tyssen, *Charitable Bequests*, 88. The trusts mentioned by the statute are charitable because they are such as public policy, expressed by the act of the legislature, allows to be sustained by a dedication of property in perpetuity. Other trusts, then, endowed by the legislature with power to accept gifts of property in mortmain for public purposes, must be considered charitable. So that a trust may be sustained as a charity by bringing itself within the statute of Elizabeth, or its generalizations and analogies, or by showing specific authority from the legislature to perpetuate itself for the public or general benefit. "Having regard to all legislative enactments and general legal principles, is it, or is it not, for the public benefit that property should be devoted forever to fulfilling the purposes named? . . . These trusts, for purposes which the law considers it for the public benefit to perpetuate forever, are called charitable trusts. This is the only general definition which can be given of the word 'charity.' If we want a more precise definition of what is and what is not a charity, we must resort to a simple enumeration of the purposes which have been included under the term." Tyssen, *Charitable Bequests*, 5. Funds supplied from the gift of the crown or the legislature, or from private gift, for any legal public or general purpose, are charitable funds, to be administered by courts of equity. *Atty-Gen. v. Heelis*, 2 Sim. & Stu. 67. We conclude, then, that a charitable trust, in the legal sense, is one which originates from a gift, and which limits property to any public use to which it is lawful to devote property forever. The legality of such appropriations may be established by general rules of law, or by special act of the sovereign power. In either case, if the use is public, the trust is a charity. Instances are common where donations in trust, which would be forbidden by general law, have been upheld because made to corporations authorized by special act or license of the crown to hold property in mortmain. The institution of a perpetual trust of a public nature, by grant of the legislature, though it be not called charitable in the act, is sufficient to make it charitable in the legal sense. So a grant of right to cut turves, made by act of parliament, was held by the court of appeal in the case *Re Christ Church Inclosure Act* (March, 1888) L. R. 38 Ch. Div. 520, to be a charitable trust. Lindley, L. J., at page 530, says: "The trust, being created by statute, cannot be held invalid on the ground of perpetuity or on any other ground. It is a perpetual trust for the occupiers for the time being of those cottages. But such a trust, unless it is a charitable trust, is one of a very anomalous character, and one which it will be extremely difficult to give full

effect to in all contingencies. . . . Now, although it is competent for the legislature to create trusts unlike any previously known, we do not think that a trust of that kind ought to be held to have been created, if it is equally consistent with the object and words of the statute to hold the trust to be one with which the lawyers are familiar, and which there is no difficulty in executing. If, therefore, this trust can be properly regarded as a charitable trust, it ought, in our opinion, to be so regarded." *Lord Lindley* bases this conclusion mainly upon the decision of the house of lords in *Goodman v. Saltash*, L. R. 7 App. Cas. 633, and says further: "The trust is for a comparatively small and tolerably well-defined class of persons. The class consists of all the then and future occupiers of the cottages, and there may be several occupiers of one cottage. The class, however, though limited, is, as to its members, uncertain, and is liable to fluctuation, and the trust for that class is perpetual. This being the case, we are unable to distinguish this case from the trust which both *Lord Selborne* and *Lord Cairns* held to be a charitable trust, and therefore valid, in *Goodman v. Saltash*, etc. In that case the house of lords supported an ancient grant of a right of fishery as a charitable trust imposed upon the fee of the fishery held by the corporation of Saltash, in favor of certain of the inhabitants. *Lord Selborne* says (page 642): "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or any particular class of such inhabitants, is, as I understand the law, a charitable trust, and no charitable trust can be void on the ground of perpetuity;" citing *Wright v. Hobert*, 9 Mod. 64, where *Lord Maclefield* established as a charitable trust an ancient grant of land for the pasture, during three months of the year, of the cows of "as many of the inhabitants of a certain village as were able to buy three cows, and during seven months of the rest of the year to be in common for all the inhabitants,"—and also *Jones v. Williams*, Amb. 651; *Atty-Gen. v. Carlisle*, 2 Sim. 437; *House v. Chapman*, 4 Ves. Jr. 642; *Atty-Gen. v. Heelis*, 2 Sim. & Stu. 76, 77; *Atty-Gen. v. Dublin*, 1 Bligh, N. R. 847. *Lord Cairns*, in the same case, says (page 650): "Such a condition would create that which, in the very wide language of our courts, is called a charitable—that is to say, a public—trust, or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that when you have a trust which, if it were for the benefit of private individuals, or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet, if it creates a charitable—that is to say, a public—interest, it will be free from any obnoxiousness to the rule with regard to perpetuities." In the light of these cases, we have no difficulty in concluding that the trust for the erection and letting of tenements such as are contemplated by this legacy, and the charter of the residuary legatee, is a public or a charitable use. The trust here declared

is not for the benefit of any persons who existed as individuals in the regard or intention of the testator. He designs them to be the objects of his bounty for no reason personal to them or to himself. They are a class of mankind comprising an undetermined number of individuals, each of whom is unknown and unrelated to him. What particular persons shall benefit by his gift, he leaves to unanticipated circumstances to determine. Here we have the indefiniteness of beneficial application, which makes the trust public. "They [*s. e.* charitable trusts] may, and indeed must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity." *Gray, J.*, in *Russell v. Allen*, 107 U. S. 167, 27 L. ed. 899. The trust is, then, valid, because it is lawful by the terms of the charter, and charitable, because it is a lawful perpetuity for a public use, even if the special act of the legislature establishing this trust as perpetual, and calling it in terms a charity, is not binding upon the court to construe it to be charitable.

It may be useful, briefly, to mention the cases cited against the validity of this trust. The trust avoided in *Hillyard v. Miller*, 10 Pa. 326, though presenting somewhat similar characteristics to the present one, is clearly distinguishable from it. The court found that trust to be simply to create a loan office. Nothing was to be gained by the borrowers but loans of money at market rates. There was no gain or benefit to the public at all. If these loans had been required to be expended in the improvement of a specified locality, under such regulations as would promote the health and welfare of its inhabitants, it might have been held good; and in that case there was no legislative approval of the perpetuity. In *Kendall v. Granger*, 5 Beav. 300, no specific object of the gift was named, but it was given to charity in its colloquial sense, or to general utility. If some specific institution of general utility had been named, such as a bridge or dyke, a house of correction, or a highway, it would have made a good charity, under the Statute of Elizabeth. In *Re Oullimore's Trusts*, L. R. 27 Ir. Rep. 18, the master of the rolls held the gift as probably intended to benefit individuals, and not the public, and as such it was void for uncertainty; and on page 24, discussing the elements of a charitable trust, he says: "Mere kindness, generosity, or benevolence on the testator's part is not enough to constitute a charitable purpose. There must also be the element of poverty or need on the part of the object, or else the gift must be dedicated to some purpose, such as education, religion, or the like, which the law regards as charitable." He thus leaves the definition open, and the trust considered there is so dissimilar to the one we are considering that the decision is of no value here. In *Thompson v. Shakespear*, 1 De G. F. & J. 899, it appeared that the execution of the trust involved a disposition of property owned and held by private individuals, which the court could not compel, and so it

failed. *Lord Justice Bruce* (page 408) says, "If the object of a museum could be dissociated from Shakespear's house it might be possible to support the gift." In *Re Sutton's Trusts*, 48 L. J. Ch. 850, a gift to a private institution, to be held in perpetuity for the benefit of its subscribers, was held void. *Kelley, C. B.*, says: "I think that if this institution were a charitable institution the bequest would probably be void, under the mortmain act; but, when we look to the rules, we find the institution really is a species of club, and not a charity." In *Chamberlain v. Stearns*, 111 Mass. 267, the question presented was whether a devise in trust to be applied "solely for benevolent purposes," in the discretion of the trustees, creates a public charity; and it was held that these words, standing alone, do not exclude objects not technically charitable and do not create a charity. *Chapel of Good Shepherd v. Boston*, 120 Mass. 212. This case decides that a charitable corporation, having invested its funds in lodging houses, and not occupying them for any charitable purpose, must pay taxes on such real estate, under the statutes of Massachusetts. It is no authority for holding that a corporation authorized to erect and manage tenement houses, under restrictions calculated to promote the public welfare, and for such purpose only as the legislature calls charitable, is not a charity. *Donnelly v. Boston Catholic Cemetery Assn.*, 146 Mass. 168, decides that a cemetery corporation, not required by its charter to apply any part of its funds to charitable purposes, is not a charitable corporation. Upon the words in the will, the seven legacies in trust are affected by two contingencies,—they are made payable out of the book accounts and credits, or out of successive accumulations of income. If resort must be had to such accumulations, all after the first one, unless that one is for a charity, would be too remote, and void; but the inventory of this estate shows that the book accounts and credits alone are sufficient to satisfy all these gifts, and so these legatees take interests vested at once, and valid.

It appears from N. H. Pub. Stat., chap. 219, § 10, that service of writs in that state is made, in cases against towns, upon one of the selectmen and the town clerk; in cases against school districts, upon one of the school board and clerk of the district. The notices required by the will to be given to the town of Meredith and to the school district should be served upon these persons accordingly. Service may be made upon these parties, by any disinterested person, by delivering to each a copy of the notice of the will, and of the bill of complaint. Notice to the state of New Hampshire may be made by a similar service of the same papers upon the governor of the state. These services may be proved by affidavit of the person making them. Similar copies may be served upon the other legatees and service proved in the same manner.

We think that an act or resolution of the general assembly of New Hampshire, accepting the legacy given to the state, and agreeing to its conditions, will be a sufficient as-

surance to the executors to justify the payment of that legacy under the terms of the will.

We think the legacy to the town of Meredith and the school districts of the town is separable, as specific portions of it are given for distinct purposes, and that the separate amounts of \$250, \$250, \$3,000, and \$500 may be severally accepted or rejected by the beneficiaries, respectively. The condition annexed to the second gift of \$250 may be performed either by the town or by the school districts, respectively. An appropriation by either of the amount required will be sufficient to authorize the payment of this legacy. We are not advised as to the legal capacity of the town of Meredith to take and administer the trusts annexed to the other portions of the \$4,000 given them by the will. We will therefore refer the question to a master, to report whether or not some enabling act of the legislature of New Hampshire may be required in the premises. Such action was taken by the privy council in *Lyons v. East India Co.* 1 Moore, P. C. C. 175. See also, *New v. Bonaker*, L. R. 4 Eq. 655; *Thompson v. Thompson*, 1 Colly. Ch. Cas. 381; *Atty-Gen. v. Sturge*, 19 Beav. 597.

As these trusts, if accepted by the town and school districts, and legally established, will be under the supervision of the equity courts of New Hampshire, we see no necessity of requiring any bond to be given.

William EDDY *et al.*

v.

D. L. GRANGER.

(.....R. I.)

A town or city cannot give a vested right to maintain a private drain in a highway such that a subsequent cutting off of the drain by an extension of a system of sewers will create any liability against the municipality.

(May 8, 1895.)

ACTION to recover damages for injuries caused by the alleged wrongful closing of a drain. On demurrer to the complaint. *Demurrer sustained.*

The facts are stated in the opinion.

Messrs. Francis Colwell, City Sol., and *A. A. Baker* for defendant in support of demurrer.

Mr. C. M. Salisbury for plaintiffs, *contra.*

Per Curiam:

The declaration charges that the city of Providence negligently caused a sewer to be

NOTE.—The denial of the right to an easement in a highway for a private drain or sewer is in accordance with the doctrine that highways are held in trust for the public. For denial of right to have private railroad in street, see *Gustafson v. Hamm* (Minn.) 22 L. R. A. 565. For denial of right of city to have standpipe in street, see *Barrows v. Sycamore* (Ill.) 25 L. R. A. 535. For denial of buckster privileges in street, see *Echopp v. St. Louis* (Mo.) 20 L. R. A. 733.

built in South Main street, as a part of the sewerage system of the city, which cut off a drain leading from the premises of the plaintiffs and others, through Harding's alley, an accepted street, to the river, said drain having been laid by permission of the town of Providence; whereby the said drain was obstructed, and water and sewage from estates above flowed back on to the plaintiffs' premises. Upon demurrer to the declaration, the question is whether there is any legal liability on the part of the city for cutting off the drain.

While the primary purpose of streets is for public travel, requiring only a use of the surface, yet, by immemorial custom, they have been put to other uses of a public nature, quite distinct from, but not incompatible with, their use as highways. Thus gas and water pipes, drains and electric wires, as well as other things of general convenience, by common consent find a place in our public streets. In *Clark v. Peckham*, 9 R. I. 455, it is said that there is an implied power in the city to build drains, and that the streets are dedicated to such necessary uses. Obviously all such constructions must be under municipal direction and control, and so, before a system of water supply and drainage was adopted, permission was granted to private parties, from time to time, to lay pipes from fountains, and to build drains, in many of the streets, of which the permission alleged in the declaration is an instance. But in granting such permission the municipality could not relinquish its control, nor confer any private rights inconsistent with its duty to secure the use of the highways for the public benefit. The permission was necessarily subject to the developing requirements of the city, and so amounted only to a license to use the street, which, from its nature, could be revoked. Otherwise the existence of private drains might prevent the building of sewers altogether. But while the plaintiffs do not deny the right of the city to remove the private drain and to build a sewer in its place, they claim that the city was bound in so doing to provide for the drainage which had flowed through the private drain, and was negligent because it did not do so. Such a claim must rest upon a vested right to maintain the drain, or else it has no foundation in an action for damages. We think that neither the town nor the city had the power to convey such a right to private parties. The most it could do would be to grant a license to use the street in a way which should not interfere with the public interest. If the plaintiffs had no vested right in the street, then they cannot legally complain because the city did not protect them in the use of it. In *Baxter v. Tripp*, 12 R. I. 310, it is said: "The argument is that the city had no

right to deprive the plaintiffs of the aqueduct without supplying its place with a sewer which could be used as safely and as well. If we were trying this case in a court of conscience, the argument would perhaps be valid." We do not see, however, that the plaintiffs' claim could be maintained even in a court of conscience. The fact that they were allowed for many years to carry their house drainage to the river, instead of being obliged, as most other people were, to provide for it in cesspools on their own land, had been to their advantage during that time. But how can this fact impose a moral duty on the city to continue a favor which had become inconsistent with public necessity? We are unable to see that there was either a moral or legal obligation on the part of the city to maintain the private drain, although the latter is the only question with which we have to deal. Authorities on this point are not numerous, but we find that such a conclusion is strongly supported in *Elster v. Springfield*, 49 Ohio St. 82. The court says: "The city as to its streets is a trustee for the use of the public. A trustee of property for the benefit of the public could not, any more than could a trustee of private property held for known specific and continuing uses, alien or incumber the property to the prejudice of the beneficiary; and a person dealing with the trustee, in either case, would be bound to take notice, at his peril, of the limitation of the power. 2 Dill. Mun. Corp. § 671; *Alton v. Illinois Transp. Co.* 12 Ill. 60, 53 Am. Dec. 479. Hence it would follow that whatever grant may have been made by the town of Springfield to the Kills, to maintain water pipes in Center street, could have no greater operation than a temporary license, subject to be revoked at the will of the town or city, as its necessities in the future uses of the street might require. It necessarily results from this that the enjoyment of the street beneath the surface for the laying of the pipes and the flowing of the water through them was a permissive use, and that no permanent right could be acquired by long continuance." Having the right, therefore, to cut off the private drain without any obligation to provide for the sewage, it is clear that there is no cause of action against the city for this act, which is all that is charged in the declaration. Suggestion was made at the hearing that there was no notice to the plaintiffs of the cutting off of the drain, and that as licensees they were entitled to notice, but, as no such allegation is made in the declaration, we do not pass upon the question whether there would be any liability on the part of the city if such were the fact.

The demurrer to the declaration is sustained.

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MICHIGAN SUPREME COURT.

Henry H. SCARVELL

v.

GRAND RAPIDS & INDIANA R. CO.,
Plff. in Err.

(.....Mich.....)

A spur track built under parol agreement by a railroad company over land of individuals at the joint expense and for the joint benefit of all the parties gives the railroad company such possession of the land covered that an action of trespass will not lie against it in favor of a land owner who has revoked his permission.

(December 23, 1894.)

ERROR to the Circuit Court of Kalkaska County to review a judgment in favor of plaintiff in an action brought to recover damages for alleged trespass *quare clausum fregit*. *Reversed.*

The facts are stated in the opinion.

Messrs. T. J. O'Brien, W. D. Totten, and J. H. Campbell, for plaintiff in error: The case is ruled by *Harlow v. Marquette, H. & O. R. Co.* 41 Mich. 336.

A judgment of non suit was affirmed.

Breaking an entry is the gist of the action of trespass, and if the original entry be lawful, *trespass quare clausum fregit* does not lie.

NOTE.—Possession of licensee to defeat trespass after revocation of license.

SCARVELL V. GRAND RAPIDS & I. R. CO. seems to be the first case in which this question was considered and squarely decided.

In *Baltimore & H. R. Co. v. Algire*, 63 Md. 319, an action of *trespass quare clausum fregit* was held to be good against a railroad company which continued to operate its road over plaintiff's land after he had revoked a parol license which he had given it. But the discussion turned more upon the right which the licensee gave than upon the effect of possession to defeat trespass.

In *Wheelock v. Noonan*, 108 N. Y. 179, in which it was sought to compel the removal of stones which had been placed on plaintiff's premises under a license which had been revoked, the court in considering the question whether or not relief would be denied in equity because of a remedy at law, said that suit could be brought at law for the trespass. But since in this case it would not be adequate, the equitable suit was sustained.

Perhaps the case nearest in point is that of *Berkey v. Auman*, 91 Pa. 481, in which it was held that trespass could not be maintained by a person out of possession against one in possession where the possession was taken under an agreement giving the latter the right to plant a crop which had not yet matured although notice had been given to him to quit.

There are several cases in which it has been held that a person may become a trespasser by attempting to act under a license after its revocation.

Thus where a license to dig ore was revoked and the licensee attempted to enter as before and was assaulted by the owner, for which he brought trespass, the court said that when he made the attempt to enter the enclosure after the revocation of the license he was a trespasser, and the owner could repel his attempted entry. But there is nothing to show whether or not in case he had entered trespass would lie against him. *Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 203.

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Draper v. Williams, 2 Mich. 538.

Trespass for breaking and entering plaintiff's close cannot be maintained where the evidence shows that the defendant entered by permission of plaintiff.

Dingley v. Buffum, 57 Me. 379; *Wheeler v. Meeking-me-sia*, 30 Ind. 402.

An action in trespass cannot be maintained where entry has been made by consent, and works constructed upon the faith of such consent.

Baltimore & H. R. Co. v. Algire, 63 Md. 319; *Goodbar v. Dunn*, 61 Miss. 618; *Jeffries v. Dowdle*, 61 Miss. 506; *Campbell v. Indianapolis & V. R. Co.* 110 Ind. 490; *Kanaga v. St. Louis, L. & W. R. Co.* 76 Mo. 207.

The license under the circumstances was not revocable because executed and the company could not be put in *statu quo*.

Campbell v. Indianapolis & V. R. Co. 110 Ind. 491; *Hodgson v. Jeffries*, 53 Ind. 834; *Nowlin v. Whipple*, 79 Ind. 481; *Buchanan v. Logansport, C. & S. W. R. Co.* 71 Ind. 285; *Gibson v. St. Louis Agr. & Mechanical Assn.* 33 Mo. App. 178; *Baker v. Chicago, R. I. & P. R. Co.* 57 Mo. 265; *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rp. 582; *Rhodes v. Otis*, 33 Ala. 579, 73 Am. Dec. 439; *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574; *Clark v. Glidden*, 60 Vt. 702; 1 Washb. Real Prop. § 4, p. 630.

So where license was pleaded to an action of trespass and the plaintiff relied on trespasses committed after the license was revoked it was held that he could recover without new assigning commission after such revocation. But in that case the license was to sport over the lands so that there was no possession at the time of revocation. *Hayward v. Grant*, 1 Car. & P. 443.

And there are also cases in which it has been held that if the licensee was out of possession when the license was revoked he would render himself liable to an action of trespass by subsequently attempting to enter to exercise his license.

Thus in *Druse v. Wheeler*, 22 Mich. 439, an action of trespass was maintained against trustees of a church who had erected sheds on the property of plaintiff under a parol license and who after a revocation of the license entered the premises to take down the sheds.

So in *Hyde v. Graham*, 22 L. J. Exch. 27, 1 Hurlst. & C. 563, 8 Jur. N. S. 1229, 7 L. T. N. S. 563, 11 Week. Rep. 119, trespass was sustained after revocation of a license to use a right of way.

So in *Wallis v. Harrison*, 4 Mees. & W. 544, 1 H. & H. 405, 2 Jur. 1019, case was sustained for a trespass after revocation of the license.

Also in *Adams v. Andrews*, 15 Q. B. 291, 20 L. J. Q. B. 33, 15 Jur. 149, case was sustained for a trespass upon a church pew after the revocation of the license.

In *Harlow v. Marquette, H. & O. R. Co.* 41 Mich. 336, the action was not sustained because the license had become irrevocable.

It seems to be agreed that the licensee may be removed from the land after the revocation of the license. *Glynn v. George*, 20 N. H. 114.

Therefore the question would be simply as to the form of action. The dearth of cases in point is doubtless due to the facts that there are other effective remedies for regaining possession, and that the instances are somewhat rare where the licensee is given possession to enable him to enjoy his license.

H. P. F.

Mr. Chauncey C. Jencks, for defendant in error:

The license could have carried with it no interest in the land.

Statute of Frauds; How. Stat. § 6179; Cooley, Torts, 806; *Druse v. Wheeler*, 22 Mich. 439. And is therefore revocable at will.

Cooley, Torts, pp. 805, 806; *Druse v. Wheeler*, *supra*; *Wood v. Michigan Air Line R. Co.* 90 Mich. 834.

The question is whether the plaintiff is to be held, in an action at law, estopped from revoking this license.

Wood v. Michigan Air Line R. Co. supra; *Hayes v. Livingston*, 84 Mich. 884, 22 Am. Rep. 538; *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192.

The license was revoked by sale of premises.

Maxwell v. Bay City Bridge Co. 41 Mich. 466, and cases cited; *Ward v. Rapp*, 79 Mich. 469; Cooley, Torts, 804, and cases cited.

Grant, J., delivered the opinion of the court:

The defendant was convicted of *trespass quare clausum fregit*. The acts of trespass consisted in maintaining a spur track over plaintiff's land, and running freight cars over the same. About ten years prior to the trial of the cause in the court below, one Amos C. Beebe owned the land, upon which was a gristmill, at which Beebe carried on both a commercial and custom business. Beyond and adjoining this land was the sawmill of the Smith Lumber Company. Mr. Beebe, the Smith Lumber Company, other parties; and the defendant entered into an arrangement or understanding for the construction of the track in question, which ran so as to accommodate the gristmill, the sawmill, and also the other parties interested. Beebe, at his own expense, furnished the ties for the construction of the track across his land; the lumber company and other parties did likewise; and the defendant furnished the rails and constructed the track, which was used for the joint benefit of all the parties, until Beebe sold and conveyed the land and the mill to the plaintiff, in 1891. After the purchase by plaintiff, he carried on only a custom business, and had but little occasion to use the track. Part of a tramway used by the Smith Lumber Company in connection with the spur track is upon plaintiff's land, for the use of which he receives a rental. The deeds from Beebe to plaintiff contained no reservation, but the plaintiff had full knowledge of the arrangement, having been in partnership with Beebe for some time previous to his purchase of the entire property. The arrangement for the construction of this track rested entirely in parol. In April, 1892, plaintiff rendered a bill to the defendant, claiming \$75 for the use of the land for switching purposes for the previous year. The defendant refused payment, and denied liability to pay any compensation. In August, 1892, he wrote the defendant a letter, stating that, because it had failed to allow him any compensation for the use of his premises, he therefore requested it to remove the track. This the defendant failed to do, and plaintiff thereupon instituted this action

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of trespass. The findings by the court are numerous, but the above statement is sufficient to present and dispose of the question which is decisive of the case.

Plaintiff insists that the defendant had only a parol license to enter upon the land in question, which was revoked by the deed from Beebe to him, and that thereafter defendant became a trespasser in its use of the track. The defendant insists that trespass is not the proper remedy, and that the parol license was coupled with an interest, was executed, and is therefore irrevocable. This spur track was constructed at the joint expense of the defendant and the several parties over whose land it ran, and who were entitled to its use. No time was mentioned for its existence, but it was the evident understanding among the parties interested that it should be continued so long as there was occasion for its use. Evidently, neither party would have incurred the expense of its construction if it had been understood that either might at any time terminate the license, and render the others trespassers by its use. We are not called upon in this suit to determine the important questions arising under an executed parol license, coupled with an interest in the land. The plaintiff has clearly mistaken his remedy. The defendant lawfully entered, and was lawfully in possession. If it be granted that the deed terminated the license, yet this did not operate to render the defendant's possession tortious, and its use a trespass. As well might a tenant whose right to possession and use has been terminated be prosecuted in trespass for remaining in possession. This is not a case of a mere naked license to enter for temporary purposes, such as the cutting of timber, the drawing of water, or the passage over one's land on foot or with teams. In these cases the licensor remains in the actual possession of his property, the licensee obtains only a temporary possession, which is not exclusive, nor coupled with any interest, and the revocation of the license terminates all right of entry. But in the present case the defendant was given the actual possession of the land. It took possession and executed the license, which was largely for the benefit of the plaintiff's grantor, and for the accommodation of the business carried on by him. Under these circumstances, it cannot be made a trespasser by an attempted revocation, either expressly or by implication of law. The rights of the parties in such case must be determined in some proceeding wherein a judgment of ouster can be rendered. Such was the course pursued in *Wood v. Michigan Air Line R. Co.*, 90 Mich. 834, an action of ejectment, upon which case the plaintiff mainly relies to establish revocation by deed.

Judgment reversed, and entered in this court for the defendant, with the costs of both courts.

McGrath, Ch. J., and **Long and Montgomery, JJ.**, concurred with **Grant, J.**

Hooker, J., dissenting:

The plaintiff recovered a judgment of six

cents damages and costs in an action of trespass. The finding of facts shows, in substance, that the plaintiff's grantor permitted the defendant to lay a spur track or switch across his land, upon ties furnished by him. He did not participate in the negotiations with defendant, but permitted the track to be laid in accordance with an arrangement between himself and adjoining mill owners. The track was laid about ten years ago, and has been used for running cars to and from the mills upon the same. On March 8, 1890, the plaintiff became the owner of the undivided one-half of the premises in question; and on March 12 he purchased and obtained title to the other undivided half of the same. These purchases were made by plaintiff with full knowledge of the existence of the track and the arrangement under which it was laid. In April, 1892, plaintiff demanded of the defendant the sum of \$75, as compensation for the use of his land by the spur track for the year immediately preceding April 1, 1892. Defendant refused to pay the same, denying liability. In August, 1892, plaintiff required defendant to remove its track, and, upon its failure to do so, brought this action to recover for alleged trespasses since such refusal. The defendant's counsel contends (1) that the defendant built its spur under a license which is coupled with an interest, and is irrevocable; (2) that, if not, the license was not revoked by the deeds of the plaintiff; (3) that, in any event, trespass would not lie, but that the action should be ejectment.

The first of these questions is disposed of by the case of *Wood v. Michigan Air Line R. Co.* 90 Mich. 384. To hold otherwise would do violence to the rule, well settled in this state, that title to land cannot be acquired by estoppel. It needs no further comment,

unless it be to add that in the case of *Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 386, the road was built by the consent of the plaintiff, upon an oral promise that her claims should be adjusted. Subsequently, she was awarded damages by a jury, which the court held settled her claim. See *Port Huron & N. W. R. Co. v. Callanan*, 61 Mich. 22; *Barnes v. Michigan Air Line Railway*, 65 Mich. 253; *Grand Rapids, L. & D. R. Co. v. Chesebro*, 74 Mich. 474. Under the circumstances of that case, it was said that she could not revoke the license under which the road was constructed. In short, the land was treated as condemned.

It becomes unnecessary to discuss the second question, for, if the deeds to the plaintiff did not have the effect of revoking the license, his express demand to remove the track did.

Upon the third point, it may be said that whether or not trespass will lie must depend upon the question of possession. If the facts were such as to be inconsistent with plaintiff's possession, ejectment, and not trespass, might be the remedy; *e. g.* if the lands had been fenced, and occupied exclusively by the defendant. There is nothing to indicate such possession. The railroad company laid its rails upon the ties and ground of the plaintiff's grantor, and ran its cars across and upon this track for the convenience of the mill owners. There is no reason for saying that it ever asserted or enjoyed possession, to the exclusion of the plaintiff or his grantor. For aught that appears, this was like any other way used under a license. The licensee used it when his business required, and the possession remained in the owner of the fee.

I find no error in the record, and think the judgment should be affirmed.

TEXAS SUPREME COURT.

J. J. POWERS, Guardian of D. R. Coleman,
Pff. in Err.,

v.

H. M. MORRISON, Admr., etc., of N. P.
Coleman, Deceased.

(.....Tex.....)

The share inherited by a grandson in lieu of a deceased parent who would have been entitled thereto if alive, is not subject to deduction for the parent's debt to the grandparent, at least if the grandson receives no property from his parent which would be subject to the latter's debts.

NOTE.—The right to deduct from a share in an estate which comes to an heir or distributee by representation because of the death of a parent or intermediate ancestor a debt due from the latter to the remote ancestor is a matter on which little can be found in law books. The above case cites all the authorities upon the question with which we are acquainted.

As to liability of heirs to pay debts of ancestors in general, see *note* to *Muldoon v. Moore* (N. J.) 21 L. R. A. 82.
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(April 8, 1895.) *

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Henderson County allowing as a set-off against plaintiff's claim to a share in the estate of N. P. Coleman, deceased, the amount due to such estate by the deceased father of the plaintiff's ward. *Reversed.*

The facts are stated in the opinion.

Messrs. Richardson & Watkins, for plaintiff in error:

The law of descent and distribution is statutory and arbitrary and the grandchild is as much an heir and takes as directly from his grandfather as a child and under the language of the statutes stands on the same relation, and being in no way responsible for his father's debts his distributive share cannot be set off by it.

Kendall v. Mondell, 67 Md. 444; *Lawson, Rights, Rem. & Pr.* p. 5080; *Rev. Stat. arts.* 1645, 1652, 1653; *Yancy v. Batte*, 48 Tex. 46.

The right of set-off is statutory, and is only

permissible in case of mutual indebtedness, and cannot be invoked to adjust the rights of estates in a suit against an heir of both of the estates.

Rev. Stat. art. 645; *Hamilton v. Van Hook*, 26 Tex. 302.

Messrs. J. J. Faulk and W. L. Faulk, for defendant in error:

When the heirs of an estate stand in the same degree they take *per capita*; where they are of different degrees they take *per stirpes*.

1. Where none but the immediate children of a decedent are living at date of his death they take *per capita*.

2. Where none of the immediate children are living at date of the death of decedent, but only grandchildren, said grandchildren will also take *per capita*; that is to say, not by representation through their immediate ancestor, but directly in their own rights.

3. Where a part of the children of decedent are living at date of his death, and a part are dead, who leave surviving children, the said grandchildren take not in their own right, but *per stirpes*, or by representation, as used by some authorities. And when an heir takes *per stirpes* he inherits his immediate ancestor's share, just as the ancestor would if living, encumbered with any advancements or debts.

2 Kent, Com. p. 531; Schouler, Exrs. & Adms. 2d ed. § 498; *Hughes' App.* 57 Pa. 179; *Earnest v. Earnest*, 5 Rawle, 213; *Person's App.* 74 Pa. 123; *Skinner v. Wynne*, 55 N. C. 43; *Levering v. Rittenhouse*, 4 Whart. 187; *Page v. Parker*, 61 N. H. 65; 7 Am. & Eng. Encyclop. Law, p. 259, note 1, p. 316; U. S. Dig. of Decisions, 1892, p. 1514, § 102; U. S. Dig. of Decisions, 1890, p. 1523, §§ 420-422.

An executor or administrator may retain a legacy or distributive share in whole or in part, in satisfaction of a debt due from the legatee or distributee.

Ibid.

Gaines, Ch. J., delivered the opinion of the court:

This controversy arose in the county court of Henderson county during the course of a proceeding for the partition and distribution of the estate of N. P. Coleman, deceased. Coleman died intestate, and defendant in error, Morrison, became the administrator of his estate. He left surviving him a widow and five children. One of the intestate's children died before his father, leaving a minor son, who is the plaintiff in error in this court. The deceased son was, at the time of his death, indebted to his father in a sum which was found to exceed the interest he would have inherited in the estate had he survived his father. The case was appealed from the county court to the district court, where it was adjudged that the share of the grandchild in the estate of his grandfather was subject to be offset by his father's debt to the estate, and that, therefore, he should take nothing in partition. The judgment of the district court was affirmed by the court of civil appeals. Was the grandchild chargeable in partition with the debt of his father to his grandfather? This is the sole question presented for our determination. The right of succession in

this state is the creature of statutory law, and therefore the decision of the question depends upon the construction of our statutes of descent and distribution. When one dies intestate in this state, the statute casts the title of all his property, both real and personal, directly upon his heirs. The provision which applies immediately to the question before us is as follows: "When the intestate's children, or brothers and sisters, uncles and aunts or other relations of the deceased standing in the same degree alone come into the partition, they shall take *per capita*, that is to say, by persons; and when a part of them being dead and a part living, the descendants of those dead have right to partition, and such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive." 1 Sayles' Civ. Stat. art. 1632. We are of the opinion that the purpose of the article was to declare under what circumstances those entitled to the inheritance should take *per capita* and under what contingencies they should take *per stirpes*. Such is the intention plainly manifested upon the face of the provision, and we find nothing in the language employed to indicate a further purpose,—that when they take *per stirpes*, those standing in the remoter degree should be subject to the liabilities of their ancestors. The plaintiff in error in this case is entitled under the statute to the share which his father would have taken, if alive, at the death of the intestate. This share would have been one sixth of the property, which descended to the children of the deceased. If the son of the intestate had survived his father, and had not paid his debt to the estate, in the adjustment of the equities between him and his coheirs, his share would have been set off by the debt. His portion of the estate would simply have been credited upon his obligation. If he had survived, and had paid his debt to the administrator, he would have been entitled to an equal distribution with his brothers and sisters. If his estate had been solvent, it would have been the duty of the administrator to collect the debt, and the right of the plaintiff in error to receive the share of the estate which he would have inherited if alive. If, on the other hand, his estate had been insolvent, and his debt had not been paid, and the plaintiff in error had received from his estate property subject to the payment of his debts, equal in value to the amount of the debt, then the latter would have become liable for the discharge of his obligation, and that liability could have been set off against the share of the estate he would otherwise have been entitled to receive. But, the estate of his deceased father being insolvent, the plaintiff in error received no property from it which rendered him liable to the payment of the debts against it, and therefore he owes his grandfather's estate nothing, and there is no liability of his own to be set off against his share in the estate.

It does not follow that, because the father of plaintiff in error, if he had been alive at the death of his intestate, would have had to account in settlement for his debt, he would

not have received his due share of the estate. He would not have been permitted to assert that his debt to the estate was of no value, though, under other circumstances, it may have been worthless. If alive he would have received his full share in his debt. Being dead, since his child did not owe the debt, the latter was entitled to receive his share without accounting for the liability of his father. It is clear that, if the intestate had left only grandchildren, the plaintiff in error would have received his full share, although the immediate ancestors of the other grandchildren had owed nothing to the grandfather's estate; and why a different rule should prevail when he takes *per stirpes* and not *per capita* we do not see. In *Kendall v. Mondell*, 67 Md. 444, a similar question came up for determination. It appears from the opinion of the court in that case that the code of Maryland provides "that if a father or mother be dead, the children of such father or mother shall receive the same share of the estate as the father or mother if living would have been entitled to, and no more." The contest was between a sister of the intestate and the children of another sister. The mother of the children was indebted to the intestate, and died first. The attempt was to set off the indebtedness against the children's share in the estate, and it was held that it could not be done. Under a statute substantially the same as our own, the supreme court of Massachusetts hold that an heir who takes *per stirpes* takes directly from the intestate, and in his own right, and not through and in right of his immediate ancestor. *Sedgwick v. Minot*, 6 Allen, 171; *Howland v. Howland*, 11 Gray, 469; *Valentine v. Borden*, 100 Mass. 278. On the other hand, the supreme court of Pennsylvania, construing the statute of that state, holds that the heir in such a case represents his immediate ancestor, and inherits his rights, and that, accordingly, a debt due by such ancestor to the intestate may be set off against the heir's interest in the estate. *Earnest v. Earnest*, 5 Rawle, 213; *M'Conkey v. M'Conkey*, 9 Watts, 858; *Hughes' App.* 57 Pa. 179. The statute of Pennsylvania reads as follows: "The issue of such deceased child shall take by representation of their parents respectively, such share only as would have descended to such parents had they been living at the death of the intestate." Laws 1832-33, p. 817. It may be doubted whether this demands a construction different from that which should be placed upon the statute of our own state. But the Pennsylvania court lays stress upon the fact that their statute declares that the heir shall take by representation. In *Earnest v. Earnest*, *supra*, they say: "As the plaintiffs entitle themselves as representing their parents only, they must take the share which descended to them, with all the burden, had their parents been living." In the subsequent case of *Igenfritz's App.*, 5 Watts, 25, a contrary ruling was made; but in *M'Conkey v. M'Conkey*, this case was expressly overruled, the court saying: "*Igenfritz's App.* was decided without adverting to the Statute of 1833, which declares that issue of such deceased child, grandchild, or other descendant shall take by

representation of their parents, respectively, such share as would have descended to such parents had they been living at the death of the intestate. On this principle of representation, and not of substitution, had been decided *Earnest v. Earnest*; and the oversight in *Igenfritz's App.* is one for which it is difficult to account." In *Hughes' App.*, *supra*, the doctrine of *Earnest v. Earnest* and of *M'Conkey v. M'Conkey* was reaffirmed, rather upon the ground, as it seems to us, that the law had been settled, than that the question had been correctly determined. We are not prepared to say what weight ought to have been given to the words in the statute of Pennsylvania upon which the determination of these cases seems to have turned; but, leaving those words out of view, it seems to us the opinion in the overruled case cannot be successfully answered. The court there says: "The grandchildren of an intestate take by substitution, not through, but paramount to, their parent. The law designates them as persons to take a title, derived, not from the parent, but immediately from the intestate. The property never was in the parent, and consequently they did not inherit from him what he had not. If the administrator could come upon the funds in their hands as the representative of the parent's creditor, it is obvious that all other creditors might do the same,—a consequence not to be pretended." At least, as applied to our statute, we think this an accurate statement of the law. The argument is as forcible as it is terse. Our conclusion is that the plaintiff in error is entitled to receive his full share of the estate, without accounting for his father's debt.

The judgments of the District Court and of the Court of Civil Appeals are reversed, and the cause remanded to the district court for further proceedings in accordance with our opinion.

Rehearing denied.

STATE of Texas, *ex rel.* Charles GUERGUIN, *Appt.*,

F. W. McALLISTER.

(.....Tax.....)

1. The contemporaneous interpretation of the constitution by those who had opportunity to understand the intention of the instrument has a strong presumption in its favor.
2. A statute providing that each ward of a city may elect one alderman does not violate Const., art. 6, § 3, providing that all qualified electors in a city "shall have the right to vote for mayor and the other elective officers," as this does not necessarily mean that every elective officer must be elected by the voters of the entire city.

NOTE.—On the general question how far the right to vote is absolute, see note to *State v. Blake* (N. J.) 25 L. R. A. 480.

For denial of the power to divide a county in New Jersey into assembly districts, see *State v. Wrightson* (N. J.) 22 L. R. A. 548.

(May 27, 1896.)

QUESTIONS certified by the Court of Civil Appeals for the Fourth Supreme Judicial District upon appeal by relator from a judgment of the District Court for Bexar County in favor of defendant in an action brought to test defendant's right to a public office. *Answer favorable to defendant returned.*

Mr. J. D. Childs for appellant.

Messrs. Camp & Umscheid, Peter Shields, and R. B. Minor, for appellee:

The provisions of section 33 of the charter of the city of San Antonio (as amended March 4, 1885), which restrict the right of suffrage of voters in each ward to voting for ward alderman of that ward, are in conflict with section 8 of article 6 of the Texas Constitution, and therefore void.

Texas Const. art. 6, § 3; Charter of City of San Antonio, as amended March 4, 1885, Acts 1885, § 33; *State v. Wrightson*, 22 L. R. A. 548, 56 N. J. L. 126; *State v. Blake* (N. J.) 25 L. R. A. 480; *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 838.

On petition for rehearing.

The action of the legislature contemporaneously with the adoption of the Constitution of 1876, in retaining article 347 (Act of March 15, 1875) in the Revised Statutes and in granting the city of Houston and perhaps other cities special charters containing provisions for voting by wards, may more reasonably be regarded as an oversight on their part than as an indication that they understood said statutory and charter provisions as being consistent with section 8 of article 6 of the Constitution.

By a separate and deliberate enactment only four months after the adoption of the Constitution of 1876, the legislature gave strong evidence of their desire to enforce section 8 of article 6 of the Constitution.

That act is as follows: "Art. 1691. All qualified voters of the state who shall have resided for six months immediately preceding an election within the limits of any city, town, or village, shall have the right to vote for all elective officers of such city, town, or village.

Sayles' Stat. art. 1691, Act, August 23, 1876.

This statutory provision clearly prohibits voting by wards and plainly adopts the interpretation of the constitution for which we are contending.

The language of the constitution plainly and unequivocally requires that aldermen be elected by the voters of the city at large.

The language of the constitution and it alone should be looked to.

An outside consideration should be excluded because if that meaning be plain all such outside considerations must give way before it.

This view is greatly strengthened by considering in connection with said section the provisions of section 18 of article 5 of the Constitution in relation to county commissioners' precincts, and voting therein. That language is: "Each county shall in like manner be divided into four commissioners' precincts, in each of which there shall be elected by the qualified voters thereof one county commissioner."

How clearly and explicitly have the framers of the constitution expressed their meaning as

to the method of voting for county commissioners. Had a similar intention existed in their minds in reference to city elections, is it not reasonable to believe that such intention would have been expressed as clearly in that case as in reference to county commissioners?

The meaning of the constitutional provision under consideration (sec. 8, art. 6) being plain and unambiguous, the court is in error in applying at all the principle of contemporaneous practical construction, which has no application whatever where the language of the constitution is plain.

Cooley, Const. Lim. 6th ed. pp. 86, 87, 5th ed. pp. 844 *et seq.*; *Bingham v. Miller*, 17 Ohio, 446, 49 Am. Dec. 471.

Brown, J., delivered the opinion of the court:

Section 33 of the charter of the city of San Antonio reads as follows:

"Sec. 33. The city council shall be composed of the mayor and aldermen. One alderman to be elected from each ward by the voters thereof, and four aldermen to be elected by the voters of the city at large. . . . The aldermen elected as representatives of the different wards shall be residents thereof at least six months prior to the election," etc.

Question: Is the above section of the city's charter unconstitutional in providing for the election of aldermen from the several wards by the vote of the wards respectively?

Section 8, article 6, of the Constitution of this state, is in the following words:

"Sec. 8. Electors in Towns and Cities: When must Pay Taxes. All qualified electors of the state, as herein described, who shall have resided for six months immediately preceding an election within the limits of any city or corporate town, shall have the right to vote for mayor and all other elective officers; but in all elections to determine the expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town," etc.

The law in question must be held to be valid "unless the constitution expressly or by necessary implication forbids its enactment." *Lytle v. Haiff*, 75 Tex. 132. In determining the question of the constitutionality of an act of the legislature, the intention of the framers of the constitution must be ascertained by considering the entire section, as well as the circumstances under which it was adopted. Cooley, Const. Lim. p. 70. At the time the constitution was adopted, the Law of 1875, entitled "An act regulating the incorporation of cities of one thousand inhabitants and over," etc., was in force, the fifth section of which provided for the election of aldermen of cities by the electors of each ward of the city. Laws 1875, p. 113. After the adoption of the constitution the laws were revised by a commission, and adopted by the legislature in 1879, and the section referred to was copied literally into the Revised Statutes, being article 846. The commissioners for revision of the laws, in their report to the legislature, said in reference to title 17 (Cities and Towns): "The

substance of the old law is retained," etc., showing that by construction of the revisers and the legislature this law was not repealed by the constitution. At the time the constitution was adopted, there were many cities and towns in the state organized under the Law of 1875 and under special acts, in which the same provision, in substance, for electing aldermen, was embraced. In fact, it was the well-known and common method of city government. The effect that is claimed for the constitution in this particular would have operated to annul all such provisions in the general law and in the special charters, thus changing the established plan of municipal government. The purpose to destroy a system of municipal government so common in the state will not be attributed to the convention that framed the constitution, unless the language used is so certain as to compel such a construction by the courts.

Before examining the particular section in question, we will notice an argument made to the effect that the Legislature of 1876 (the first held after the convention adjourned) construed that section in accord with the claim of appellee. In an act entitled "An act regulating elections," approved August 23, 1876, the legislature simply embodied in the statute the third section of article 6 of the Constitution. It is no construction of the constitution, but, if to be considered as construction, we think that the legislation of that session upon this subject, taken as a whole, would militate against the claim of appellee. If it had been intended to change the manner of electing aldermen, the legislature would certainly have provided another mode, which it did not do, but left the old law in force. At the same session (1876) the legislature amended the charter of the city of Houston in which the section of the constitution under consideration was substantially copied, and in a subsequent section provided "that each ward in the city shall be represented in the city council by two aldermen, elected by the qualified voters of each ward, who shall vote only in their respective wards." Special Laws 1876, p. 44, § 7. A similar provision is found in the charters of the city of Dallas granted at that session. Laws 1876, p. 74, § 5. And at the same session the legislature granted a new charter to Galveston, in which the same method of electing aldermen is prescribed. Laws 1876, p. 8, § 5. Thus, we see that the construction placed by the first legislature which assembled after the adoption of the constitution is to the effect that the section under consideration did not interfere with the election of aldermen by wards, for assuredly the legislature would not have embraced the constitutional provision in these charters, and at the same time prescribed a manner of electing officers in conflict with the constitution, as the members of that body understood it. The contemporaneous construction of the constitution by the legislature being against the claim of the appellee in this case, what weight should be given to that construction? Mr. Cooley says: "Indeed, where a parti-

cular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. And where this has been given by officers in the discharge of their official duties, and rights have accrued in reliance upon it which would be divested by a decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight." Cooley, Const. Lim. p. 81. We think that this rule is specially applicable to those matters which are political, as the creating and regulation of municipal corporations, when the legislative branch of the government has placed a construction upon the provisions of the constitution relating thereto.

We have been cited to a number of cases to sustain the contention that the act is unconstitutional. We will notice those most in point. *State v. Wrightson*, 56 N. J. L. 126, 22 L. R. A. 548, arose under the constitution of New Jersey, in which it was prescribed that "the general assembly shall be composed of members elected annually by the legal voters of the counties respectively," etc. It will be observed that the requirement is that the members be elected by the voters of the county, which, of course, means the entire county. The legislature divided the counties into assembly districts, and required a given number to be elected from each district. In *Re Newport Charter*, 14 R. I. 658, the question arose under the provisions of their constitution to the effect that the voters should have the "right to vote at all elections of civil officers," etc. The legislature restricted the right to taxpayers, and the court held the law unconstitutional. The constitution of Ohio secured to each qualified voter the right "to vote at all elections." The legislature enacted a law by which the city of Springfield was to elect for the entire city four police commissioners, but it was declared in the act that no elector should vote for more than two of the persons to be elected. The supreme court held that this was unconstitutional, and that each elector was entitled to vote for each officer to be elected. In that case the voters were deprived of the privilege of casting their ballots for some of the officers to be voted for in their district or territory. These are not parallel cases to the one under consideration. The law assailed in this case secures to every qualified voter the right to vote for all officers to be elected from his ward, which we think was the intention in adopting the constitution. The language of section 3, article 6, of the Constitution indicates the intention of the convention to have been to divide the voters into two classes, and to secure the rights of each upon the two principal subjects of elections: First. In the election of city officers, all of the qualified electors under the constitution, upon residence in the city for six months prior to the election, were secured in the

right to vote. The reason is obvious, because these officers deal with the rights of all citizens alike in the general government of the city. Second. In determining the questions of "expenditure of money and assuming a debt," the right to vote was restricted and secured to those of the people who would bear the burdens of taxation, that they might determine for themselves the purposes for which taxes should be levied upon their property, and the amount to be thus raised. This section of the constitution does not prescribe that all elective officers shall be elected by the votes of the entire city, but it simply secures to the voters of each city the right to cast their ballots for all officers to be elected for the particular subdivision of the city for which such officers are chosen. If, however, there was a doubt as to the proper construction of this language, we must maintain the law in question under the well-established and recognized rule of construction that courts cannot declare an act of the legislature void unless it be clearly in conflict with the constitution. *Sutherland v. De Leon*, 1 Tex. 304, 46 Am. Dec. 100; *Orr v. Rhine*, 45 Tex. 854. The words "all other elective officers" mean all such officers of the city as the law might make elective; but this language, when taken in connection with the remainder of the section, does not necessarily mean that every elective officer must be elected by the voters of the entire city.

We answer that the section of the law referred to in the question is not unconstitutional, and that the legislature has the power to make the aldermen of a town or city elective by wards, in whole or in part, or by the city at large.

Rehearing denied.

WEATHERFORD MINERAL WELLS & NORTHWESTERN R. CO., *App't.*,

M. B. WOOD.

(.....Tex.....)

An agreement to give a pass to a man and his family annually for ten years and to stop trains at his house to let them on and off during that period is not within the statute of frauds as an agreement which cannot be performed within one year, since the death of each member of the family within the year would end the contract.

(April 25, 1886.)

ERROR to the Court of Civil Appeals, Second and Supreme Judicial District, to review a judgment affirming a judgment of the Dis-

NOTE—The above case makes a very strong test of the rule of the statute of frauds in respect to contracts not to be performed within one year. As to this, see also *Seddon v. Rosenbaum* (Va.) 3 L. L. A. 337, and *note*; *Lowman v. Sheets* (Ind.) 7 L. R. A. 784, and *note*; *Wooldridge v. Stern* (C. C. W. D. Mo.) 9 L. R. A. 129; *Arkansas Midland R. Co. v. Whitley* (Ark.) 11 L. R. A. 621. 38 L. R. A.

trict Court for Parker County in favor of plaintiff in an action brought to enforce compliance with a contract which defendant had made to give plaintiff an annual pass over its road and to stop its trains at his residence. *Affirmed.*

The facts are stated in the opinion.

Mr. B. G. Bidwell, for appellant:

This suit is against the party whose agreement was not to be performed within a year, and is within the statute of frauds.

Tex. Rev. Stat. art. 2464, subsec. 5; *Warner v. Texas & P. R. Co.* 54 Fed. Rep. 922; *Sheehy v. Adarene*, 41 Vt. 541, 98 Am. Dec. 623; *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708; Throop, Verbal Agreement, art. 1, p. 67; 1 Benjamin, Sales, § 90, p. 108, and *notes*; Wood, Stat. Fr. §§ 277-279, and *notes*.

The part performance of the agreement by either or both parties does not take the agreement out of the statute of frauds, and specific performance can only be decreed by a court of chancery in a suit therefor.

Reynolds v. Johnston, 18 Tex. 216; *Morris v. Gaines*, 82 Tex. 255; Pom. Spec. Perf. § 30, and other sections under the head of statutes of frauds; Pom. Eq. Jur. title, Statute of Frauds; *Warner v. Texas & P. R. Co.* *supra*.

Mr. A. H. Culwell for appellee.

Denman, J., delivered the opinion of the court:

Wood had a judgment against the railroad for \$1,000. In satisfaction of such judgment the railroad verbally agreed to pay Wood \$800 cash, and issue him a pass over the road for himself and family for a period of 10 years, the pass to be issued annually on the first of each year; and to stop its trains at his house, to let him and his family get on and off, whenever they desired to do so during said 10 years. In accordance with this agreement the railroad immediately paid the \$800, and issued the pass to Wood and family, and stopped the train at his house for his family to get on and off, as agreed, during the first two years of the contract, but declined to issue any pass to stop the train at Wood's house for his family to get on and off after the second year, whereupon Wood sued the railroad for damages for breach of the contract. The defense was based upon the proposition that no action could be maintained upon the verbal contract, because it was not to be performed within one year. Judgment for plaintiff having been affirmed by the court of civil appeals, the railroad has brought the case here upon the alleged ground that "the court of civil appeals erred in holding that the verbal contract for the breach of which appellee, Wood, seeks redress is not within the statute of frauds of the state of Texas." The statute provides that "no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized." Rev. Stat. art. 2464. It seems

to be pretty generally held in the English and most of the American courts that the agreement is not within the statute where (1) the agreement is of such a character that either party thereto may perform his part thereof within a year, though the other party cannot, or (2) the consideration for the agreement not performable within the year has been paid or executed. In fact, this class of decisions excludes from the operation of the statute all agreements except those which cannot be performed by either side within the year. Since such contracts are rare, this ruling virtually repeals the statute. *Blanding v. Sargent*, 83 N. H. 239, 66 Am. Dec. 720; *Wolke v. Fleming*, 103 Ind. 105, 53 Am. Rep. 496; *Suggett v. Cason*, 26 Mo. 224; *Perkins v. Clay*, 54 N. H. 518.

While these questions appear never to have been passed upon by this court, though one of them was raised in the brief of appellee in *Miller v. Roberts*, 18 Tex. 16, 67 Am. Dec. 683, nevertheless it early evinced a strong disinclination to follow any construction of the statute of frauds which defeats the legislative will. *Garner v. Stubblefield*, 5 Tex. 552. Subsequent rulings in reference to that clause of the statute relating to contracts for the conveyance of land indicate the settled policy of adhering to the intention of giving effect to the statute, except where the contract has been so far performed that it would be inequitable to refuse specific performance, such a case not being presented by mere payment of consideration and taking possession. *Thouvenin v. Lea*, 26 Tex. 612; *Ann Berta Lodge v. Leverton*, 42 Tex. 25; *Murphy v. Stall*, 48 Tex. 124; *Bradley v. Owsley*, 74 Tex. 69. Some learned courts, whose reasoning is difficult to answer, have given effect to that clause of the statute under consideration here by holding it applicable to that numerous class of cases where the contract or agreement of the party sought to be "charged therewith" in the particular suit was not to be performed within the year, though the promise of the other party was performable within the year, or the consideration executed. *Pierce v. Paine's Estate*, 28 Vt. 36; *Sheehy v. Adarens*, 41 Vt. 541, 98 Am. Dec. 623; *Parks v. Francis*, 50 Vt. 626, 28 Am. Rep. 517; *Doyle v. Dixon*, 97 Mass. 209, 93 Am. Dec. 80; *Prary v. Sterling*, 99 Mass. 462; *Bartlett v. Wheeler*, 44 Barb. 162; *Reinheimer v. Carter*, 31 Ohio St. 586; *Broadwell v. Getman*, 2 Denio, 87.

Under the view we have taken of this case, it does not become necessary for us to determine now which of these two conflicting lines of decisions we will follow. It seems to be well settled that where there is a contingency expressed upon the face of the contract or implied from the circumstances, upon the happening of which within a year the contract or agreement will be performed, the contract is not within the statute, though it be clear that it cannot be performed within a year, except in the event the contingency happens. Thus an agreement to give an annual pass over a railroad during life is performable by the happening of the implied contingency of the death of the donee within the year, and is not within the statute.

28 L. R. A.

Atchison, T. & S. F. R. Co. v. English, 39 Kan. 110. So an agreement to support a child or children until majority will be performed upon the happening of the implied contingency of the death of such child or children within the year, and is therefore not within the statute. *Peters v. Westborough*, 19 Pick. 864, 31 Am. Dec. 142; *Wiggins v. Keizer*, 6 Ind. 252. So an agreement not to do business at a certain place will be performed upon the death of the party so agreeing within a year, and therefore is not within the statute. *Lyon v. King*, 11 Met. 411, 45 Am. Dec. 219; *Worthy v. Jones*, 11 Gray, 168, 71 Am. Dec. 696; *Hill v. Jamieson*, 16 Ind. 125, 79 Am. Dec. 414; *Foster v. McO'Blenis*, 18 Mo. 88. So an agreement to support one during life may be performed upon the contingency of the death of the person to be supported, and is not within the statute. *Heath v. Heath*, 31 Wis. 223; *Carr v. McCarthy*, 70 Mich. 258; *Hutchinson v. Hutchinson*, 46 Me. 154; *Howard v. Burgen*, 4 Dana, 137; *Burney v. Ball*, 24 Ga. 515.

Some courts have undertaken to draw a distinction between that class of contracts or agreements to do or refrain from doing a thing during life and that class of contracts or agreements to do or refrain from doing a thing for a stipulated period of years, holding that, where the former will be performed upon the happening within the year of the implied contingency of death, the statute does not apply, but that it does apply to the latter class, though performable upon the happening of the same contingency within the year. The reason given is that by the terms of the contract the parties in the latter class contemplate that the same will not be performed within a year. *Mallett v. Lewis*, 61 Miss. 105. Thus, according to this reasoning, an agreement to give A. an annual pass for life is not within the statute, because performable within the year upon the happening of the contingency of A's death within that time, while an agreement to give him a pass for 10 years is within the statute, for, though the contract would appear to be performable within a year upon the happening of the contingency of A's death within that time, still the parties contemplated by the terms of the agreement that it would not be performable within a year. According to the same reasoning, a contract to give A. an annual pass for 10 years would be within the statute, though it is clear the contract would be performed upon A's death within a year, while a contract to give A. an annual pass for 10 years, provided the contract shall be considered performed if A. die within a year, would not be within the statute; for in the first case the parties by their contract contemplated that it would not be performed within a year, whereas, in the latter case, they, by their contract, contemplated its performance within a year if A. should die within that time. We think this reasoning untenable, and not justified by the statute. If the contingency is beyond the control of the parties, and one that may, in the usual course of events, happen within the year, whereby the contract will be performed, the law will presume that the parties contem-

plated its happening, whether they mention it in the contract or not. *Peters v. Westborough, supra; Ellicott v. Turner*, 4 Md. 476; *Peter v. Compton*, Skin. 353; *Fenton v. Emblers*, 8 Burr. 1278; *Wells v. Horton*, 4 Bing. 40. The statute only applies to contracts "not to be performed within the space of one year from the making thereof." If the contingency is such that its happening may bring the performance within a year, the contract is not within the terms of the statute, and this is true whether the parties at the time had in mind the happening of the contingency or not. The existence of the contingency in this class of cases, and not the fact that the parties may or may not have contemplated its happening, is what prevents the agreement from coming within the scope of the statute. Applying these principles to the case under consideration, we think it clear that the contract above set out was not within the statute. The agreement to give the pass and stop the trains was personal to Wood and family. He could not transfer it. In case of his death within the year, the obligation of the company to him would have been performed, and no right thereunder would have passed to his heirs or executors. If it be held that each member of his family had an interest in the agreement, the same result would have followed the death of such member or all of them within the year. If the agreement had been to give Wood a pass for life, it would, under the above authorities, not have been within the statute, and we can see no good reason for holding it to be within the statute because his right could not have extended beyond 10 years. The happening of the contingency of death of himself and family within a year would have performed the contract in one case as certainly as in the other.

The judgment is affirmed.

J. E. FAIRES, Impleaded, etc., *Plff. in Err.*,

v.
M. COCKRILL *et al.*

(.....Tex.....)

1. The right of action of a co-obligor or surety who satisfies the debt, for contribution from those who are liable with him rests upon the implied promise raised by law and not upon subrogation, where the creditor has no security and the debt creates no lien upon property and is entitled to no priority over other debts.

NOTE.—In illustrating and defining the limits of the doctrine of subrogation and distinguishing between that and an implied promise the above case is exceptionally clear. The court has so fully developed the subject in the light of the other authorities that no annotation will be attempted.

For subrogation on payment by volunteer or stranger, see *note* to *Crumlish v. Central Imp. Co.* (W. Va.) 23 L. R. A. 120.

For subrogation on void execution sale, see *note* to *Riley v. Martinelli* (Cal.) 21 L. R. A. 33.

For some general principles of the subject, see *note* to *Spaulding v. Harvey* (Ind.) 13 L. R. A. 612, 28 L. R. A.

2. The cause of action for contribution between joint obligors on a written contract is not founded upon the written contract so as to be within the four years' limitation under Rev. Stat., art. 2203, but is within the two years' provision applicable to contracts not in writing.

(May 20, 1895.)

ERROR to the Court of Civil Appeals, First Supreme Judicial District, to review a judgment modifying a judgment of the District Court for Fayette County so as to deny defendant Faires the benefit of the statute of limitations in a suit to compel him to contribute his share toward a fund subscribed to a railroad company which had been paid by his co-obligors. *Reversed.*

The facts are stated in the opinion.

Messrs. Moore & Duncan for plaintiff in error.

Messrs. Brown, Lane & Jackson for defendants in error.

Brown, J., delivered the opinion of the court:

The following statement of the facts is sufficient for an understanding of the questions presented: J. E. Faires and the defendants in error, with other persons, were appointed, by a meeting of citizens, as an executive committee to secure the right of way for the San Antonio & Arkansas Pass Railroad through Fayette county, and depot grounds at the town of Platonía in that county, and they gave to that railroad company a written agreement binding themselves to secure the right of way and depot grounds, and to pay for the same. The contract provided that the railroad company should select the grounds, but at the time the agreement was signed Faires understood that the depot was to be located upon or near lands belonging to him, upon which understanding he signed the contract. The railroad company made the selection at that point, but afterwards changed the depot to another part of the town; and upon the trial Faires pleaded and sought to prove the facts. The court excluded the evidence, upon objection that such testimony tended to vary the terms of the written contract. The other parties to the contract, or some of them, paid out money for the right of way, depot grounds, and expenses in procuring them, some of which payments were made more than two years, but not four years, before the bringing of the suit. The depot was located, and the contract with the railroad company was completed in 1887, the suit being brought in 1893 by the plaintiffs against Faires and others to recover their *pro rata* part of the money so paid. Faires pleaded the statute of four and two years' limitation. The court below rendered judgment against Faires and others for the amount due. Faires alone brings the case to this court, upon two questions: First, that the court erred in excluding the evidence as to the understanding that the depot would be located as he claimed; second, that the court erred in holding that the plaintiffs' claim, or part of it, was not barred by the statute of limitations. Upon

the first question the court of civil appeals rightly held that the evidence was not admissible, and it is unnecessary for us to discuss that question. On the second question the court of civil appeals held that the plaintiffs' cause of action was founded upon the written contract entered into with the railroad company, and that it required the expiration of four years from the date of each payment by the plaintiffs to bar their claim for contribution. This presents to us the following questions: First. Was plaintiffs' claim founded upon the written contract or upon an implied promise from each signer to reimburse the other signers of that contract for payments made by them in excess of their proportional part thereof? Secondly. What period of limitation applies to the plaintiffs' claim for contribution?

Our statute of limitations, so far as it affects the question before us, is as follows: Article 3203: "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterwards, all actions or suits in court of the following description: . . . 2. Action for debt where the indebtedness is not evidenced by a contract in writing." Article 3205: "There shall be commenced and prosecuted within four years after the cause of action shall have accrued and not afterward, all actions or suits in court of the following description: . . . 1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing." In *Holliman v. Rogers*, 6 Tex. 91, Holliman, as principal, and O'Neill and Grace, as his sureties, made a note payable to Frank or bearer. Grace paid the note, and suit was instituted in the name of Rogers against Holliman to recover the amount of the note. Rogers sued for benefit of Grace, though it does not so appear directly in the case. The suit was upon the note, and the question was directly presented as to whether or not a suit could be maintained upon the note under such circumstances. The court, Judge Lipscomb delivering the opinion, held that when Grace paid the note it was extinguished, and no suit could be maintained upon it, but that the suit should have been upon the implied promise which the law raises from Holliman to indemnify the surety in case he paid the debt.

Sublett drew a draft in favor of Gen. Sam. Houston on McKinney and Williams, who accepted the draft, and paid it on the 26th day of November, 1841. Suit was filed on the draft against Sublett's administrator, he having died September 2, 1844. McKinney and Williams had no funds of Holliman in their hands, and the former accepted the draft for his accommodation. Holliman pleaded the statute of limitations of two years. The supreme court held that the right of action of the accommodation acceptor was upon the draft, and that it required four years to bar the action. *Sublett v. McKinney*, 19 Tex. 439. That case would justify the conclusion drawn by the learned judge who wrote the opinion of the court of civil appeals in this case that the period of limitation would be four years, and would run from the date of

the payment. The opinion in *Sublett v. McKinney* was written by Judge Wheeler, who was on the court at the time the case of *Holliman v. Rogers* was decided. The same question was not before the court for decision in *Close v. Fields*, 2 Tex. 282, but Judge Wheeler, who wrote that opinion, said, in discussing a kindred question: "It may, however, be here remarked that according to the principles of liability of the drawer to the acceptor for accommodation the acceptor can never sue on the bill; he must sue for money loaned or paid to the use of the drawer,"—citing Chitty on Bills, p. 537, in which it is said: "In the case of an acceptor for the accommodation of the drawer, such acceptor, if he has been obliged to pay, may sue the drawer on his implied contract to indemnify him, but not on the bill itself." Dan. Neg. Inst. § 532. *Tutt v. Thornton*, 57 Tex. 85, was decided by the commission of appeals before the law required the supreme court to approve their decisions, and is not, therefore, to be considered as an authority in the sense that it has been decided or passed upon by the supreme court. In that case Tutt gave his note to Heckler, and before it was delivered Thornton wrote his name upon the back of it, for the accommodation of Tutt. He afterwards paid the note, and it was transferred to him, whereupon he sued Tutt upon the note, striking out his indorsement on the back of it. The court held that the cause of action was upon the note. In this case the judge followed the case of *Sublett v. McKinney*. In *Carpenter v. Minter*, 72 Tex. 370, Judge Collard, for the commission of appeals, held that a surety who pays the note of his principal is entitled to sue upon the note, and to recover all that the payee of the note could have recovered, including attorney's fees, although the surety paid the note before suit, and the note provided for attorney's fees in case of suit. In that case it is said: "The right of the surety, after payment of his principal's note, was not on the implied assumption for the amount paid, but to sue on the note itself." The opinion was adopted by the supreme court. *Jackson v. Murray*, 77 Tex. 644, was also decided by the commission of appeals after the law required the supreme court to approve their opinions. In that case, Collard, J., delivering the opinion, held that the cause of action of a surety against his cosurety for contribution was upon the implied promise, and not upon the note. The opinion was adopted by the supreme court. Thus it will be seen that the cases in our own court are in conflict upon this question, the authoritative decisions being *Holliman v. Rogers* and *Sublett v. McKinney*. It becomes necessary for us to settle the question upon authority and principle, for which purpose we will briefly examine the cases and cite some of the authorities. In the case of *Sublett v. McKinney*, Judge Wheeler states the doctrine that a surety who pays the debt of his principal is entitled to be subrogated to the rights of the payee as to all securities which he may have from the principal debtor, and from this premise he reasons to the conclusion that this subrogation applies with

equal force and justice to the debt itself. In support of this proposition or conclusion he cites *Ex parte Crisp*, 1 Atk. 183; *Morgan v. Seymour*, 1 Ch. R. 64 [1 Rep. in Ch. 120]; *Parsons v. Briddock*, 2 Vern. 608; *Lumpkin v. Mills*, 4 Ga. 843. In the case of *Ex parte Crisp* the question was as to the right to have the securities of the principal creditor assigned upon payment of his debt, and the court held that such right would, in a proper case, be enforced. But in that case the assignment of the debt itself was not involved. We have not been able to find the case of *Morgan v. Seymour*, and suppose it is a mistake in the citation. The case of *Parsons v. Briddock* likewise involved the right to an assignment of an independent security. The plaintiffs were the sureties of the defendant in the judgment, and, he being arrested, gave bail. Judgment being rendered upon the debt and against the bail, the sureties paid the judgment, and brought an action to compel the assignment of the judgment against the bail. *Lumpkin v. Mills*, 4 Ga. 843, involved the question of subrogation to the very debt, it being a specialty, and therefore entitled, under the laws of that state, to priority in payment out of the estate of the deceased debtor. The court held that the surety was entitled to that remedy, upon which point there is much conflict in the authorities.

Before examining the authorities, we will see if the doctrine of subrogation can be logically carried to the extent that Judge Wheeler extended it in *Sublett v. McKinney*. Where there is no independent security held by the creditor, what is the reason for holding that the surety is subrogated to the debt? The object of the rule of subrogation is to give to the paying surety all the remedies that the creditor has against the principal debtor. There is no advantage in having the unsecured debt assigned. A suit upon the implied promise, growing out of the relations of the parties, is just as effective for that purpose, and a more simple proceeding. If the surety pays the half of the debt, he is only entitled to recover that much, and he cannot recover that upon the note or contract without other proof, for he must show how much he has paid. It is not, therefore, true that he is subrogated in that case to the position of the creditor who recovers upon the contract according to its terms, without other proof. The result is that, under this view of the doctrine of subrogation, the surety is not subrogated to all of the rights of the payee, but only partially so,—that is, to the extent that he has paid; and we must read the contract as an obligation to pay one half of its face when the language expresses a promise to pay the whole sum. There are many difficulties in the application of this doctrine, some of which we will briefly notice. The surety can recover from the principal debtor only the amount that he has paid, and from a co-surety only his proportional part of what has been paid on the debt. Subrogation gives indemnity, and no more. *Batsell v. Richards*, 80 Tex. 507; *Brandt, Suretyship*, §§ 176, 177. If the surety makes different payments on the debt, his right of action accrues upon each payment; therefore the statute of limitations begins to run against the

surety paying at the time of each payment. *Brandt, Suretyship*, § 199. If, at the time the payment is made, the surety making such payment is himself legally bound to pay the debt, he may recover from the principal debtor or co-surety, although at the time the payment was made by him the principal or co-surety was discharged from the debt by limitation. *Peaslee v. Breed*, 10 N. H. 489, 34 Am. Dec. 178; *Boardman v. Paige*, 11 N. H. 481; *Crosby v. Wyatt*, 23 Me. 156; *Mazey v. Carter*, 10 Yerg. 521; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Wood v. Leland*, 1 Met. 388; *Preslar v. Stallworth*, 37 Ala. 402; *Reeves v. Pulliam*, 7 Baxt. 119; *Marshall v. Hudson*, 9 Yerg. 57. In the case of *Preslar v. Stallworth*, *supra*, the note was given in 1837, upon which Preslar and Stallworth were co-sureties. Suit was filed against the principal and both sureties, but Preslar not being served, it was discontinued as to him. Judgment was rendered against the principal and Stallworth in 1842, but was not paid by Stallworth until 1854, when he paid \$1,000 as a compromise, and sued Preslar for contribution. The supreme court of Alabama held that Stallworth was entitled to recover, the statute of limitations not beginning to run against him until the payment was made. To the same effect is the case of *Mazey v. Carter*, cited above. Let us suppose that A. as principal and B. as his surety execute their note to C. for \$2,000, payable in one year from date, and at the time the note falls due A. fails to pay, but B. pays on it at maturity \$500, at the end of the second year from maturity B. pays another \$500, and at the end of the third year he pays \$500, paying the remainder one day before the note would be barred by limitation. One month after the last payment, B. sues A. upon the note. Under the doctrine that he is subrogated to all the rights of the payee, C., and that his cause of action arose at the date of each payment, and is upon the note, he has upon the same written instrument three periods of limitation. Five hundred dollars is barred, upon \$500 he has two years yet to run, upon another sum three years, and upon the remainder four years. If B. had made no payment until the last one,—that is, one day before the note would be barred, he pays the whole,—then B. would have four years from that date to sue upon the note, and it would run for eight years, instead of four, as prescribed by the statute. If at the maturity of the note, or at any time before it would be barred, A. is insolvent, C. might sue B., and recover judgment against him. Suppose that under these circumstances C. sues B. the day before the note would be barred by limitation, and B. defending against the suit, the litigation is protracted for four years, when judgment is rendered, after which C. sues out his executions regularly, and keeps his judgment alive for four years more, when he succeeds in making his money out of B's property. Under the doctrine asserted, B. could not sue A. on the judgment, because he is not a party to it, but must sue on the note; and he has four years from the date of payment which was

made twelve years after the note became due, and in the hands of B. the note will be a good claim sixteen years after it became due. Subrogation is but an equitable assignment, and puts the parties where they would be if an actual assignment had been made; but in this case subrogation would not put the surety, B., in the shoes of C., but would confer upon him a right that C. never had, and could not assign under the law. Mr. Story, in his work on Equity Jurisprudence (section 499c), says: "The error of the contrary opinion [that the surety is subrogated to the debt], if, indeed, upon the enlarged principles of equity, any there be, seems to have arisen from confounding the right of the surety on payment of the debt to be substituted for the creditor, and to have an assignment of any independent collateral securities, with the supposed right to have the original debt assigned." This is a reasonable solution of the difficulties that grow out of the conflict in language used, more than in the results of decisions, for, as we will show hereafter, whenever this doctrine has been stated outside of our courts, or at least in most instances, the matter for adjudication was the right to be subrogated to the securities held by the creditor, and not the debt itself. When two or more persons enter into a joint or joint and several obligation, by which they agree to pay a sum of money to, or to do something for, another, the law implies a promise from each of such obligors to each of the others that each will indemnify the other in case he pays or performs more of the obligation than his proportional part. If to such obligation there be one or more sureties, the law implies a promise from each of the principal obligors to each of the sureties that they, the principal obligors, and each of them, will indemnify any surety that performs or pays any part of the obligation. If there be more than one surety on such contract, the law implies a promise from each surety to each other surety that, in case he shall discharge the obligation to an extent greater than his share, they will each reimburse him to the extent of the liability of each of them upon said obligation. These promises are raised by the law at the time the contract is made, and grow out of the relations of the parties to each other. Such implied promises only arise in the absence of express agreements, for the parties may, by an understanding among themselves at the time, set aside this legal obligation, or limit it, just as they may agree among themselves.

From a careful examination of the authorities we reach the conclusion that when the creditor has no security from either of the payors, and the debt itself holds no lien upon property, nor is for any reason entitled to priority over other debts of the debtor, the payment of the debt by a co-obligor or surety satisfies the original debt, and the party paying has his right of action against the others, upon the implied promise raised by law, for his reimbursement, according to their several liabilities. *Griffith v. Reed*, 21 Wend. 505, 84 Am. Dec. 267; *Copie v. Middleton*, Turn. & R. 228; *Bryant v. Smith*, 10 Cush. 169; 28 L. R. A.

Pray v. Maine, 7 Cush. 253; *Kennedy v. Carpenter*, 2 Whart. 344; *Hopkins v. Furwell*, 32 N. H. 425; *Singleton v. Townsend*, 45 Mo. 379; *Smith v. Johnson*, 23 Cal. 64; *Ward v. Henry*, 5 Conn. 595, 13 Am. Dec. 119; *Frevert v. Henry*, 14 Nev. 191; *Gieseke v. Johnson*, 115 Ind. 808; *Crisfield v. State*, 55 Md. 193; *Bushnell v. Bushnell*, 77 Wis. 435, 9 L. R. A. 411; *Chipman v. Morrill*, 20 Cal. 131; *Sichel v. Carrillo*, 42 Cal. 506; *Loucall v. Gridley*, 70 Cal. 510; *Penniman v. Vinton*, 4 Mass. 376. When the creditor in such a contract has a security from the principal obligor, or either of them, or if the debt itself constitutes a lien upon property of the debtor, as a vendor's lien, or if, from its nature, it be entitled to priority in payment over other debts of the debtor, the person paying the debt, not being a volunteer, will be subrogated to the securities, liens, and priorities of the creditor to the extent that he makes payment on the debt; and if it be necessary from the character of the lien or security, in order to do full justice between the parties, equity will treat the original debt as subsisting, so far as may be necessary to accomplish that end. *Hodgson v. Shaw*, 3 Myl. & K. 183; *Parsons v. Bridgock*, 2 Vern. 608; *Berthold v. Berthold*, 46 Mo. 557; *Ex parte Cripp*, 1 Atk. 133; *Stevens v. West*, 1 How. (Miss.) 808, 29 Am. Dec. 630; *Waldrip v. Black*, 74 Cal. 409; *First Nat. Bank of Houston v. Ackerman*, 70 Tex. 315; *Fleming v. Beaver*, 2 Rawle, 128, 19 Am. Dec. 629; *Rodgers v. McCluer*, 4 Gratt. 81, 47 Am. Dec. 715. Perhaps the courts of no state have gone further in applying the doctrine of subrogation than has the court of this state, of which we cite a few instances. One who discharges the vendor's lien upon lands,—even the homestead,—either by paying as surety or at the request of the debtor, or at a judicial sale which for irregularities in the process fails to convey the title, is entitled to be subrogated to the lien of the creditor to the extent of the payment so made. *McDonough v. Cross*, 40 Tex. 285; *Burns v. Ledbetter*, 54 Tex. 885; *Texas Land & Loan Co. v. Blalock*, 76 Tex. 85. The sureties on a sheriff's official bond, who pay a judgment on account of the failure of the sheriff to return the writ or make collection of the debt, are entitled to be subrogated to the lien of the judgment creditor. *Sayles v. Taylor*, 36 Tex. 313. A surety on an appeal bond, who pays the judgment after affirmance, is entitled to be subrogated to the rights of the plaintiff in the judgment. *Black v. Epperson*, 40 Tex. 180. A purchaser at a sale by a guardian, who pays the purchase money, which is appropriated to the payment of debts against the minor's estate, is entitled to be reimbursed for such payment before the minor can recover the property, although the sale did not pass the title. *Harrison v. Ilger*, 74 Tex. 86. These cases do not bear directly upon the question under consideration, but we cite them to show that our decisions recognize the doctrine of subrogation to its fullest extent. It has been held by our court and others that where one is subrogated to the securities held by the creditor he is not entitled to recover the rate

of interest expressed in the judgment or note which is the evidence of the debt. *Burns v. Ledbetter*, 56 Tex. 282; *Close v. Fields*, 2 Tex. 232; *Smith v. Johnson*, *Waldrip v. Black* and *Bushnell v. Bushnell*, *supra*. The amount of the payment made, with legal interest, is the measure of recovery.

Applying these principles to this case, we hold that, the plaintiffs and Faires being joint obligors in the contract made with the railroad company, each was liable to the other for contribution to indemnify him for any payments made in excess of his share. Whenever either made payments to an amount in excess of his share, he had a right of action upon the implied promise of all of the others for reimbursement, and the statute of limitations commenced to run against such right of action from the date of each payment made after the *pro rata* share of such party had been paid. The right of action in this case being upon the implied promise arising out of the relation of the parties, and not upon the written contract, which promise is not evidenced by writing, nor founded upon a written contract, the cause of action thereon was barred in two years from the date when the right of action upon each payment accrued. *Wood v. Leland*, 1 Met. 887; *Singleton v. Townsend*, *Chipman v. Morrill*, and *Penniman v. Vinton*, *supra*. It does not clearly appear whether the notes and debts paid off by plaintiffs were contracted as a committee, or such as they had given in lieu of the debts so contracted; that is, whether or not the notes paid were not notes of plaintiffs, given upon their individual responsibility in satisfaction of those given originally as a committee. If the debts when paid, were not barred, and were the debts of the committee, the statute would run from the date of payment; but if plaintiffs gave their individual notes in lieu of and as satisfaction of the committee obligations, then the statute would run from the date of such substitution, because it was, as to Faires, a satisfaction of the original debts. *Brandt, Suretyship*, p. 249. The case of *Holliman v. Rogers* announced the correct doctrine, and the case of *Sublett v. McKinney*, being in conflict with that decision and with this, is therefore overruled, as well as each case which has followed it.

The district court and court of civil appeals erred in holding that the action was upon the written contract, and that it required four years from each payment to bar plaintiffs' action; for which errors the judgments of said courts are reversed, and this cause is remanded for trial in accordance with this opinion.

Rehearing denied June 27, 1895.

Henry HOUSE, *Plff. in Err.*,

v.

HOUSTON WATERWORKS CO.

(.....Tex.....)

1. A contract by a city with a water-

works company for a water supply will not sustain an action against the company for a breach thereof, by a citizen whose property was destroyed by fire in consequence of such breach.

2. An action ex delicto against a waterworks company cannot be maintained by a private person on account of the failure of the company to comply with its contract with the municipality to furnish water although the plaintiff's property was burned on account of such failure.

3. A public duty which will sustain a right of action in favor of individuals injured by its nonperformance is not created by a contract with a municipality to furnish a water supply.

(May 12, 1895.)

ERROR to the Court of Civil Appeals, First Supreme Judicial District, to review a judgment affirming a judgment of the District Court for Harris County in favor of defendant in an action brought to hold defendant liable for the destruction of plaintiff's property by fire in consequence of its failure to furnish an adequate water supply. *Affirmed*.

The facts are stated in the opinion.

Messrs. O. T. Holt and *A. T. Patrick* for plaintiff in error.

Messrs. Hutcheson & Sears for defendant in error.

Brown, J., delivered the opinion of the court:

The city of Houston was incorporated by a special act of the legislature which contained the following provisions (Laws 1874, p. 11):

"Sec. 24. That the city council shall have power and authority . . . to provide means for the protection, and extinguishment of conflagrations, and for the regulation and maintenance of a fire department."

In the year 1878, the city, by its mayor, entered into a contract in writing with James M. Loweree and associates by which the latter agreed and bound themselves to construct in the city of Houston a first-class system of waterworks, and to furnish the city with water for the purpose of extinguishing fires and other purposes. Loweree and associates, after making the contract, procured a charter from the state of Texas, being incorporated as the Houston Waterworks Company; and under that charter the defendant constructed waterworks in the city of Houston, and furnished water to the city under the terms of the contract made with Loweree and associates, receiving pay therefor in accordance with the terms of that contract. Plaintiff in error sued defendant in error in the district court of Harris county, alleging that he and his wife, at and before the date of the fire, were citizens of the city of Houston, and that they owned a lumber yard in the said city; that a fire originated in a lumber yard near to that which belonged to plaintiff in error, which fire was communicated to the lumber yard and property of plaintiff. It was alleged that the city of Houston had a

NOTE.—That the doctrine of the above case is in accord with that of nearly all others on the subject 28 L. R. A.

is shown by the note to *Howsmon v. Trenton Water Co.* (Mo.) 23 L. R. A. 144.

well equipped and efficient fire department, which arrived at the scene of the fire in due time, and could and would have arrested its progress, and would have prevented the destruction of plaintiff's property, if there had been in the pipes and mains a sufficient supply of water, with a proper pressure, such as defendant had contracted with the city of Houston to furnish; that defendant negligently failed to furnish water in the pipes as it agreed to do; that there was not sufficient pressure to throw water to the height specified in the contract, and that by reason of such negligence the plaintiff's property was destroyed by the said fire. The district court sustained a demurrer to the petition, and, plaintiff declining to amend, the cause was dismissed, from which judgment plaintiff appealed to the court of civil appeals, which affirmed the judgment of the district court.

This action is based solely upon the alleged failure of the waterworks company to comply with the following clause of the contract made by Lowerree and associates with the city of Houston: "(6) To guarantee that the said waterworks shall be of the most durable character and materials, and first class in all respects, and capable of supplying three million (3,000,000) gallons per day, for twenty-four hours, also with a sufficient pressure to raise the water to all parts of the highest building of said city, and shall maintain said supply of water in the pipes at all times, except it be in case of accident or to repair the said works, in which case such time as may be necessary shall be allowed for repairs; and that said works shall be capable at any time in case of fire of throwing six streams of water at one time one hundred (100) feet high through fifty (50) feet of hose, of two and one-half inch hose, and one and one-eighth inch nozzle."

Three questions of law arise upon the allegations of the petition, which are material to the determination of this case: First. Can the plaintiff recover against the defendant upon the contract made with the city of Houston? Second. If plaintiff cannot maintain an action against defendant upon the contract, can he maintain an action as for tort for the failure to comply with the contract? Third. Did the defendant, by its contract with the city of Houston, undertake the performance of a public duty, and, for failure to comply, become liable to plaintiff for damages for his losses?

As a general rule, no person can sue upon a contract except he be a party to or in privity with it. Many cases based upon contracts practically the same as the one now in suit, under almost identically the same circumstances, have been decided by the courts of different states of the United States, and almost unanimously these courts have held that a citizen of a municipal corporation cannot recover from a water company for a failure to perform such a contract made with such municipal corporation. *Ferris v. Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485; *Foster v. Lookout Water-Works Co.* 3 Lea, 42; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 38 Am. Rep. 1; 28 L. R. A.

Fowler v. Athens City Water-Works Co. 88 Ga. 219; *Davis v. Clinton Water-Works Co.* 54 Iowa, 59, 37 Am. Rep. 185; *Becker v. Keokuk Waterworks*, 79 Iowa, 419; *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48; *Eaton v. Fairbury Water-Works Co.* 37 Neb. 546, 21 L. R. A. 653; *Mott v. Cherryvale Water & Mfg. Co.* 48 Kan. 12, 15 L. R. A. 375; *Beck v. Kittanning Water Co.* (Pa.) 9 Cent. Rep. 536; *Housmon v. Trenton Water Co.* 119 Mo. 304, 23 L. R. A. 146.

It is claimed, however, that the city of Houston represented its inhabitants in making the contract, and that it was made for their benefit, which gives a right of action to any citizen that may suffer injury by its breach. The city of Houston did represent its citizens in making the contract just as such governments represent the people in every official act, but in no other sense. It is true that plaintiff in error might have received benefit from the performance of the contract by the defendant, but "it is not every promise made from one to another, from the performance of which a benefit may inure to a third, which will give a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited." *Simson v. Brown*, 68 N. Y. 355; *Burton v. Larkin*, 86 Kan. 249, 59 Am. Rep. 541; *Wright v. Terry*, 23 Fla. 169.

In support of the right of the plaintiff to recover on the contract made between Lowerree and associates and the city of Houston, counsel cite *Western U. Teleg. Co. v. Adams*, 75 Tex. 531, 6 L. R. A. 844; *Atkinson v. Newcastle & G. Waterworks Co.* L. R. 6 Exch. 404; *Paducah Lumber Co. v. Paducah Water Supply Co.* 89 Ky. 340, 7 L. R. A. 77; and *Duncan v. Owensboro Water Co.* 12 Ky. L. Rep. 35.

The first-cited case, *Western U. Teleg. Co. v. Adams* was a suit for failure to deliver the following telegram: "Waco, October 12, 1887. F. E. Adams, Athens: Clara, come quick. Rufe is dying. O. M. Simmons." The party addressed was the husband of Clara, who was the sister of Rufe. Mrs. Adams was mentioned in the message. It was sent for her benefit alone, and the court held that she came within the rule quoted above, and could recover for its breach. In this case the contract does not embrace the plaintiff either by name or by mentioning a class to which he belongs. It was not made for the purpose of benefiting him or a class to which he belongs. The object and purpose of making the contract was to keep water in the mains which the city might apply to use in the public fountains, by flushing the gutters, or in extinguishing fires in case a conflagration should occur. If a fire occurred, and if plaintiff's property should be involved, and if the fire company should arrive in time, he might be benefited by the performance of the contract. Such benefit would be incidental, however; not flowing immediately from the performance of the contract. So the injury resulting from a failure on the part of the water company

would not be proximate, but remote, as a cause.

An act of parliament required the New Castle Water Company to keep its mains and pipes filled with water, with a pressure sufficient to throw water to a stated height, which was sufficient to extinguish fires in the buildings of the town; and each citizen was authorized to take water at all times to extinguish fires. In *Atkinson v. Newcastle & G. Water-Works Co.* plaintiff alleged a failure to keep the water in the pipes with the required pressure, whereby plaintiff was unable to extinguish a fire which occurred in his premises, and the property was destroyed. The court held the company liable to the plaintiff in the value of the property destroyed. On appeal the judgment was reversed, and, while the reversal was put on another ground, the court criticised and virtually overruled the opinion upon this point. L. R. 2 Exch. Div. 441. The case under consideration does not come within the principles which governed in that case. No statute enjoined upon the Houston Waterworks Company to keep water in the mains, and the citizens of Houston had no right to use the water to extinguish fires. The city by its fire company could alone use the water for that purpose.

In *Paducah Lumber Co. v. Paducah Water Supply Co.* the right of the property owner to recover of the water company upon a contract made with the municipal corporation, very much like the one under consideration, and under very similar circumstances, was the question directly involved. The court held that the property owner could sue upon the contract. *Duncan v. Owensboro Water Co.* was decided by the same court (the supreme court of Kentucky) upon the authority of the former case. No authority is cited by the court to sustain the decisions, and no reference is made to the many cases which held to the contrary. The reasoning in the cases is not such as to induce us to follow them in opposition to the otherwise unanimous decisions of the American courts.

It is claimed for the plaintiff that, if he cannot maintain an action upon the contract as such, he can sue as in tort for the breach of that contract, growing out of the failure of the water-works company to comply with the sixth article of the contract between Loweree and associates with the city of Houston. One who has a right of action upon a contract may sometimes sue either on the contract as such or in tort for the breach of it. But the right of a person not privy to the contract rests upon a different rule. The correct rule of law as to the right of a party to sue as in tort for the breach of a contract is thus well expressed in *Shearman & Redfield on Negligence* (sec. 116): "Negligence which consists merely in the breach of a contract will not afford a ground of action by any one who is not a party to the contract, nor a person for whose benefit the contract was avowedly made. . . . The true question always is, Has the defendant committed a breach of duty apart from the contract. If he has only committed a breach of the contract, he is liable only to those

with whom he has contracted; but, if he has committed a breach of duty, he is not protected by setting up a contract in respect to the same matter with another. This rule is well supported by authority. Cooley, Torts, p. 104, and *note 1*, same page; Moak's Underhill Torts, p. 28, rule 7; *Id.* p. 24, rule 8; *Id.* p. 25, subrule. The plaintiff is not party to or in privity with the contract. It was not made expressly for his benefit. The defendant has not been guilty of any breach of duty that it owed the plaintiff apart from the contract, nor growing out of any relations between them created by or arising out of the contract; and it is clear that plaintiff cannot maintain the action *ex delicto* for the breach of the contract itself.

It is urged by plaintiff's attorneys with great earnestness that by the contract between Loweree and associates with the city of Houston (adopted by defendant) the defendant undertook the performance of a public duty, for the negligent failure to perform which any person injured may maintain an action. The rules of law upon this subject are well settled, and are clearly stated in the following quotations: "Whenever a statute creates a right or duty or an obligation, then, although it has not in express terms given a remedy, the remedy which by law is properly applicable to that right or obligation follows as an incident. . . .

In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to said law." Addison, Torts, 6th ed. 75. "It is well settled that a public officer or other person who takes upon himself a public employment is liable to third persons in an action on the case for any injury occasioned by his own personal negligence or default in the discharge of his duties." *Sawyer v. Corse*, 17 Gratt. 238, 99 Am. Dec. 445. It is not true that for every failure to perform a public duty an action will lie in favor of any person who may suffer injury by reason of such failure. If the duty is purely a public duty, then the individual will have no right of action; but it must appear that the object and purpose of imposing the duty was to confer a benefit upon the individuals composing the public. In the case of *Taylor v. Lake Shore & M. S. R. Co.*, 45 Mich. 77, 40 Am. Rep. 457, plaintiff sought to recover from defendant damages for an injury alleged to have been received by falling upon the snow and ice on the sidewalk in front of defendant's property in the city of Monroe. The charter of the city gave it full control of the streets and sidewalks, and empowered the city to require of adjacent property owners to remove snow and ice from sidewalks in front of their property, making such owners liable for all damages that the city might be compelled to pay by reason of the failure of such owner to so remove the obstruction. The question was the liability of the property owner to those who might pass along the sidewalk. Judge Cooley, delivering the opinion of the court, said: "To maintain

this proposition, it is necessary to make it appear that the duty imposed was a duty to individuals rather than a duty to the whole public of the city; for, if it was only a public duty, it cannot be pretended that a private action can be maintained for a breach thereof. A breach of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages. Nevertheless, the burdens that individuals are required to bear for the public protection or benefit may in part be imposed for the benefit or protection of some particular individual, or class of individuals also, and then there may be an individual right of action as well as a public prosecution if a breach of the duty causes individual injury. The nature of the duty and the benefits to be accomplished through its performance must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their special benefit." The case of *Taylor v. Lake Shore & M. S. R. Co.*, cited above, is strongly analogous to the case under consideration. In that the duty of keeping the sidewalks free from ice and snow was imposed upon the city by its charter, with power to impose it upon property owners. By ordinance it was imposed upon the property owner under penalties prescribed. The court held that the obligation of the property owner was to the general public,—that is, to the city,—and not to the individuals who might travel over the sidewalk. In this case the law authorized the city of Houston to provide the means of extinguishing conflagrations under which the city might have built its own waterworks or secure water to be furnished under contract. Upon the principle that prevailed in the case last cited, the obligation or duty of the defendant was to the city, and not to the individual citizen. Looking to the "nature of the duty and the benefits to be accomplished through its performance" under this contract, it seems to be strictly, within the above case, a duty under a contract to be performed to the city (the corporation), not to the citizen, and is not, therefore, such a duty as will give a right of action, by a failure of performance, to individuals who may be injured thereby.

An examination of the authorities relied upon by plaintiff in error will show that they are not applicable to this case. In the case of *Sawyer v. Corse*, 17 Gratt. 230, 99 Am. Dec. 445, Sawyer had entered into a contract with the postmaster general of the United States to carry the mail from Washington, D. C., to Alexandria, Va., by which he bound himself to safely carry and deliver all packages delivered to him under the contract. One Fleming was the agent of Sawyer to carry the mail. He received from the postmaster at Washington a package deposited in that office by Corse, containing \$988, directed to Alexandria, which Fleming negligently lost. The court held Sawyer liable as having undertaken the performance of a public duty. The duty of safely carrying was enjoined by public statute, and specially undertaken by the contract. Packages were

to be carried for any person who might deliver them to the post-office. It was a public duty, because it was prescribed by statute for all persons contracting to carry the mail. It was assumed by Sawyer when he became, by contract, one of the class of persons upon whom the statute placed the duty. Sawyer was a bailee of the property of Corse, and under obligation, as such, independent of his contract with the United States government, to safely carry and deliver, just as, in case of a public carrier which upon a contract with one person agrees to carry another, the carrier is under an obligation, independent of the contract, to carry safely the person with whom it had no contract. In this case no statute prescribed that which defendant contracted to do. It had no property of plaintiff in its possession, and had not contracted to do anything for him. There were neither contract relations with plaintiff nor obligation to him arising out of its relations to him under the contract with the city. The difference between the facts of that case and this is so manifest that it does not require argument to show that the same principles do not apply.

Robinson v. Chamberlain, 84 N. Y. 389, 90 Am. Dec. 713, and *Fulton F. Ins. Co. v. Baldwin*, 87 N. Y. 648, are cited as authority. In these cases the defendants had, under the statute of that state, contracted to keep certain sections of public canals in good condition, and, failing to do so, obstructions occurred in the canal, by which the plaintiffs, in traveling upon it, suffered injury from its unsafe condition. The court held that the canal was a public highway, and that defendants, having entered into a contract to keep it in good condition, were liable as the highway commission would have been, and that the obstruction in the canal was a public nuisance, for which defendants were liable. The statute authorized the letting of the contract. *Novell v. Wright*, 8 Allen, 166, 80 Am. Dec. 62, was a case in which the defendant was appointed, under a statute of that state, keeper of a drawbridge over a navigable stream. His duties were defined by law. He failed to close the draw of the bridge, whereby plaintiff's wife, in attempting to pass over the bridge, fell and was injured. Upon the same principle as in the preceding cases, the court held defendant liable, because the bridge was a part of the public highway. In each of the three preceding cases last cited, the public had a right to use the highway, and the object of the contract or undertaking was specifically to keep the highway in a condition safe for all who might use it. The contract was made and the duty enjoined especially for the benefit of the public, a class of individuals who might use it. No such relation existed between defendant and plaintiff in this case. The defendant did not agree to do any act for the individual inhabitants, nor had they the right to use the water furnished by the defendant to the city. The cases are not similar, and cannot be determined by the same rules of law.

Counsel also cite *Henly v. Lyne*, 5 Bing. 91, in support of plaintiff's right to recover

for the failure to perform a public duty. But an examination of the case will show that it rests upon principles not applicable to this case. The king of England, by letters-patent, granted to "the mayor and burgesses of Lyme Regis (aforesaid) and their successors the borough or town of Lyme Regis, and also all that building called the pier, quay, or cob of Lyme Regis with all and singular the liberties, privileges, profits, franchises, and immunities to the same town, or to the same pier, quay, or cob, in anywise howsoever belonging or appertaining; . . . and did direct that the aforesaid mayor and burgesses of the borough of Lyme, and their successors, all and singular the buildings, banks, seashores, and all other mounds and ditches within the aforesaid borough of Lyme, or to the aforesaid borough in any wise belonging or appertaining, or situate between the same borough and the sea, and also the said building there called the pier, quay, or cob, at their own cost and expense thenceforth, from time to time, forever, should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient." The city failed to maintain the walls, and the water from the sea came in, and damaged the houses of the plaintiff. The court held the defendants liable, putting it upon the principle that a public officer is liable for a failure to discharge a public duty whereby a citizen is injured. It will be seen that certain revenues were granted to the defendants, and the court held that they were not given for their private advantage, but to enable them to discharge the duties imposed. This was in effect a charter, and contained the provisions quoted as a duty imposed. The case is similar to that class of cases in this country wherein it is held that a municipal corporation to which is granted control over the public streets, and which is empowered to levy taxes for their maintenance, will be held liable for a failure to perform the duty. In the last case cited, the duty was prescribed in the grant, and was manifestly commanded to be done for the benefit of all the property owners along the sea frontage. It comes within the rule, as we before said, that is applied in this country to municipal corporations. There is no similarity between that case and this, and it is not authority to support the claim of the plaintiff. Let us suppose that the town of Lyme had made a contract with A. to build the wall and keep it in repair, and had made a contract with B. to furnish to it (the town) the stone, cement, and other material necessary to perform the work, B. knowing the use to which the material furnished was to be put, and that B. failed to furnish the material, whereby A. was prevented from constructing or maintaining the wall, through which failure the water rushed in and destroyed the plaintiff's property; would it be contended that plaintiff could maintain an action against B.? Certainly no such claim would be made. B. would in that case occupy the same relation to the property owners of Lyme that defendant sustains under this contract to the property owners of Houston, being obligated

to furnish to the city the means with which to discharge its duty to the public.

The case before the court is more analogous to *Winterbottom v. Wright*, 10 Mees. & W. 109, and *Marvin Safe Co. v. Ward*, 46 N. J. L. 19. In the former case the defendant had contracted with the postmaster general of England to keep in good repair a coach for the purpose of carrying the mail. He failed to keep the coach in safe condition. The driver was injured by reason of defects in the coach, and sued for damages. Lord Abinger said: "It is, however, contended that, this contract being made on behalf of the public by the postmaster general no action could be maintained against him, and therefore the plaintiff must have a remedy against the defendant. But that is by no means a necessary consequence. He may be remediless altogether. There is no privity of contract between these parties; and, if the plaintiff can sue, every passenger, or even any person passing along the road who was injured by the upsetting of the coach, might bring a similar action. . . . Where a party becomes responsible to the public by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servants or agents. So in case of a public nuisance, whether the act was done by the party as a servant or in any other capacity, you are liable to an action at the suit of any person who suffers. These are cases, however, where the real ground of liability is the public duty or the commission of a public nuisance." In the same case, Rolfe, B., said: "The duty, therefore, is shown to have arisen from the contract, and the fallacy consists in the use of that word 'duty.' If duty to the postmaster general be intended, that is true; but if a duty to the plaintiff be intended (and in that sense the word is evidently used), there was none. This is one of the cases in which there certainly has been *damnum*, but it is *damnum absque injuria*. It is no doubt a hardship on the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law." *Marvin Safe Co. v. Ward* was a suit against the defendant for failing to comply with a contract made with the boards of chosen freeholders of two counties in New Jersey for the construction of a temporary bridge over a river. It was claimed that the bridge was defectively built, from which cause the plaintiff suffered injury. The court held that plaintiff could not recover upon the contract, and, discussing the view that the defendant was discharging a public duty, the court said: "Such contract creates the ordinary relation of employer and employé. It does not put off from the board of chosen freeholders the duty and responsibility which the statute fixes upon them, nor does it create any duty or liability on the part of the other contracting party, except such as arises *inter se* from the terms of the contract." In each of the two cases last referred to the contract was made by public officials representing the public, just as did the city in this case. In each of the cases the contract was made to

furnish that which would be used for public purposes, as in this case it was intended that the water should be used for a public purpose by the city of Houston. In the case of *Martin Safe Co. v. Ward, supra*, the court said: "Nor will the fact that the defendant's contract related to a structure for public use alter the position of the case." Nor will the fact that the city of Houston intended to use the water furnished for the purpose of extinguishing fires alter the position of the parties in this case, and convert a private into a public contract.

It is not claimed that there is any statute which imposed upon the water company the duty of furnishing water to the city of Houston or its citizens. If the defendant, by its contract, undertook to perform a public duty, it must be ascertained from the terms of the contract, or be an obligation which the law attaches to the making of such a contract. We must determine the character of the undertaking of the water company from the terms of the contract which Loweree and associates made with the city of Houston. The purpose and intent of the water company in making the contract is expressed in the following language: "That said James M. Loweree and associates, parties of the first part, in order to supply the city of Houston with water to maintain the cleanliness and health of the city, for extinguishing fires, and for the protection of property of the inhabitants of said city, using the waters of Buffalo Bayou above tide water, do hereby agree and contract," etc. The language "in order to supply the city of Houston with water," etc., expresses the object of the water company in making the contract; while the words "to maintain the cleanliness and health of the city, for the extinguishment of fires," etc., state the uses to which the city intended to apply the water. This contract proceeds to provide for the erection of a system of waterworks in the city of Houston, specifying how such works should be constructed, the laying of pipes and mains in the streets, and placing hydrants at designated points, or such as should be designated by the city. It provides that a reservoir of given capacity shall be built, in which water shall be maintained at a height sufficient to throw water to a given height. The city is to be furnished water for the use of the public at two places, and for flushing the gutters of the streets where gutters are laid. In fact, it specifies with great particularity what is to be done for the city, and the manner in which it shall be done. It also binds the contractors to erect and maintain a system of fire alarm, evidently to render the provision for fire protection more effective. The defendant agrees to put the water in the mains, and the city can use it for the fountains, to flush gutters, or to extinguish fires, as its necessities may demand. This contract contains the following provision: "(8) To supply water to private consumers at a rate not to exceed five (5) cents per one hundred (100) gallons used, and, if meters are used, the private consumer to pay rent of meter; it being understood that the private consumer is to pay for the

costs of tapping the main conductor, and for service pipe to and through his premises; and it being further understood that private consumers are to have the privilege of using said water, paying therefor as aforesaid, without being required to use any given quantity." Distinctly, an agreement is here expressed to do certain things for the citizen. The terms of the contract itself thus show that, in so far as the acts to be done were to be done directly for the citizen, it was expressed. If there had been any doubt as to the intention of the parties in the other parts of the contract, it seems that this last clause would remove the doubt by showing explicitly in what particular the citizen was to be directly benefited. There is no part of the contract which will justify the conclusion that the water company or the city contemplated that the water company should assume any duty to the citizens in the performance of this contract. Neither party intended that the water company should be obligated to the citizen. Then, how is it to be arrived at that such an obligation exists? It is no answer to quote the well-established rule that a person or corporation that undertakes the performance of a public duty is liable to any person injured thereby for a negligent failure to perform that duty. It must first be established that the duty is to the individual before the rule is applicable. It is claimed that a public character is given to the duty to be performed by the water company from the fact that the city, in making the contract, acted for the public, and for the benefit of its citizens. It is true that the city acted for the public just as every city does in every act it performs, and each citizen was in a sense interested and to be benefited just as from the performance of any work for the city. But no citizen had such an interest as would give him a right of action for its breach unless it was a public duty. In the case of *Nickerson v. Bridgeport Hydraulic Co.*, cited above, the court, in deciding a question similar to this, said: "The most that can be said is that the defendant was under obligation to the city to supply the hydrants with water. The city owed a public duty to the plaintiffs to extinguish their fire. The hydrants were not supplied with water, and so the city was unable to perform its duty. We think it is clear that there were no contract relations between the plaintiff and the defendants, and consequently no duty which can be the basis of a legal claim." The relations of the parties to this suit and their legal rights could not be more accurately or clearly expressed than by the quotation of this language. Some company or person sold to the city of Houston hose for the purpose of throwing water upon any building that might be on fire, and at the time knew that the hose was to be used for that purpose. In some cities engines are used to apply the water, instead of the pressure from the waterworks, in which case both hose and engine would be used. Suppose that in this instance the water pressure had been sufficient, but the hose, from defect in its construction, had burst, so that the water could not be applied;

or, if an engine had been used, suppose that, from defective construction, it had failed to perform its functions, and by either of these causes the property had been destroyed. Would it be contended that the company or person furnishing hose or engine would be liable to the property owner for the loss of his property? We think that such a claim could not be maintained,—indeed, would not be made; yet the principle is the same. In buying the hose and engine the city would be acting for the inhabitants of the city, with the purpose of applying them to the use of the city in discharging the duty of extinguishing the fire, for the protection of the citizen; and the company selling either hose or engine would know as fully the uses to which it was to be applied as did defendant. The consequences of a failure to comply with the contract to furnish suitable hose or engine would be the same as the failure to furnish sufficient water and pressure. There can be no difference in the principle applicable to the cases supposed and the one before the court. The city of Houston might have constructed and operated its own waterworks, in which event it would have performed that part of its duty to the public which in this case it delegated to the defendant. If the city had been operating its own waterworks, and had failed to supply water, as did the defendant, and the same consequences had resulted to plaintiff, it would not have been liable for the property burned. 2 Dill. Mun. Corp. § 975; *Wright v. Augusta*, 78 Ga. 241; *Vanhorn v. Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750; *Hayes v. Oshkosh*, 83 Wis. 814, 14 Am. Rep. 760. If the city would not be liable for a failure to perform the same duty, we think that the defendant, acting under a contract in the performance of the duty imposed upon the city by law, could not be charged with greater responsibility than the law imposed upon the city itself. *Mott v. Cherryvale Water & Mfg. Co.* 48 Kan. 12, 15 L. R. A. 875. If the city of Houston had contracted with the defendant that it was to be liable to individual citizens for losses sustained by fires under such circumstances as are shown in this case, such contract would have been void, because the city had no power to make such contract. *Taylor v. Dunn*, 80 Tex. 670; *Becker v. Keokuk Waterworks*, 79 Iowa, 422. It being true that the city could not have made a contract with the defendant that it should be so liable, it follows that no such implied liability could arise out of the contract, for assuredly nothing could be implied which could not have been lawfully expressed in the contract.

There is no error in the judgments of the district court and court of civil appeals, and the judgments are affirmed.

GULF, COLORADO & SANTA FÉ R. CO., *Plff. in Err.*,

v.

T. D. SHIEDER.

(.....Tex.....)

1. Defendant has the burden of proving plaintiff's contributory negligence unless that is established prima facie by the legal effect of facts stated in the petition, or by undisputed evidence adduced on the trial.
2. The mere fact of injury raises no presumption of negligence against either plaintiff or defendant.
3. There is no presumption of contributory negligence of a woman who drove across a railroad side track where her view was obstructed before discovering the approach of an engine, and then tried to turn her horse, which, frightened by the approaching engine, jumped on to the main track in front of it.
4. A suspicion of plaintiff's negligence is not enough to throw on him the burden of proof as to that fact unless it amounts to prima facie evidence thereof.
5. The question of the negligence of a person who drove across a side track before discovering an approaching engine, which was wholly or partly concealed, and was then taken upon the track while trying to turn her horse which was frightened by the engine, is for the jury.
6. An instruction that it was the duty of a person to do certain things which is equivalent to declaring as a matter of law that failure to do so would have been negligence, is correctly refused.

(April 8, 1896.)

ERROR to the Court of Civil Appeals, Third Supreme Judicial District, to review a judgment affirming a judgment of the District Court for Concho County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been negligently inflicted by defendant upon plaintiff's wife. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles K. Lee and J. W. Terry, for plaintiff in error:

The court erred in overruling defendant's motion for new trial on the ground that the verdict of the jury is contrary to the law and the evidence.

This court has jurisdiction to pass upon this assignment.

Clarendon Land Investment & Agency Co., Limited, v. McClelland Bros. 22 L. R. A. 105, 86 Tex. 179; *Missouri Pac. R. Co. v. Patton* (Tex.) 26 S.W. Rep. 978; *Bauman v. Jaffray*, 86 Tex. 617.

There are circumstances under which the

NOTE.—The conflict on the question of the burden of proof as to contributory negligence renders it impossible to reconcile the cases, but the able exposition of the doctrine adopted in the above case renders it a valuable one. As to the presumption of negligence from occurrence of accidents to persons, see *note to Barnowski v. Helson* (Mich.) 15 L. R. A. 23, also *Hower v. Cumberland & P. R. Co.* (Md.) 27 L. R. A. 154.

court would be warranted in directing a peremptory charge to find for the defendant on the issue of contributory negligence.

Galveston, H. & S. A. R. Co. v. Ryon, 80 Tex. 61; *Thompson, Trials*, p. 1218; *Gulf, C. & S. F. R. Co. v. Riordan*, 85 Tex. 511; *Texas & P. R. Co. v. Nicholson* (Tex.) 22 S. W. Rep. 770; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 291.

When the plaintiff's own case exposes him to suspicion of negligence, then he must clear off such suspicion.

Dallas & W. R. Co. v. Spicker, 61 Tex. 427, 48 Am. Rep. 297; *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 814; *Murray v. Gulf, C. & S. F. R. Co. Id.* 6; *Gulf, C. & S. F. R. Co. v. Redeker*, 67 Tex. 181; *Texas & P. R. Co. v. Murphy*, 46 Tex. 363, 26 Am. Rep. 272; *Brickell v. New York Cent. & H. R. R. Co.* 120 N. Y. 290.

A mere surmise or scintilla of evidence is not enough to support a verdict.

Galveston, H. & S. A. R. Co. v. Faber, 77 Tex. 153.

It is the duty of a person approaching a railroad crossing to look and listen for an approaching train.

Galveston, H. & S. A. R. Co. v. Bracken, 59 Tex. 71.

The finding that the ladies never exercised any care whatever and never became apprised of the approach of the train until the instinct of the horse brought knowledge home to them, is abundantly supported by the evidence of plaintiff himself.

Horn v. Baltimore & O. R. Co. 6 U. S. App. 381, 54 Fed. Rep. 304; *Stitt v. Huidekoper*, 84 U. S. 17 Wall. 894, 21 L. ed. 647; *Texas & P. R. Co. v. Fuller*, 5 Tex. Civ. App. 660.

Cases where the undisputed evidence shows a failure to look or a failure to listen contributing to the injury, have been frequently reversed on the ground of contributory negligence.

Texas & N. O. R. Co. v. Hare, 4 Tex. Civ. App. 18; *Missouri Pac. R. Co. v. McKernan*, 82 Tex. 204; *Gulf, C. & S. F. R. Co. v. Moss*, 4 Tex. Civ. App. 318; *Galveston, H. & S. A. R. Co. v. Kulac*, 73 Tex. 643; *St. Louis, I. M. & S. R. Co. v. Tippett*, 56 Ark. 457.

What is due care depends entirely upon the facts and circumstances of each particular case, and varies in each particular case with the danger attending the passage at the particular time and as to each particular person with the knowledge or means of knowledge that he has as to such danger. The greater the danger the greater the care which would generally be required. The greater the knowledge of the danger the particular party has, the greater would be the care required of him.

6 Am. & Eng. Encyclop. Law, p. 36; *Beach, Contrib. Neg.* § 13; *Birmingham Mineral R. Co. v. Jacobs* (Ala.) 55 Am. & Eng. R. R. Cas. 299; *International & G. N. R. Co. v. Graves*, 59 Tex. 331; *Patterson, Railway Accident Law*, pp. 49, 50; *Bennett v. New York, N. H. & H. R. Co.* 57 Conn. 422.

There is hardly a single crossing accident that comes before the courts but what stress is laid by the opinion of the courts upon the fact that the plaintiff was or was not familiar with

the locality and the circumstances of danger, either as showing contributory negligence or excusing him therefrom.

Townley v. Chicago, M. & St. P. R. Co. 53 Wis. 626; *Patterson v. South & North Ala. R. Co.* 89 Ala. 818; *Lake Shore & M. S. R. Co. v. Herriek*, 49 Ohio St. 25; *Helbig v. Michigan Cent. R. Co.* 85 Mich. 359; *Presby v. Grand Trunk R. Co.* (N. H.) 5 Am. R. R. & Corp. Rep. 43; *International & G. N. R. Co. v. Kushn*, 2 Tex. Civ. App. 218; *Houston & T. O. R. Co. v. Boozer*, 70 Tex. 536; *St. Louis & T. R. Co. v. Orosnoe*, 72 Tex. 83.

The duties of the railroad company and of the public in care to be exercised passing over public railroad crossings are equal and reciprocal.

Austin & N. W. R. Co. v. McElmurray (Ky.) 25 S. W. Rep. 324; *Hals v. Dutant*, 39 Tex. 667; 4 Am. & Eng. Encyclop. Law, p. 909.

In *Galveston, H. & S. A. R. Co. v. Ryon*, 80 Tex. 61, *Justice Gaines* holds that it was negligence *per se* for a man to go on a railroad track and stand there until he was knocked off by a train.

Houston & T. O. R. Co. v. Richards, 59 Tex. 373.

The degree of care will vary with the danger and knowledge of danger, although this danger and knowledge of danger may be the result of negligent acts on the part of the defendant, past or present and all testimony tending to establish either fact is relevant.

Gulf, C. & S. F. R. Co. v. Smith (Tex.) 28 S. W. Rep. 520.

The doctrine stated in cases of *Gulf, C. & S. F. R. Co. v. Anderson*, 76 Tex. 244, and *Missouri Pac. R. Co. v. Lee*, 70 Tex. 493, and kindred decisions, wherein it is held that it is error for the court to charge the jury that if a party approaching a railroad crossing fails to look or listen for an approaching train, and that failure contributes to the injury, to find for the defendant, is erroneous.

These decisions are wrong for two reasons: (1) that as ordinary care is required of the plaintiff, and as ordinary care can only be exercised by a person under such circumstances by looking and listening, it is not error to charge the jury that failure to look and listen would be failure to exercise ordinary care, because it would be a failure to exercise any care at all, and no care cannot under any circumstances be ordinary care; and (2) because articles 4231 and 4232 of the Revised Statutes do place upon parties approaching a railroad crossing the duty to look and listen, and, therefore, that duty being defined by statute, the court has a right to declare the failure to discharge it negligence.

We do not think that it is the purpose of the law in providing for the court to charge the jury that he should give them mere formal instructions, but that the purpose was that he should give them the benefit of his learning and experience as a lawyer and on the bench to enable them to properly and conscientiously discharge their functions as jurors.

Gulf, C. & S. F. R. Co. v. Hodges, 76 Tex. 90; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32; *East Line & R. R. Co. v. Smith*, 65 Tex. 167; *Gulf, C. & S. F. R. Co. v. Evansich*, 63 Tex. 54; *Texas & St. L. R. Co.*

v. Suggs, 62 Tex. 828; *Gulf, C. & S. F. R. Co. v. Williams*, 70 Tex. 161; *Rozvadofskis v. International & G. N. R. Co.* 1 Tex. Civ. App. 494; *Houston & T. C. R. Co. v. Gorbett*, 49 Tex. 575.

Similar charges to these asked have been given by distinguished trial judges in this state, and have met with the apparent approval of the supreme court.

Artusky v. Missouri Pac. R. Co. 73 Tex. 194; *Houston & T. C. R. Co. v. Brin*, 77 Tex. 175; *Brown v. Griffin*, 71 Tex. 654; *Texas & N. O. R. Co. v. Brown*, 2 Tex. Civ. App. 2-3; *Texas & P. R. Co. v. Brown*, 78 Tex. 402; *Missouri, K. & T. R. Co. v. Jamison* (Tex.) 27 S. W. Rep. 1090; *Texas & P. R. Co. v. Bryant*, 56 Fed. Rep. 802.

On petition for rehearing.

In a carefully considered article, in vol. 4 of the Harvard Law Review, pp. 48, 49, speaking of the term "Burden of Proof" it is said: "In legal discussion this phrase is used in two ways: (1) to indicate the duty of bringing forward argument or evidence in support of a proposition, whether at the beginning or later; (2) to mark that of establishing a proposition as against all counter argument or evidence.

This distinction in the meaning of the term may be differently expressed thus:

1. The burden of bringing forward testimony at particular stages of the case to meet or rebut a prima facie case made by the opposing side.

2. The burden of establishing on the whole case by a preponderance or superior weight of testimony any particular fact or facts which are essential to the existence of a cause of action or of a defense based on a discharge of a right of action which once existed. It is when the term is used in the second sense that it is often properly said "the burden of proof never shifts."

Bearing this distinction in mind, we believe that we can demonstrate the following propositions:

1. That the burden of proof on contributory negligence in the sense of the burden of establishing such issue by a preponderance of evidence, where there is evidence in the case of contributory negligence whether first offered by plaintiff or defendant, on the whole case has never been held by the decisions of this state to be on the defendant, and that wherever expressions have been used by the court to the effect that the burden on that issue was on the defendant, the term has been used in the sense of the burden or obligation to introduce testimony at a particular stage of the case. 2. That in whichever sense the term may have been used, if it can be held that there are any decisions in this state which hold that the burden of proof is on the defendant as to contributory negligence, still that without dissent or dispute the rule has been qualified to this extent; that where the plaintiff's own case discloses any evidence of contributory negligence, the burden is on him on the whole case.

The burden of proof in the sense that it means the burden of establishing any particular proposition by a preponderance of testimony never shifts.

Clark v. Hills, 67 Tex. 141; *Scott v. Pettigrew*, 73 Tex. 821.
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The real reason in support of the rule that the burden of showing absence of contributory negligence is on plaintiff seems to us to be: (1) that the law will not permit a man to avail of his own wrong; and (2) that the law will not disturb vested property rights or the settled order and condition of things without the moving party establishing his right by the more weighty, the more credible, and more trustworthy testimony.

Heil v. Glanding, 42 Pa. 493, 82 Am. Dec. 537; *Byers v. Wallace* (Tex.) 28 S. W. Rep. 1058.

The courts in following the rule throwing the burden of proof upon the defendant have unconsciously fallen into an error of treating the defense as one in the nature of a plea in confession and avoidance.

If contributory negligence existed then plaintiff never at any time had a legal demand, and no right of action ever existed against which a plea of confession and avoidance could operate.

McMannus v. Wallis, 53 Tex. 534.

The presumption of the absence of contributory negligence is only applicable in a case where the circumstances of the plaintiff's connection with his own injury are shown, and where those circumstances do not in themselves raise against him an inference of negligence, and it is only effective in that character of case to cast upon the defendant the burden of introducing proof to show affirmatively the negligence of the plaintiff, and if pertinent evidence on this issue is offered this presumption drops out of the case for all practical purposes, and it is a simple question of preponderance of testimony on the issue as made by the evidence.

Texas & N. O. R. Co. v. Crowder, 63 Tex. 502; *Moberly v. Kansas City, St. J. & O. B. R. Co.* 98 Mo. 183; *Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 13, 57 Am. Rep. 589; *Supreme Council, A. L. of H. v. Anderson*, 61 Tex. 300.

That plaintiff must show absence of contributory negligence is stated in, *Texas & N. O. R. Co. v. Crowder*, *supra*; *Texas & P. R. Co. v. Bradford*, 66 Tex. 735, 69 Am. Rep. 739; *St. Louis, A. & T. R. Co. v. Denny*, 5 Tex. Civ. App. 367; *Missouri Pac. R. Co. v. Bartlett*, 69 Tex. 82; *International & G. N. R. Co. v. Kuehn*, 70 Tex. 585; *Texas & P. R. Co. v. Morin*, 66 Tex. 184; *Texas & P. R. Co. v. Geiger*, 79 Tex. 13; *Missouri Pac. R. Co. v. Porter*, 78 Tex. 306; *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311; *Gulf, C. & S. F. R. Co. v. Scott* (Tex.) 27 S. W. Rep. 827; *Bail v. El Paso*, 5 Tex. Civ. App. 221; *Gulf, C. & S. F. R. Co. v. Riordan* (Tex.) 22 S. W. Rep. 522; *Gulf, C. & S. F. R. Co. v. Albright* (Tex.) 26 S. W. Rep. 251.

The doctrine of *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427, 48 Am. Rep. 297, is supported not only by the text of Wharton on Negligence, but by Cooley on Torts, p. 673, and 2 Thompson on Negligence, p. 1173.

4 Am. & Eng. Encyclop. Law, pp. 92, 93; *Baltimore & O. R. Co. v. Whitacre*, 85 Ohio St. 627; *New Jersey Exp. Co. v. Nichols*, 83 N. J. L. 484; *Winship v. Enfield*, 42 N. H. 197; *Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110; *Prideaux v. Mineral Point*, 43 Wis. 522, 28 Am. Rep. 553; *Starry v. Dubuque & S. W. R. Co.* 51 Iowa, 419; *Louisville & N. R. Co.*

v. *Ynietra*, 21 Fla. 700; *Nehrbas v. Central Pac. R. Co.* 62 Cal. 320

In every Texas case where the court refers to the burden of proof being on the defendant as to contributory negligence, the term is used in the sense of the burden of introducing testimony on the issue.

Whatever may be the general rule, the same has always been qualified in this state—that where plaintiff's own case discloses a suspicion of, an inference of, any evidence of, contributory negligence, the burden is on him on the whole case to establish absence of negligence on his part.

Messrs. Guion & Truly and Fisher & Townes for defendant in error.

Denman, J., delivered the opinion of the court:

This suit was brought by T. D. Shieder against the Gulf, Colorado & Santa Fé Railway Company to recover damages for injuries inflicted upon plaintiff's wife in a collision between one of the trains of defendant and the buggy in which Mrs. Shieder was riding at the intersection of a public street with the railroad in the town of Ballinger on the 17th day of April, 1892. The railroad ran east and west, and the street crossed same at right angles. The railroad at said intersection had two tracks parallel with each other, about 46 feet apart; the main track being on the north and the side track on the south. On said side track, just east of the crossing, stood a number of box cars. Mrs. Shieder and Mrs. Younger approached said crossing from the south, in said buggy, the horse being in a slow trot, and passed over said side track just west of the box cars, and at the same time an engine with caboose attached approached said crossing on the main track from the east. Plaintiff's testimony tends to show that as the buggy crossed the side track Mrs. Shieder, who was driving, raised up in the buggy, and looked in the direction of the approaching train, and then pulled the horse to the left, whereupon the horse, becoming unmanageable, plunged forward across the main track, bringing the buggy onto same just in time to collide with the engine, which threw Mrs. Shieder about 74 feet and Mrs. Younger about 55 feet, greatly injuring the former, and killing the latter. Some of the employes of defendant on the train appear to have discovered the horse as he came over the side track from behind the cars, but the engineer testified that he was not aware of the presence of the buggy until the engine struck it, and that he did not make any effort to stop for that reason. There was much conflict in the testimony as to whether the bell was ringing as the engine approached the crossing, and as to the speed of the train. Mrs. Shieder has no recollection of the accident, and does not ever remember being with or seeing Mrs. Younger on the day of her death. Verdict and judgment for plaintiff was affirmed by the court of civil appeals.

The court below charged the jury that the burden of proof was upon defendant railroad to establish contributory negligence on the part of Mrs. Shieder. This charge is assigned 28 L. R. A.

as error. There is much conflict of authority upon the question as to whether the burden of proof, upon the issue of contributory negligence, rests upon plaintiff or defendant. The confusion resulting is intensified by the fact that few, if any, jurisdictions can be found in which the decisions of the courts of last resort can be entirely reconciled upon this important question. A careful examination of the cases leads us to the conclusion that much of the apparent conflict in the decisions of any particular state is due to the fact that the courts, in deciding individual causes, have sometimes relied upon the authority of decisions by courts holding a different view of the law as to burden of proof; such difference not appearing on the face of the opinions, but lurking in the principle upon which they are based. The two classes of decisions, and the reasons by which they are respectively supported, are essentially antagonistic. They start from different premises, and logically arrive at different results, and therefore the citation of one to support the other generally leads to confusion. Mr. Beach, who undertakes to defend the rule imposing the burden on the plaintiff, asserts that it is supported by "the decided weight of authority," and declares it to be the doctrine in Massachusetts, Maine, Mississippi, Louisiana, North Carolina, Michigan, Oregon, Illinois, Connecticut, Iowa, Indiana, and probably New York, but candidly admits that the contrary is the settled rule in England, the Supreme Court of the United States, Alabama, California, Georgia, Kentucky, Kansas, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, Nebraska, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Wisconsin, West Virginia, Vermont, and Colorado, and is the opinion of the text-writers. Beach, *Contrib. Neg.* § 156, etc. The burden was first held to be upon plaintiff by the supreme court of Massachusetts in 1831, in *Lane v. Crombie*, 12 Pick. 177, in which case the court held that the trial court erred in charging the jury that the burden of proof was upon defendant to establish plaintiff's contributory negligence, relying for authority upon the case of *Butterfield v. Forrester*, 11 East, 60, decided in the court of king's bench in 1809. We do not think the last-mentioned case can be construed to support the Massachusetts court. In that case "plaintiff left a public house, not far distant from the place in question, at eight o'clock in the evening, in August, when they were just beginning to light the candles, but while there was light enough left to discern the obstruction at one hundred yards distance; and the witness who proved this said that, if plaintiff had not been riding very hard, he might have observed and avoided it (the obstruction in the street). The plaintiff, however, who was riding violently, did not observe it, but rode against it, and fell with his horse, and was much hurt in consequence of the accident." On this evidence, Bailey, J., directed the jury "that, if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street

extremely hard, and without ordinary care, they should find a verdict for the defendant;" which they accordingly did. The only question before the court was the correctness of the charge, which did not instruct as to the burden of proof, and the opinion approving the charge does not undertake to discuss such question. By giving this case a construction not warranted by the sole question before the court and not given it in England, the supreme court of Massachusetts adopted a rule which, being followed by the courts above cited, has produced much confusion in American jurisprudence. Mr. Beach virtually admits that the strongest defense of the rule is contained in the following language of Storrs, J., in *Park v. O'Brien*, 28 Conn. 845: "The reason of the rule is that the plaintiff must prove all the facts which are necessary to entitle him to recover, and this is one of those facts. It was necessary for the plaintiff to prove—First, negligence on the part of the defendant, in respect to the collision alleged; and, secondly, that the injury to the plaintiff occurred in the consequence of that negligence. But, in order to prove this latter part, the plaintiff must show that such injury was not caused, in whole or in part, by his own negligence; for, although the defendant was guilty of negligence, if the plaintiff's negligence contributed essentially to the injury, it is obvious that it did not occur by reason of the defendant's negligence. Therefore the plaintiff would not prove enough to entitle him to recover by merely showing negligence on the part of the defendant, but he must go further, and also prove the injury to have been caused by such negligence, by showing a want of contributory negligence on his own part, contributing materially to the injury. Hence, to say that the plaintiff must show the latter is only saying that he must show that the injury was owing to the negligence of the defendant." We think this reasoning fallacious. It assumes that plaintiff cannot recover unless it appears that the injury was caused solely by the negligence of defendant, when the law is that he may recover when defendant's negligence is only one of several contributing causes; the defendant being able to defend, where one of such causes is plaintiff's negligence, not on the ground that his own negligence was not the sole cause of the injury, but upon the ground that the law will not permit plaintiff to recover where it is shown that his own wrongful or negligent act contributed to the injury. The real ground upon which the rule is based is the assumption that the law, from the fact that plaintiff was injured, raises a prima facie presumption that he was guilty of negligence contributing thereto. If this assumption be correct, then it follows that before he can recover he must show that he was not guilty of contributory negligence. We are of the opinion that the law raises no presumption of negligence, from the mere fact of injury, against either the plaintiff or the defendant. Negligence, like fraud, is a species of wrong, and will not be presumed. The rule seems to be well settled that it is not necessary for the plaintiff in his petition to negative,

either by facts stated or by express averment, the existence of contributory negligence on his part. This was held by Duer, J., in 1855 (*Johnson v. Hudson River R. Co.* 5 Duer, 32); by the supreme court of California in 1874 (*Robinson v. Western Pac. R. Co.* 48 Cal. 426); by Chief Justice Roberts in 1876 (*Texas & P. R. Co. v. Murphy*, 46 Tex. 360, 26 Am. Rep. 272; *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 302). And Lord Penzance, in 1878, in delivering his opinion in the house of lords in the leading case of *Dublin, W. & W. R. Co. v. Slattery*, 3 App. Cas. 1180, said, "I think I may safely say that no such declaration was ever seen." We have been able to find no case where such pleading has been required, except in a few of those states where the burden of proof is upon plaintiff to show that he was not guilty of contributory negligence. Since these states have changed the well established and logical rule of evidence at common law, consistency would seem to require a corresponding change in the rule of pleading; but it seems that only a few of them have so ruled. As said in the *Slattery Case*, above referred to: "If any such burthen lay upon the plaintiff, it would certainly have been necessary for him, in the days when pleadings were required to be more precise and strictly accurate than perhaps they are now, to allege in his declaration that the accident happened without any such negligence on his own part as contributed to cause it. And yet I think I may safely say no such declaration was ever seen." See also *Johnson v. Hudson River R. Co.* 5 Duer, 26.

We are of the opinion that the great weight of authority, as well as the reason of the law, is in favor of the rule which imposes the burden of proof upon defendant to establish plaintiff's contributory negligence, and it may be considered the settled law in this state. *Texas & P. R. Co. v. Murphy*, 46 Tex. 360, 26 Am. Rep. 272; *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 300; *Dallas & W. R. Co. v. Spicker*, 61 Tex. 429, 48 Am. Rep. 297; *Gulf, C. & S. F. R. Co. v. Redeker*, 67 Tex. 189, 60 Am. Rep. 20; *San Antonio & A. Pass R. Co. v. Bennett*, 76 Tex. 153. It cannot be denied that the opinions of this court in the cases of *Walker v. Herron*, 22 Tex. 55, and *Texas & N. O. R. Co. v. Crowder*, 63 Tex. 503, and 76 Tex. 500, contain language showing that the learned judges delivering same favored the reasoning of the Massachusetts and Connecticut courts, and from an examination of the opinions and briefs of counsel it appears that cases from those courts were relied upon. It does not clearly appear that the question of burden of proof was before the court in the case of *Walker v. Herron*, and in the *Crowder Cases* the court held that the facts were not sufficient to show defendant's negligence, and, since the cases must have been disposed of upon that ground, it is probable that the question of burden of proof on the issue of contributory negligence did not receive a very careful examination. This appears more probable when we consider that the learned judge who delivered the opinion in the *Crowder Case*, 63 Tex. 503, also de-

livered the opinion in the *Spicker Case*, 61 Tex. 429, 48 Am. Rep. 297, and was a member of the court when the *Redeker Case*, 67 Tex. 189, 60 Am. Rep. 20, was decided,—in both of which it was expressly held that the burden of proof was upon defendant,—and was chief justice of this court when the opinion of the commission of appeals in the *Bennett Case*, 76 Tex. 153, was adopted, holding the same view. We understand that two questions were decided in *Murray v. Gulf, C. & S. F. R. Co.*, 73 Tex. 2.—First, that the evidence was sufficient to sustain the verdict on the issue of contributory negligence; and, second, that the evidence on such issue was admissible under the general denial, the special plea of contributory negligence having been held defective. It is not necessary for us to determine here in what class of cases a special plea of contributory negligence is required, but it seems generally to be admissible in many jurisdictions under the general denial, even where the burden of proof is on defendant. See *Slattery Case*, *supra*; *Hocum v. Weiherick*, 22 Minn. 153. To the general rule imposing upon the defendant the burden of proof on the issue of contributory negligence there appear to be, in the very nature of things, two well-defined exceptions: First. Where the legal effect of the facts stated in the petition is such as to establish *prima facie* negligence on the part of plaintiff as a matter of law, then he must plead and prove such other facts as will rebut such legal presumption. The plain reason is that by pleading facts which, as a matter of law, establish his contributory negligence, he has made a *prima facie* defense to his cause of action which will be accepted as true against him, both on demurrer and as evidence on the trial, unless he pleads and proves such other facts and circumstances that the court cannot, as a matter of law, hold him guilty of contributory negligence. When he has done this, he has made a case which must be submitted to the jury. For instance, if plaintiff's petition shows that he was injured by defendant's cars while on the track, under circumstances which in law would make him a trespasser *prima facie*, then the law would raise a presumption of contributory negligence against him for which his petition would be bad on demurrer; and it would be necessary for him to plead some fact or circumstance rebutting such presumption,—such as that he was, after going upon the track, stricken down by some providential cause,—in order to save his petition, and on the trial the burden would be upon him to establish such cause. *Texas & P. R. Co. v. Murphy*, and other cases above cited; *Houston & T. O. R. Co. v. Sympkins*, 54 Tex. 618, 38 Am. Rep. 632. Second. When the undisputed evidence adduced on the trial establishes *prima facie* as a matter of law contributory negligence on the part of plaintiff, then the burden of proof is upon him to show facts from which the jury upon the whole case may find him free from negligence; otherwise the court may instruct a verdict for defendant, there being no issue of fact for the jury. *Sanchez v. San Antonio & A. Pass. R. Co.* (Tex.) (recently decided 38 L. R. A.

by this court) 27 S. W. Rep. 922, and cases cited; *Cassidy v. Angell*, 12 R. I. 447, 34 Am. Rep. 690; *Houston & T. O. R. Co. v. Sympkins*, 54 Tex. 618, 38 Am. Rep. 632. Let us apply these principles to the case at bar. Plaintiff's wife was traveling in a buggy along a public street when injured. She evidently knew the track was there, for she lived in view of and near the crossing. There is no proof as to whether she saw or heard the engine coming until she crossed the side track, though there was some disputed evidence as to whether the whistle was blown some distance back, and as to whether the bell was ringing as the engine approached the crossing. The testimony showed that her view of the approaching engine was partially, if not entirely, obstructed, until she crossed the side track, when she appears to have discovered the train, and tried to turn the horse, which, becoming frightened by the approaching engine, jumped onto the track. We have seen that the law rises no presumption of negligence from the fact of injury. Are there any other facts from which a legal presumption of negligence on the part of Mrs. Shieder arises? We think not. She had the same right to travel on the street as the defendant had to cross it, and therefore there was nothing *prima facie* wrongful or negligent in her being there. It cannot be said as a matter of law that any one or more things she did or failed to do were *prima facie* the failure to use such care and caution as a reasonably prudent person would have exercised under like circumstances. No fact or group of facts can be gathered from the plaintiff's pleading or from the undisputed evidence from which the law can be said to raise a *prima facie* presumption of negligence on the part of Mrs. Shieder, and therefore the case does not come within either of the two exceptions above noticed to the general rule imposing upon the defendant the burden of proof upon the issue of contributory negligence. But defendant contends that plaintiff's evidence exposes Mrs. Shieder to a "suspicion of negligence," and that, therefore, under the rule stated by Mr. Wharton, and quoted with approval in the *Spicker Case*, 61 Tex. 429, 48 Am. Rep. 297, the burden of proof was upon plaintiff. The rule referred to is stated by Mr. Wharton in his work on Law of Negligence (2d ed. § 426) as follows: "No doubt where, in an action for injuries caused by failure of duty on the part of the defendant, the failure of duty and the injury are shown by the plaintiff, and there is nothing that implies that he brought on the injury by his own negligence, then the burden is on the defendant to prove that the plaintiff was guilty of such negligence. On the other hand, when the plaintiff's own case exposes him to suspicion of negligence, then he must clear off such suspicion." For authority he refers to the opinion of Sharswood, J., in *Hays v. Gallagher*, 72 Pa. 140, decided in 1872, which opinion seems to us as being directly opposed to the rule stated by Mr. Wharton, or rather to that part of it relating to "suspicion of negligence," rolled upon here. The facts were that Hays had constructed a bridge across a

cut, and allowed the hand rails to become decayed and torn away, whereby it became dangerous to travelers by night; and Gallagher, on a dark night, though living in the neighborhood, and being familiar with the condition of the bridge, undertook to cross same, and fell off, whereby he was injured. He was found lying in the cut, and stated that he had fallen off the bridge. This was all the evidence, and though plaintiff, Gallagher, was in court during the trial, he did not testify or give any explanation whatever as to how the accident happened. Gallagher recovered judgment, and Hays appealed upon the refusal of the court below to affirm the fifth point made by him, which was as follows: "The fact that the plaintiff was found in the cut, under or near the bridge between the hours of 11 and 1 o'clock at night, and saying that he had fallen off the bridge, without any explanation of where he had been or was going, or for what purpose he was on the bridge at that hour, or of the time or manner or cause of his falling off, is not sufficient to sustain his action for injuries occasioned by his fall." The court held "that, though there was no evidence of the precise circumstances of the accident, still plaintiff had made out a prima facie case without his own testimony, and was not bound to offer himself as a witness, but that defendant should have called him if he wished the facts developed," and affirmed the judgment. Thompson, *Ch. J.*, dissented on the ground "that the bridge was only eight or ten feet long and was eighteen feet wide, and that the plaintiff was perfectly well acquainted with it; that some evidence ought to have been given to clear him of negligence." It appears that the chief justice was inclined to the Massachusetts rule, but, however this may be, we do not construe the case as supporting the rule as stated. Mr. Wharton does not explain or indicate in any way what legal idea he intended to express by the phrase, "when the plaintiff's own case exposes him to suspicion of negligence," or what amount or character of testimony or proof of negligence would create such suspicion. The word "suspicion" is defined as being "the imagination of the existence of something without proof, or upon very slight evidence or upon no evidence at all." If this be the meaning of the rule, it is practically the same as that which places the burden of proof upon plaintiff in all cases upon the issue of contributory negligence, for an accident could rarely occur but that there would be some slight evidence of negligence on part of plaintiff. Counsel for defendant ingeniously argue that a suspicion of contributory negligence is raised by circumstances attending plaintiff's case, though such circumstances fall short of that quantum of proof necessary to support a verdict against plaintiff on the issue of his contributory negligence, for they say, "Certainly it will take more than a mere suspicion of contributory negligence to support a finding to that effect." This is equivalent to the proposition that the burden is upon plaintiff to disprove the existence of contributory negligence on his part before any testimony has been of-

ferred which would authorize the court to submit the issue to the jury, and brings us again, for all practical purposes, to the rule imposing the burden on plaintiff in all cases. If the rule stated by Mr. Wharton means any more than that condition of pleading or proof necessary to bring plaintiff within one of the two exceptions to the general rule above stated, we are not prepared to follow it. We are of the opinion, therefore, that the trial court correctly charged the jury that the burden of proof was upon defendant to establish contributory negligence on part of plaintiff's wife.

The next assignment of error is as follows: "The court erred in overruling defendant's motion for new trial on the twenty-fourth ground thereof, as follows: 'Because the verdict of the jury is contrary to the law and the evidence in this: That the undisputed evidence shows that plaintiff's wife, without looking or listening for an approaching train, and without making any effort to discover a train approaching on defendant's track, when upon the track at the point of the crossing where the accident occurred, and was struck by a train, when by the use of ordinary care she could have prevented the same, and that plaintiff is, therefore, not entitled to recover.' This court having no power to pass upon the sufficiency of evidence, and the burden of proof being upon defendant to establish contributory negligence on the part of Mrs. Shieder, the sole question we can consider is whether the evidence, as a matter of law, establishes contributory negligence on her part; or, in other words, should the court have instructed a verdict for defendant upon the ground that her contributory negligence was, under the state of the proof, no longer a question of fact for the jury, but of law for the court." We cannot say, as matter of law, that the jury should have found that plaintiff's wife did not use such care and caution as a reasonably prudent person would have used under like circumstances. They may have considered that the use of reasonable care would not have discovered the approach of an extra, which they were not expecting, especially since their view was so much obstructed that the employes on the train could not see the horse and buggy with top up until after it crossed the side track, and since there was such conflict of testimony as to the speed and noise made by the train. If the jury found them not guilty of negligence until they crossed the side track, then it would be difficult to argue that, as a matter of law, Mrs. Shieder failed to act thereafter as a reasonably prudent person, for she seems to have tried to turn the horse from the track, and ought not to be held responsible for the fright of the animal, caused by defendant's negligent act in running the train upon him. It would be a clear invasion of the province of the jury for this court to hold as a matter of law that plaintiff's wife was guilty of negligence. The *Slattery Case*, above cited, is probably one of the best considered to be found in the books on the question as to the power of a court having jurisdiction of questions of law only, to set aside a verdict for want of evi-

dence. The evidence of contributory negligence of the deceased in that case was much stronger, in our opinion, than here, but the verdict was allowed to stand, because there was no conclusive evidence of negligence on part of deceased. *Robinson v. Western Pac. R. Co.* 48 Cal. 420; *Missouri Pac. R. Co. v. Lee*, 70 Tex. 501.

Error is assigned on the refusal of the court to give a number of special charges asked by defendant, one of which is as follows: "It was the duty of plaintiff's wife to look for an approaching train when about to go upon the railroad, and, if her view was in any way obstructed while approaching said crossing, it was her duty to look for a train as soon as she had reached a point when she passed such obstructions, and a view of the track was open to her; and if you believe from the evidence that she failed to look for a train as soon as she could have seen the same, and that a failure to do so was a failure to exercise such care as a reasonably prudent person would have used under the circumstances, and that such failure contributed to the injuries received, you will find for the defendant." This charge instructs that it was her duty to do certain things, which is equivalent to declaring as a matter of law that failure to do so would have been negligence, and was correctly refused. *Missouri Pac. R. Co. v. Lee*, 70 Tex. 501; *Gulf, C. & S. F. R. Co. v. Anderson*, 76 Tex. 251. The latter part of the charge, reading, "if you believe from the evidence," etc., states a correct principle of law, and should have been given if asked alone. It left to the jury the question as to whether, upon the whole evidence, she failed to look, and whether, under all the circumstances, such failure was negligence. We are of the opinion that a party is entitled to have the law applied to the facts of his case, provided he requests a special charge, which does not invade the province of the jury by declaring or intimating to them the court's opinion as to the legal effect of the evidence. The charge of the court in general terms instructed the jury that, if they believed from the evidence that plaintiff's wife failed to use such care as a reasonably prudent person would have used under like circumstances to prevent injury to herself, and that such failure contributed to or caused her injuries, they should find for defendant. The charge being a correct general presentation of the issue, the court was not bound to reform defendant's special charge above, but correctly refused it as presented.

Error is assigned on the refusal of the court to permit defendant to show by certain witnesses "that Mrs. Shieder and Mrs. Younger passed over and about the crossing in question frequently, the same being the crossing at the place where the accident occurred; and that they knew, or ought to have

known, that trains passed such point frequently, and at rapid rates, and sought thereby to charge plaintiff's wife with notice of such facts." We understand that the purpose of the proposed proof was to charge Mrs. Shieder with notice of the fact that trains frequently passed the crossing at rapid rates of speed, in order that the jury might weigh her knowledge of such fact, together with other circumstances, in determining whether she acted as a reasonably prudent person would have acted under like circumstances in going upon the track. The proof offered is of a very indefinite and uncertain character. It does not show during what period the ladies frequently passed the crossing, nor that the trains did in fact frequently run there at rapid rates during such a time that they would have probably learned that such was the custom. The only testimony that the trains ran at great rates of speed is what can be gathered from that of the witness Meadows, who said that he did not know whether he ever saw a train cross those streets as fast as the engine causing the injury, and continued, "My opinion is that they run pretty fast, over the yard there, all the time." Whether the time they, in his opinion, ran pretty fast, embraced a period anterior to the accident, or during the time it was sought to be shown that the ladies were in the habit of passing, does not appear. In fact the whole record shows that defendant did not make any effort to show rapid speed for the trains, but the contrary. If the evidence had shown that at a time prior to the accident the trains frequently passed there rapidly, and that while so passing the ladies often passed the crossing, so as to allow the jury to infer their knowledge of the fact, we are of the opinion that the evidence should have been admitted. We cannot say, as a matter of law, that it was negligent to run the cars at a rapid rate at that point; and hence the question discussed by counsel as to whether Mrs. Shieder was bound to anticipate the negligent running of the cars on the particular day from such previous custom is not before us. We do not think there was any error in excluding the evidence under the circumstances. The testimony shows that Mrs. Shieder lived near and within view of the crossing, for her son saw the collision from her home. Under these circumstances the jury might as well have inferred her knowledge of the way the cars were accustomed to run as from the indefinite proof offered, and therefore it does not appear that any injury would have resulted from the exclusion of the evidence if it were held that it had been properly presented. There are many other assignments of error, none of which we consider well taken.

The judgment is affirmed.

Rehearing denied.

INDIANA SUPREME COURT.

OHIO & MISSISSIPPI R. CO., *Appl.*,

Rose EARLY, Admr., etc., of Emmett E. Early, Deceased.

(.....Ind.)

1. The duty of a railroad company to provide medical or surgical attendance for an injured employé in the absence of contract can arise only in a case of strict necessity and urgent exigency, and expires with the emergency.
2. The conscious and deliberate choice of an injured employé while in possession of his mental faculties of the time when, place where, and person by whom he will be treated, relieves the master of any liability for failure to provide other treatment.
3. Liability of a railroad company for failure to provide for an injured brakeman is not shown where the best medical treatment that could be obtained at the little town where he was injured was procured and he was removed as soon as possible with his intelligent and conscious consent, without any objection of the physicians who had attended him thus far, to another town where a place was provided for him and competent surgeons were waiting him, but he insisted on being taken still further to the town where he lived but died soon after reaching the place from loss of blood on the way.

(April 12, 1886.)

APPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to recover damages for negligence which was alleged to have resulted in the death of plaintiff's testator. *Reversed.*

The facts are stated in the opinion.

NOTE.—Duty of master to furnish medical aid to servant.

- I. Servants generally.
- II. Seamen.
- III. Apprentices.
- IV. Slaves.

I. Servants generally.

The earliest expressions of opinion upon this question seem to have been to the effect that a master was liable to furnish medical aid to his sick or injured servant.

In *Newby v. Wiltshire* (1782) 2 Esp. 739, Cald. 527, 4 Dougl. 284, which was an action by the parish officer against the master for money expended by the former in curing the latter's servant, Lord Mansfield said: "I think in general the master ought to maintain his servant and take care of him in sickness; but the question now is, What is the law?"

... there is in point of law no action against the master to compel him to repay the parish for the cure of his servant. The parish is bound to take care of accidents."

But in *Scarman v. Castell* (1795) 1 Esp. 270, an action was brought for medicine furnished to and attendance on defendant's servant. Lord Kenyon said that he was of opinion that a master was obliged to provide for his servant in sickness and in health, and that therefore he was liable for medicine furnished to a servant while in his service. While the servant was under the master's roof, the master was under a legal as well as a moral obligation

Messrs. Edward Barton, H. D. McMullen, W. R. Johnston, and H. R. McMullen for appellant.

Messrs. W. K. Marshall, Zareng & Hottell, and Elliott & Elliott, for appellee:

It was the appellant's duty to furnish medical and surgical aid for the decedent.

Terre Haute & I. R. Co. v. McMurray, 98 Ind. 858, 49 Am. Rep. 752; *Cairo & St. L. R. Co. v. Mahoney*, 83 Ill. 73, 25 Am. Rep. 299; *Louisville, R. & St. L. R. Co. v. McVay*, 98 Ind. 891, 49 Am. Rep. 770; *Toledo, St. L. & K. C. R. Co. v. Mylott*, 6 Ind. App. 438; *Cincinnati, I. St. L. & O. R. Co. v. Cooper*, 6 L. R. A. 241, 120 Ind. 469; *Chaplin v. Freeland*, 7 Ind. App. 676; *Union Pac. R. Co. v. Winterbotham*, 52 Kan. 483; *Sevier v. Birmingham, S. & T. R. R. Co.* 93 Ala. 258.

Where a railroad company receives infirm or disabled passengers who are physically unable to help themselves, the company is guilty of negligence if it does not render them such assistance as is necessary in boarding and alighting from the cars.

2 Am. & Eng. Encyclop. Law, p. 767; Patter-son, *Railway Accident Law*, § 278; *Madden v. Port Royal & W. C. R. Co.* 41 S. C. 440; *Conolly v. Crescent City R. Co.* 8 L. R. A. 133, 41 La. Ann. 57; *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542.

The rule has been applied to a trespasser or a stranger who is injured on the track of the railroad company, and the company has been held liable for negligence in not properly caring for such person after the injuries were received.

Northern Cent. R. Co. v. State, 29 Md. 420, 96 Am. Dec. 545.

The defendant assumed and undertook to

tion to provide the necessary medicines. The case of *Newby v. Wiltshire*, being mentioned, was explained by counsel as the case of a servant in husbandry and the action was an action of assumpsit by the parish officer to recover a surgeon's bill paid by him for the care of the servant, and Lord Kenyon said the distinction seems a reasonable one, and that that case was distinguishable from the present.

These opinions, however, did not prevail, for it was soon expressly decided that the obligation of the master to provide medical assistance for his servant, if any, must arise from contract. *Wen-nall v. Adney* (1802) 3 Bos. & P. 247.

The master is not liable for services rendered by other than his regular physician unless they were rendered by his procurement or he subsequently ratified them. *Cooper v. Phillips* (1831) 4 Car. & P. 581.

In *Sweet Water Mfg. Co. v. Glover* (1859) 29 Ga. 399, it is said that when one white man employs another to work for him it is not an implication or incident that the employer shall pay the employé's physician's bills. It would require an express contract to create that obligation.

In *Holmes v. Hutchinson* (1833) Gilp. 447, the court in comparing the condition of seamen with other laborers said that the latter are not only obliged in case of sickness, accident, or other disability to maintain themselves and pay all the expense of nursing, medicine, and medical attendance, but their wages, their only source of revenue, the

procure medical and surgical aid for the decedent but was guilty of such negligence and carelessness in so doing as to cause the decedent's death, and for that negligence and carelessness the defendant is responsible.

Richardson v. Carbon Hill Coal Co. 20 L. R. A. 338, 6 Wash. 52; *Atchison & N. R. Co. v. Jones*, 9 Neb. 67; *Union Pac. R. Co. v. Winterbotham*, 52 Kan. 433.

The appellant having entered upon the performance of the undertaking of procuring medical and surgical aid for appellee's intestate, was bound to use a degree of diligence and attention adequate to the performance of the undertaking, and was bound to exert itself in proportion to the exigency of the matter it undertook.

Cogg's v. Bernard, 2 Ld. Raym. 909; *The New World v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 486, 14 L. ed. 509; *Hutchinson*, Carr. 2d ed. § 566; *Conner v. Winton*, 8 Ind. 315, 65 Am. Dec. 761; 2 Kent, Com. 571, 572; *Story*, Ballm. 194; *Whitney v. Lee*, 8 Met. 91; *Tracy v. Wood*, 8 Mason, 183; *Moore v. Mourgue*, Cowp. 479; *Dartnall v. Howard*, 4 Barn. & C. 845.

The degree of negligence must be determined by the things done and the nature of the things bailed.

Tracy v. Wood, *supra*; *Smith v. Horne*, 2 J. B. Moore, 18; *Booth v. Wilson*, 1 Barn. & Ald. 59; *Batson v. Donovan*, 4 Barn. & Ald. 21; *Conner v. Winton*, 8 Ind. 315, 65 Am. Dec. 761; *Edwards*, Ballm. 2d ed. § 78, *et seq.*; *Preston v. Prather*, 187 U. S. 604, 84 L. ed. 788; *The New World v. King*, 57 U. S. 16 How. 470, 14 L. ed. 1020; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 857, 21 L. ed. 627; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 28 L. ed. 874.

The modern tendency is to do away with the different degrees of negligence and to abolish

the different distinctions and recognize only one degree, namely, that of negligence, and to use only one term "negligence."

Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301.

In the case at bar the thing bailed was a thing demanding the highest degree of care.

McCabe, Ch. J., delivered the opinion of the court:

This was a suit by the appellee against the appellant to recover damages for alleged negligence in the appellant, causing the death of her intestate, Emmett Early. A trial of the issues formed upon the complaint resulted in a verdict and judgment against appellant, over its motion for a new trial, for \$5,000. The important and controlling question in the case is whether the evidence is sufficient to support the verdict. It appears that on the 5th day of December, 1887, the decedent was in the employment and service of appellant in the capacity of a brakeman on one of appellant's freight trains running eastward through the county of Jennings, on appellant's railroad; and while in said employment and service, and in the line of his duty, he was required to couple a part of said freight train to a car standing on a side track of said railroad at Butlerville, in said county of Jennings, loaded with heavy logs, so that the ends projected over and beyond the end of said car so as to make it necessary for said decedent to stoop down in order to make said coupling, and, to get to the place of making said coupling, said decedent had to run along by the said of the moving part of said train as it approached said car, and in stooping down to get to said coupling apparatus he was tripped and fell, and the wheels of the moving car ran over him, and broke the bones of his leg, and

only means by which they can provide such expenditure, are stopped.

There is no legal obligation resting upon the company to provide medical or surgical care for those who have been injured in its service, but the ground upon which the authority of the superintendent to make such contracts is inferred is that it is a reasonable thing for the company to provide for the care and cure of persons who are engaged in the hazardous employment of railroading. *Union Pac. R. Co. v. Beatty* (1886) 85 Kan. 265, 57 Am. Rep. 160; *Union Pac. R. Co. v. Winterbotham* (1893) 52 Kan. 433.

Aid furnished by master under his own roof.

The distinction seems to have been made, however, that if the master volunteers to furnish aid he cannot afterwards charge the servant with it.

Thus in *Sellon v. Norman* (1829) 4 Car. & P. 80, the court said: "I am not prepared to say that a master is bound to provide a menial servant with medicine, . . . but if a master, when a menial servant falls ill, calls in his own medical man, I think he cannot afterwards charge that against the servant's wages, unless there be some special contract between the master and the servant that he should do so."

So in *Simmons v. Wilmott* (1800) 3 Esp. 93, the doctrine is recognized that the master is liable to take care of a servant sick under his roof.

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Master may furnish aid.

So it seems that there is nothing to prevent the master, even in case it is a corporation, from furnishing aid if he wishes to.

Thus a railroad company may incur expense for medical attendance upon employes. *Toledo, W. & W. R. Co. v. Rodriguez* (1868) 47 Ill. 188; *Toledo, W. & W. R. Co. v. Prince* (1869) 50 Ill. 25.

So when an employe has been disabled while in the employ of his railroad company it is a sufficient consideration to support a promise to pay for the nursing and medical attendance necessary to his cure. *Toledo, W. & W. R. Co. v. Rodriguez*, *supra*. So the master will be liable to pay for medical attendance which he procures. *Clark v. Waterman* (1835) 7 Vt. 73, 29 Am. Dec. 150.

The doctrine in regard to railroads.

Some of the states have been inclined to place upon railroad companies a duty in respect to furnishing aid to injured employes which is not extended to other employes.

In South Carolina it is the duty of the railroad company to notify a physician most accessible to the place of an accident occurring on its road by which employes are injured. *Adkins v. Atlanta & C. Airline R. Co.* (1887) 27 S. C. 71.

In *Toledo, St. L. & K. C. R. Co. v. Mylott* (1893) 6 Ind. App. 438, it is said the law of Indiana goes one step further than most if not all cases outside of that state, and says that it is not only within the

lacerated the flesh, muscles, and veins of his leg, so that the blood flowed from said wound in large quantities; that said wounds and flow of blood therefrom was in such quantities that it created a sudden emergency that required the immediate attention and service of a physician and surgeon to treat and dress said wound and stop said flow of blood; that there were two physicians and surgeons, competent and skillful, residing at and practicing their profession at said town of Butler-ville. The uncontroverted evidence shows that the car wheel passed over the decedent's leg below the knee, mashing it and breaking the bones, and so mangling it that amputation, had he lived, would have been necessary. The employes of the appellant in charge of the train consisted of a conductor, engineer, fireman, and two brakemen, the decedent, Early, being one of them, the conductor being the highest in authority of any employé or agent present on that occasion. The fireman was among the first to reach decedent after his injury. The other brakeman and several citizens of Butlerville came at once to lend assistance, and, with his leg bleeding all the time, he was carried to a shop in the vicinity, and placed upon a lounge therein. The conductor being at the caboose some distance from the place of the accident, a boy who saw it ran to him, and told him of it, and as the two were running back the conductor inquired for a surgeon. By this time Early had been picked up and carried to the shop. The conductor asked some of the boys two or three times to run and get a physician quick. As they were entering the shop with the wounded man, Dr. Nelson, one of the physicians resident in Butlerville, arrived and went into the shop with the crowd. A boy had gone for him, and as soon as he got into the shop the conductor inquired whether he was a surgeon.

Dr. Nelson took temporary charge of the case, but he had no surgical instruments. Dr. Kendrick, the only other surgeon in Butlerville, arrived very soon. Up to this time, the only employé of the appellant, other than the freight train crew mentioned, that had knowledge of the accident, was the local station agent. Butlerville was not a telegraph station; the nearest telegraph office being Nebraska, four miles east. The train and crew remained about twenty minutes or half an hour after the accident, and, being obliged to get their train out of the way of a west-bound passenger train due in a short time, proceeded on east with their train. Early did not want them to leave him there, and begged them not to do so, but the conductor told him they would have to go, and that at Nebraska they would telegraph some one for a doctor. Dr. Nelson had told the conductor that he had not the necessary instruments to perform an amputation, and that amputation would be necessary. The conductor told Dr. Nelson to take care of the patient as good as he could, and he turned and said to Early that he would go on with the train, and would telegraph back, and send a surgeon there to perform the operation. Early also requested that he should also send his wife, which the conductor promised to do. Dr. Nelson's understanding was that it was to be the appellant's surgeon from Seymour. Another witness testified that the conductor said he would telegraph to Seymour for Dr. Gerrish. When the crew left the wound had been bandaged by the doctor, and the flow of blood entirely checked. When the crew reached Nebraska the conductor thereof telegraphed to Seymour that Early had been injured, and to send him assistance at once. The dispatch was to the train master, and the answer received was that the west-bound passenger train No. 3.

power of the company to provide medical attendance but it is its duty to do so in cases of emergency where it is imperatively demanded.

Is there not a duty to the mangled man that some one must discharge? And if there be such a duty who owes it, the employer, or a stranger? Humanity and justice unite in affirming that some one owes him this duty, since to assert the contrary is to affirm that upon no one rests the duty of calling aid that may save life. If we concede the existence of this general duty then the further search is for the one who in justice owes the duty; and surely when the question comes between the employer and a stranger, the just rule is, it rests upon the former. *Terre Haute & I. R. Co. v. McMurray* (1885) 96 Ind. 358, 49 Am. Rep. 752.

In another case, however, it is said, railroads are under precisely the same obligations in respect to procuring medical and surgical aid for injured employes as other employers under like circumstances. *Terre Haute & I. R. Co. v. Brown* (1886) 107 Ind. 336.

But in *Chaplin v. Freeland* (1893) 7 Ind. App. 676, the question arose as to whether or not the foreman of a manufacturing company had power to employ a physician for an injured employé, and the court held that except perhaps in an extreme case there was no duty resting on the employer to furnish medical or surgical aid and that therefore the authority of the foreman to employ such aid would not be presumed.

In *Marquette & O. R. Co. v. Taft* (1873) 28 Mich. 250, it is said by one of the judges: "It was the 28 I. R. A.

duty of the corporation to keep lodged where it could be seasonably executed a discretionary power for meeting emergencies caused by injuries to employes and in the interest of humanity it ought to be used cheerfully and liberally.

In *Sevier v. Birmingham, S. & T. R. R. Co.* (1891) 92 Ala. 258, the court in considering the question of the power of a conductor to bind the company upon a contract for medical services for an injured brakeman, said the railroad company is not under any legal obligation to provide surgical assistance for employes who are injured while in the discharge of their duties.

In *Clark v. Missouri Pac. R. Co.* (1892) 48 Kan. 654, it is said: "It does not appear that the railroad company are under any legal obligations to provide medical or surgical care.

Not responsible for surgeon's negligence.

But if in any event the employer is obliged to furnish aid he cannot be charged with the negligence of the surgeon if he uses due precaution to select a competent one.

A railroad company which procures competent surgeons to attend an injured employé is not liable for any mistake, error of judgment, or want of foresight in him. *Atchison, T. & S. F. R. Co. v. Zeller* (1894) 54 Kan. 340.

A railroad company is not liable to employes for negligence of physicians and surgeons in a hospital which it voluntarily maintains for the gratuitous accommodation of injured employes to whom the

the first train that passed Butlerville after the accident, would stop there. It was due at Butlerville about forty minutes from the telegram, but was not a train that regularly stopped there. Butlerville was 23 miles from Seymour, and seven miles from North Vernon, the distance from North Vernon to Seymour being fourteen miles. The running time from Butlerville to North Vernon was about ten minutes, and from North Vernon to Seymour twenty-five minutes. Dr. Gerish lived at Seymour, as did also Early. In the answer to the freight conductor's telegram from Nebraska, nothing was said as to where Early would be taken. A telegram was sent to his wife to come to him, and with this, and the telegram for assistance, the connection of the freight crew with the accident terminated. The only employes of appellant having knowledge of the accident were the local agent and crew of the freight train. At Osgood, a station east of Nebraska, the conductor of passenger train No. 3 received, through the telegraph, orders from the train master to stop and get Early. Although the fact is not directly stated, the inference is irresistible that the order directed that he be taken to North Vernon. The conductor, whose evidence is just cited, is the only witness testifying as to the contents of the order, but subsequent events and references in other connections show that, whatever the passenger conductor or others may have done or intended, the train master did not order or intend that Early be taken to Seymour. The passenger train reached Butlerville about an hour and a half after the accident, which had occurred between 8 and 9 o'clock in the evening. It seemed to be understood there that Early would be taken away, for J. W. Gordan, a witness for plaintiff, testified as follows: "Q. What was Dr. Nelson doing for him? A. When I came in

he was standing at the head of the lounge, and I asked the doctor if he could not do something for him. He said all that he could do was to keep him easy; that they were going to take him away in a little while; and he did something with the bandages on his leg." That was after the freight crew had gone. Dr. Nelson had gone to his office, leaving Dr. Kendrick with the patient, and, hearing the west-bound passenger train whistle to stop, he started back, and met one of the employes accompanying the passenger train, who asked him where the man was that had been hurt. The doctor told him, and the employe started to the place, but before he reached it met others carrying Early out.

J. S. McElroy, plaintiff's witness, who was in the shop when Early was lying there, testified that neither the conductor nor any of the passenger train crew reached it, but that several fellows present picked up the lounge and carried Early out. Willis Miles, another witness for plaintiff, also testified that the citizens there carried him out. The passenger conductor inquired for Early with a view to taking him on the train. That he was brought out of the shop for that purpose, and put in the baggage car, on the cot or lounge on which he had been lying, with which there were some coverings. That the local station agent was present at the time. That Drs. Nelson and Kendrick were not consulted with as to the advisability of taking Early away, they both being present, and walked along with him and others to the train, and knew all about what was being done. Neither of them made any objection to his removal. It appears that he was in possession of perfect consciousness of what was being done with and for him, and that he gave an intelligent and conscious consent, if he did not in fact actually re-

company owes no statutory or contractual obligations in the matter. *Eighty v. Union Pac. R. Co. (Iowa) (1895) 27 L. R. A. 296.*

A corporation which voluntarily provides a physician for injured and sick employes whose services they are free to accept or reject, is liable only, if at all, for negligence in the selection of the physician and not for his negligence or tortious acts in the treatment of those who accept his services. *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan (Ind.) (1895) 27 L. R. A. 840.*

If a railroad company can become liable for medical aid to injured employes, its whole duty will have been performed when it employs a person of ordinary competency and skill in the profession, and having done so it cannot be held liable for his carelessness or negligence in the performance of his duties. *South Florida R. Co. v. Price (1893) 32 Fla. 46.*

A railroad company is not liable for the malpractice of physicians or the carelessness of attendance at a hospital maintained as a charitable enterprise by contributions of the company and small sums deducted monthly from the wages of its employes. *Union Pac. R. Co. v. Artist (1894) 23 L. R. A. 581, 60 Fed. Rep. 365.*

But for negligence in employing a surgeon at a hospital maintained by an employer for the benefit of employes from whose wages a small sum is deducted monthly to create a fund for that purpose, the employer is liable if by reason of the surgeon's unfitness an employe sustains damages. *Richardson v. R. A.*

son v. Carbon Hill Coal Co. (1893) 20 L. R. A. 838, 6 Wash. 53.

II. Seamen.

The rule seems to have been very generally enforced that a seaman was entitled to medical aid at the expense of the vessel. All text-writers on maritime law state that to be the rule and the cases with few exceptions follow them.

The right of a seaman in case of sickness to be treated at the expense of the ship constitutes in contemplation of law a part of the contract for wages and is a material ingredient in the compensation for the labor and services of the seaman. *Harden v. Gordon (1823), 2 Mason, 541.*

Wrongfully withholding suitable medicines from a seaman, and wrongfully setting him ashore in a foreign country, are violations of a contract of hiring. *Crapo v. Allen (1849), 1 Sprague, 184.*

In *Nelson v. The Brig Laura (1872), 2 Sawy. 244*, it is said that the general principle that seamen during sickness and disability are to be cured at the expense of the ship is not disputed.

The fact that the disease is of a malignant and infectious variety will not justify the master in setting the seamen on the shore without any provisions for their subsistence or proper medication. *Tomlinson v. Hewett (1872), 2 Sawy. 278.*

The ship must cure injuries inflicted by the ship's officers in punishing the seamen. *Ringold v. Crocker (1848), 1 Abb. Adm. 344.*

Where a seaman taken with smallpox was neg-

quest to be removed. There was no bleeding from his wound when first placed on the passenger train. The baggage master, who was with him on the car, testified as a witness for the plaintiff that "when they put him in the car they put him on the north side. I told them to move him on the other side, and that he was going to North Vernon. He said, 'No; I want to go to Seymour.'" He was conscious all the way from Butlerville to North Vernon. The conductor stated that within two or three minutes after they started from Butlerville he told Early he was going to take him to North Vernon; but that Early said he wanted to be taken to Seymour to his wife and Dr. Gerrish. He insisted on being taken to his home at Seymour, and expressed himself as though he was afraid of being left at North Vernon. He said he was afraid the doctors there would butcher him. All this occurred on the way from Butlerville to North Vernon. The run was made in about ten minutes, the train arriving at North Vernon two or three minutes late. While the train was stopped there his wound bled some. That within fifty-two or fifty-three minutes from the dispatch from Nebraska to the train master Early was in North Vernon. Drs. Kyle and Light, two competent surgeons and physicians at North Vernon, came to the station there on the arrival of the train to render any services required. A room had been prepared there into which to take him, in anticipation that he would be taken off the train at North Vernon, and men were at the depot with a stretcher to carry him to the room. The train was detained there nearly an hour. Drs. Kyle and Light during that time administered to the wounded man some brandy. After the train had stood there a few minutes blood ran through the bed down on the floor, but not to amount to anything. Dr. Kyle was the appellant's surgeon at North Vernon, and he called Dr. Light to assist in treating Early. The room mentioned had been procured in an hotel in response to a telegraphic dispatch by appellant's night watchman and baggage master at North Ver-

non, and he and the hotel proprietor were at the station to meet the train on its arrival, ready with a folding cot to take Early off and to the room. He went into the car, and saw the injured man. R. H. Swift, appellant's yard master at North Vernon, also went into the car, and remained with Early until he died. Early said to him "he wanted Swift to stay with him and see him home; didn't want to be taken off at North Vernon, but wanted to be taken to Seymour, to Dr. Gerrish." Swift told him he would do so. The run from North Vernon to Seymour was made in twenty-five minutes; and Early died at Dr. Gerrish's office in about an hour and a half after their arrival thereat. He bled some on the way, and lived about two hours and three quarters after reaching Seymour. It was the opinion of the surgeons that the hemorrhage probably caused his death.

The complaint seeks to recover on the ground of negligence of the appellant in failing to furnish medical and surgical assistance to one of its employes receiving a dangerous injury, while engaged in the line of his duty as such servant; and the charge is that appellant negligently failed to furnish such aid at Butlerville to stop the dangerous flow of blood, but wrongfully left him in the room in Butlerville for a long space of time without such aid, and without any attempt to stop the dangerous flow of blood, and wrongfully placed him on a passing train to be taken to Seymour, twenty-one miles distant, to Dr. Gerrish's office in said city; and that during the time the train was detained at North Vernon, there being competent physicians and surgeons residing there, who could and would have stopped the flow of blood from decedent's wounds if called on to do so, but that appellant carelessly and negligently omitted and refused to procure their service, and as a direct result of such failure and neglect, when the office of Dr. Gerrish at Seymour was reached with Early, he was so far gone from the loss of blood that nothing could be done to save his life, and that he died in twenty minutes after arriving at said office.

lected by the ship's officers so that his feet were frozen, the ship was held liable for the expense of treatment made necessary thereby in a hospital. *Moseley v. Scott* (1864-6), 14 Am. L. Reg. 599.

Where a ship has not the means to cure a seaman taken ill on a whaling voyage and he is cared for on shore, the reasonable expense of the care and cure are chargeable to the ship. *Babcock v. Terry* (1866), 1 Low. Dec. 66.

It seems that by the law of Great Britain when a seaman is hurt in the service of the ship and left behind for that cause in a foreign country and the cause is duly certified by the consul, the ship is responsible for his care and sustentance. *The Magna Charta* (1872), 2 Low. Dec. 136.

Where a seaman is disabled by an accident in the actual discharge of his duty he is to be cured at the expense of the ship. *Holmes v. Hutchinson* (1838), 4 Glip. 447.

In that case the court says, evidently as the basis for distinctions, that the sickness was not produced by an accident while engaged in service on board of the ship, and while in discharge of his duty; it is not an endemic disease of the locality to which the seaman was exposed; it was not a contagious dis-

ease, dangerous to the crew which made it necessary for their safety to remove the man from the vessel, thereby incurring extraordinary expense; it was an ordinary disease which the man might have had anywhere in any other place of employment.

In *The Explorer* (1884), 20 Fed. Rep. 135, an injured seaman claiming damages for his injuries was allowed the amount paid by him for medical expenses.

It is the duty of the master to procure medical attendance that may be available at ports where the vessel touches for the benefit of seamen injured where there is reasonable evidence of a necessity for it. *The Vigilant* (1897), 30 Fed. Rep. 233.

If upon arriving at port the necessity of immediate surgical attention to the injured sailor is ascertained, the owner of the vessel will be liable for injuries caused to him by the master's sailing away without procuring for him the required attention. *Scarff v. Metcalf* (1897), 107 N. Y. 211.

In *Winthrop v. Carleton* (1815), 12 Mass. 4, the consignee was permitted to recover from the owner the expenses of the sickness and funeral of the master of the vessel which occurred while at the

We do not think this evidence is sufficient to support the verdict. While a railroad company is under no legal obligation to furnish an employé, who may receive injuries while engaged in the service of the company, with medical or surgical assistance, yet where a day laborer or employé has, by unforeseen accident to him while engaged in the line of his duty as such employé, been rendered helpless, the dictates of humanity, duty, and fair dealing would seem to demand that it should furnish medical assistance. Of course, this duty could not rest upon the master in ordinary cases, in the absence of a contract to do so, but should rest upon him only in extraordinary cases, where immediate medical or surgical assistance is imperatively required to save life or avoid further serious bodily injury. This duty on the railroad company only arises out of strict necessity and urgent exigency, where immediate attention thereto is demanded in order to save life or prevent great injury. The duty arises with the emergency, and with it expires. *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 353, 49 Am. Rep. 752, and authorities there cited. This duty does not clothe the master with the power to dictate to the injured servant what particular physician or surgeon shall treat him, nor does it deprive such injured servant of the right of making a conscious and deliberate choice, while in the possession of his mental faculties, of the time, place, and person, and by whom and when and where he will be treated. And if the master, yielding to such right, complies with the request to be so treated, and at the same time promptly places before him ample medical and surgical assistance, ready to be rendered to meet the emergency, which he declines, then such emergency has ceased, and the duty with it; and if the choice thus made, in the conscious exercise of his own free will, turns out to be a mistake, the company is not liable, because the duty ceased with the expiration of the emergency. As to the conduct of the appellant's servants at Butlerville, assuming that the freight conductor was in this emer-

gency clothed with the powers, and charged with the duties, of the appellant, in that emergency the uncontradicted evidence shows that he faithfully discharged those duties by promptly furnishing all the medical and surgical assistance to the injured servant within reach or nearer than North Vernon, and that he promptly made arrangements that carried the decedent to North Vernon after his wound had been bandaged and the flow of blood stopped by such surgical aid as could be got at Butlerville. He reached North Vernon sooner than the surgeons there could have been brought to Butlerville after the accident, the distance being seven miles. There is no shadow of evidence showing negligence at Butlerville on the appellant's part. The evidence shows without contradiction that the appellant had taken every precaution to have Early treated at North Vernon by proper medical and surgical skill, and that he declined it all, except the brandy administered there by the physicians summoned in attendance by the appellant. There was no necessity or emergency after that, and therefore no legal duty resting on appellant afterwards to furnish medical or surgical aid. The evidence shows, without any conflict, that the appellant met the pressing emergency and urgent necessity at Butlerville, and discharged the duty thereby imposed; and conceding, without deciding, that such emergency continued till the injured servant was brought to North Vernon, the duty imposed by such emergency was fully met there, and there, at least, it expired. This is not a case of a conflict or preponderance of the evidence, but one where the most favorable view that can be taken of it for the appellee shows that the verdict is not supported by proof of those indispensable facts without which, as we have indicated, there can be no liability on the part of the appellant. The circuit court erred in overruling the appellant's motion for a new trial.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion for a new trial.

port of consignment and which expenses were paid by the consignee.

The seaman is entitled to be cured of the injury received although no one is in fault for the injury. *Brown v. The Bradish-Johnson* (1873), 1 Woods, C. C. 301.

But a freighting vessel is not bound to provide a physician or nurses for sick seamen. *Cormack v. The Wensleydale* (1890), 41 Fed. Rep. 602.

And in *Organ v. Brodie* (1854), 10 Exch. 449, 24 L. J. Exch. 70, an English case, an action was brought for provisions furnished to seamen who had been injured on shipboard and left behind by the captain, and the court said there is no pretence that the case falls within the general authority which the master of a vessel has of pledging the credit of the owner for such matters as were necessary for the due prosecution of the voyage; for the facts show that it was not necessary that these seamen should be cured in order that the vessel might proceed on her voyage. If that had proved to be the case the owner would have been responsible for all necessary supplies of medicine ordered by the captain and perhaps even for provisions, but as there is no ground for saying that these matters were nec-

essary, in that sense the captain had no authority to pledge the owner's credit.

The latter case, however, applies to the case some rules which are not considered as applicable elsewhere, and it is out of harmony with the bulk of the law upon the subject.

Although in *Walton v. The Ship Neptune* (1800), 1 Pet. Adm. 142, it is said there is no difference as to wages between the case of a sailor disabled on actual duty or that of one taken sick, or owing to no misconduct accidentally disabled while in service. In the former case he is to be cured at the expense of the ship; in the latter at his own charge.

How long does the obligation last.

In many of the cases the general expression is used, that a seaman disabled in the service of the ship is to be cured at the expense of the ship. *Brown v. Overton* (1859), 1 Sprague, 422; *Brown v. The D. S. Cage* (1872), 1 Woods, C. C. 406; *Brunet v. Taber* (1854), 1 Sprague, 243; *The North America* (1872), 5 Ben. 436; *Longstreet v. Steam-Boat R. R. Springer* (1880), 4 Fed. Rep. 671; *Croucher v. Oakman* (1861), 8 Allen, 185; *Hart v. The Ship Littlejohn* (1800), 1 Pet. Adm. 115.

TENNESSEE SUPREME COURT.

Thomas H. QUINN, Admr., etc., of Thomas J. Quinn, Deceased, *Pff. in Err.*,
c.

KANSAS CITY, MEMPHIS & BIRMINGHAM R. CO.

(24 Tenn. 713.)

1. The relation of master and servant does not exist between a railroad company and surgeons employed by it to render services to injured employes, so as to render the company liable for the mistakes or malpractice of such surgeons.
2. Selecting surgeons skilled and competent in their profession and placing them in attendance upon an employe injured in his service discharges every duty which the master owes in regard to the curing of such injury and he is not liable for the mistakes which they may subsequently commit.

(May 2, 1895.)

ERROR to the Circuit Court for Shelby County to review a judgment in favor of defendant in an action brought to recover damages for the negligence of defendant in failing to use proper care in attending to injuries which plaintiff's intestate received while in defendant's employ. *Affirmed.*

The facts are stated in the opinion.

In some of these cases, however, the question of how long the treatment was to last was not distinctly before the court. Nevertheless those expressions have been acted upon as the law in some of the cases.

Thus a seaman whose feet are frozen while in the ship's boat in the service of the ship before he is discharged, although he is at the home port, is entitled to be cured at the ship's expense. *Reed v. Canfield* (1832) 1 Sumn. 195.

So where an injury is received by a seaman while in the discharge of his duty, from the fault or negligence of the officers of the boat, the boat is liable for the expense of his keeping and medical attendance until he is restored. *Myers v. The Lizzie Hopkins* (1871) 1 Woods, C. C. 170.

In *The W. L. White* (1885) 25 Fed. Rep. 503, in which an injured seaman discharged by permission of a consul under act of congress was given a decree against the ship for the amount of the cost for cure, the court says: "If this seaman had come home in the ship he might have been discharged at the end of the voyage, so far as the payment of wages was concerned, but such discharge would not have operated to absolve the ship from her obligations to him under the maritime law to pay for all additional expenses of his medical treatment and cure within a reasonable time afterwards."

A seaman who is injured in the service of the ship without fault of his own is entitled to be healed at the expense of the ship and this after the voyage is terminated and the seaman is discharged. He is not entitled to receive any allowance for the effect of his injury, and when the cure is complete as far as the ordinary medical means extend, the ship and owner are freed from all liability. *The Lizzie Frank* (1881) 31 Fed. Rep. 477.

But there are other cases which limit the ship's obligation to the voyage, and which hold that when the seaman is returned to his home port the liability of the ship ceases.

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Messrs. James M. Greer and C. D. M. Greer for plaintiff in error.

Mr. Wallace Pratt, with Messrs. Adams & Trimble, for defendant in error:

There is no general liability on the part of a railroad company to provide surgical aid for sick or wounded servants.

Terre Haute & I. R. Co. v. McMurray, 99 Ind. 358, 44 Am. Rep. 753; *Marquette & O. R. Co. v. Taft*, 28 Mich. 289; *Toledo, W. & W. R. Co. v. Prince*, 50 Ill. 26.

Where a railroad company undertakes to furnish medical or surgical treatment to servants it discharges the full measure of its duty when it procures and sends to the injured person a surgeon of reasonable skill and good reputation in his profession, and is not liable for any negligence of such surgeon.

Laubheim v. De Koninglyke Nederlandse Stoomboot Maatschappij, 107 N. Y. 228; *O'Brien v. Cunard SS. Co. (Limited)* 13 L. R. A. 3:9, 154 Mass. 272; *South Florida R. Co. v. Price*, 32 Fla. 46; *Union Pac. R. Co. v. Artist*, 23 L. R. A. 581, 60 Fed. Rep. 363; *Secord v. St. Paul, M. & M. R. Co.* 18 Fed. Rep. 221; *McDonald v. Massachusetts Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 529.

Where a person injured through the negligence of another has received an injury which, without a surgical operation, would have caused his death, and employs a competent and skill-

The liability of the vessel in reference to the curing of injured seamen is generally to be limited to the period which is reasonably necessary for his conveyance to the United States. *The Atlantic* (1849) Abb. Adm. 452.

The obligation of the vessel does not extend beyond the termination of the seaman's contract and his return to his home or to a marine hospital. *The J. F. Card* (1890) 43 Fed. Rep. 92.

The seaman is to receive at the vessel's expense the ordinary medical attendance and treatment in case of injury or acute diseases for a reasonable time. The ship is not bound to pay for his medication for the cure of a chronic disease for an unlimited length of time. *Raymond v. The Ella S. Thayer* (1887) 40 Fed. Rep. 902.

In considering the question of liability of the ship for damages for injuries negligently caused to a seaman, the court in *The City of Alexandria* (1883) 17 Fed. Rep. 390, held that a seaman injured while in the service of the vessel is entitled to care, nursing, and attendance at the expense of the ship to the end of the voyage in all cases except where the injury arose from the willful and gross misconduct of himself or his associates, and that rule was followed in *Sullivan v. Neptune* (1887) 30 Fed. Rep. 325; *The Tammerlane* (1891) 47 Fed. Rep. 822.

It is the right of a seaman injured in the service of a vessel to be cared for at least to the end of the voyage and nothing short of gross negligence or willful misconduct causing, or concurring to cause, the injury will forfeit such right. *The City of Carlisle*, 5 L. R. A. 52, 14 Sawy. 179, 39 Fed. Rep. 807.

The privilege of seamen to be cured at the expense of a ship of disease incurred in the service of the ship continues no longer than their right to wages under their contract in the particular case. *Nevitt v. Clarke* (1846) Alcott, 316.

The ship's duty terminates in ordinary cases when the shipping contract is dissolved. *The Ben Flint* (1887) 1 Biss. 561, 1 Abb. (U. S.) 126.

ful surgeon by whose mistake the operation is not successful and the patient dies, the wrongdoer is not shielded from liability by the surgeon's error; and this although the operation was the immediate cause of the death.

Sauter v. New York Cent. & H. R. R. Co. 66 N.Y. 50, 28 Am. Rep. 18.

Beard, J., delivered the opinion of the court:

One Quinn, the intestate of plaintiff in error, was an employé of defendant, who was seriously crushed by the driving wheel of one of its engines, while engaged in the discharge of his duty as switchman in the yards of the railroad at Holly Springs, Miss. Immediately after the injury he was taken in charge by a surgeon employed by the defendant to render surgical attention to such of its employes as were injured at that place, while in its service. He at once placed himself in communication by wire with the chief surgeon of the railroad, whose duty, under his employment, was to render personal attention in such cases, and to exercise supervisory care over its local surgeon, including the one in personal charge of Quinn; this chief surgeon living, and at the time being, in Memphis in this state. The result of this communication was that the latter, having decided it was best for the wounded man that he should be brought to his father's home in Memphis, where he could more safely and intelligently receive surgical care, announced his decision

to the railroad authorities, and requested them to prepare at once to bring him in. In obedience to this direction, a special train was made up without unnecessary delay, and Quinn, accompanied by the Holly Springs surgeon, was taken on board, and, after a rapid run, was delivered over, at the depot of the railroad in Memphis, into the keeping of the chief surgeon. Within a few hours thereafter intestate of plaintiff died. This action was brought to recover damages against the railroad for negligence in various particulars resulting in his death. Among other grounds of negligence laid in the declaration was that defendant failed to provide the intestate with proper medical service, and that this failure greatly aggravated his condition, and largely contributed to his death.

On the trial of the case, the court below excluded certain evidence offered by plaintiff in error, which tended to show that these surgeons were unskillful in their treatment of the patient, and that this unskillfulness was one of the active causes contributing to his death. When he came to instruct the jury, the trial judge, among other things, said to them: "If deceased was put in charge of physicians of good reputation, it was their business to stop the flow of blood, if any, and defendant is not liable for any failure to stop this flow while the patient was in charge of, or after he was put in the charge of, the physicians. If deceased was put in the hands of competent surgeons of good rep-

To whom is the rule applicable?

The rule seems to have been adopted in the interest of common seamen, but it has been gradually extended to embrace others.

The rule is applicable to seamen on the lakes. *The Ben Flint* (1867) 1 Biss. 562, 1 Abb. (U. S.) 126.

Fishermen on mackerel voyages are entitled to be cured at the expense of the ship. *Knight v. Parsons* (1855) 1 Sprague, 279.

A mate is entitled to be cured at the expense of the ship in the same manner as seamen. And if he is put on shore when sick for the convenience of the ship his expenses for medical advice, attendance, and board are to be borne by the ship owner. *The Brig George* (1822) 1 Sumn. 151, affirming *Lamson v. Westcott* (1831) 1 Sumn. 560.

A second mate who is called upon to aid in suppressing a riot on the ship, who takes a pistol which he is warned not to use, but which is accidentally discharged during the scuffle so as to wound him, is entitled to be cured and sent home at the expense of the ship. *Callon v. Williams* (1871) 2 Low. Dec. 1.

A fireman on a steamship is within the rules. *The North America* (1872) 5 Ben. 496.

The engineer of a steamboat is entitled to be cured at the expense of the ship. *Holt v. Cummings* (1883) 102 Pa. 312, 48 Am. Rep. 199.

If the engineer of a steamboat is injured at the home port and the captain of the ship summons a physician who attends the man on board the boat and subsequently after his removal to his home, the ship will be liable for the whole amount of the bill. *Holt v. Cummings*, *supra*.

But a person employed to aid in shifting a barge from one location in a harbor to another for the purpose of placing her in winter quarters is not within the rule which entitles injured seamen to be cured at the expense of the ship. *The John B. Lyon* (1887) 83 Fed. Rep. 184.

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Effect of character of, or stipulations in, the contract.

The right to cure is the same whether the compensation is to be specific money, wages, or a share of the earnings of the vessel. *The Atlantic* (1849) 1 Abb. Adm. 452.

The fact that men on a fishing schooner are to be paid according to their catch does not take them out of the rule that entitles them to be cured at the expense of the ship. *Knight v. Parsons* (1855) 1 Sprague, 279.

A stipulation in the shipping articles not to charge for medicines is void. *The Sarah Jane* (1833) 1 Blatchf. & H. 411.

A stipulation in the shipping articles that the seaman shall pay for all medicines and medical advice without any condition that there shall be a suitable medicine chest on board the vessel, is contrary to the policy of the act of congress and will not be upheld. *Harden v. Gordon* (1823) 2 Mason, 541.

An express promise by a sick seaman to pay the physician's bill is without consideration and void. *Freeman v. Baker* (1833) 1 Blatchf. & H. 372.

Effect of statutes.

The English Statute 7 & 8 Vict. 112, provides that every ship navigating between the United Kingdom and places out of the same shall have and keep constantly on board a sufficient supply of medicine suitable to accidents and diseases arising on sea voyages. *Couch v. Steel* (1854) 3 EL. & BL. 402 23 L. J. Q. B. 121, 18 Jur. 515.

The United States Act of 1790, chap. 20, § 8, provides that certain classes of vessels shall be provided with a chest of medicine put up by some apothecary of known reputation and accompanied by directions for administering same; and the medicine shall be examined by the same or some other apothecary once at least in every year and supplied with fresh medicines in the place of such as

utation and standing in their profession, defendant is not liable for any treatment given the patient by them, or by others under their advice." The action of the court below in excluding this testimony and in giving this instruction is now assigned as error. Before considering this assignment, it is proper to say the record tends to show that both those surgeons were men of fine reputation for having skill and experience in their profession, and that for the service rendered to the deceased, as in all other similar cases, they were paid by the corporation, without cost or charge to him or to his estate. The question presented by this assignment is new in this state. It is almost as new to the courts outside the state. The diligence of counsel in this case, and the investigations of this court, have resulted in finding but few cases involving it, and these of so recent date that neither they, nor the rule announced by them, have been carried into the latest text-books on railway law.

Plaintiff in error insists that the defendant in error is liable for the mistakes or malpractice of the surgeons in question; that their employment by the railroad creates the relation of master and servant; and that the ordinary rule which makes the master liable for the negligent acts of his servant within the scope of his employment is to be applied in this case. If he be correct in his contention that the relation between the railroad and these

surgeons was that of master and servant, then his conclusion would properly follow. But was that the relationship? We do not think so. The term "servant," as it is used in connection with the rule invoked, has a well-defined meaning. "It is applicable," says Mr. Thompson in his work on Negligence (vol. 2, p. 892), "to any relation in which, with reference to the matter out of which an alleged wrong has sprung, the person sought to be charged had the right to control the action of the person doing the alleged wrong; and this right to control appears to be the conclusive test by which to determine whether the relation exists." "For the relation to exist, so as to make the master responsible, he must not only have the power to select the servant, but to direct the mode of executing, and to so control him in his acts in the course of his employment as to prevent injury to others." *Robinson v. Webb*, 11 Bush, 464. To the same effect are *Mound City Print & Color Co. v. Conton*, 92 Mo. 221; *Wilise v. State Road Bridge Co.*, 63 Mich. 639; *Andrews v. Boedecker*, 17 Ill. App. 213. The term "master" is equally well defined in the law. A "master" in the sense of the rule is "one who has the superior choice, control, and direction; whose will is represented, not merely in the ultimate result in hand, but in all its details; one who is the responsible hand of a given industry; one who has the power to discharge; one who not only pre-

shall have been used or spoiled; and in default of such medicine chest the owner of such vessel shall provide and pay for all such advice, medicine, or attendance of physicians as any of the crew shall stand in need of in any case of sickness at every place where the vessel may touch or trade during the voyage, without any deduction from the wages of such sick seaman. And these provisions were subsequently extended to other classes of vessels and provisions were made for the deduction from the wages of seamen for the support of hospitals.

The act of congress providing for a medicine chest on board a vessel did not change the maritime law as to the duty of the ship to sick seamen except as far as it respects medicine and medical advice, when there is a proper medicine chest and medical directions on board the vessel. *Harden v. Gordon* (1822) 2 Mason, 541.

If a seaman is put on shore the expense of board and nursing are to be borne by the vessel notwithstanding the passage of the act of congress, and there is no exemption from liability for medical advice unless there is a proper medicine chest on board, the burden of proof of which is upon the owners. *The Nimrod* (1822) 1 Ware, 9.

To exempt the vessel from the cost of medical advice under the act of congress it must be made to appear that the proper medicine chest was on board. *The William Harris* (1837) 1 Ware, 373.

The owner is not exempted from the expense of medical advice although there is a proper medicine chest on board, if the seaman cannot have the benefit of it either by reason of being removed to shore or from the fact that there is no one on board by whom the medicine can be safely administered. *The Forest* (1837) 1 Ware, 421.

In note to *Swift v. The Ship Happy Return* (1799) 1 Pet. Adm. 263, it is said although in ordinary cases having a medicine chest on board may be a compliance with the act of congress, exceptions should be made where dangerous diseases require and compel extraordinary remedies and assistance.

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Effect of seaman's negligence, or refusal of aid.

Mere negligence on the part of the seaman which causes the injury does not exempt the ship from liability to cure him. *The Chandos* (1890) 6 Sawy. 544; *Peterson v. The Chandos* (1890) 4 Fed. Rep. 645; *The Ben Flint* (1867) 1 Biss. 562, 1 Abb. (U. S.) 126.

In *Johnson v. Huokins* (1843) 1 Sprague, 67, it was held that in case of sickness produced by the seaman's own fault, he would be charged with the expenses of subsistence, and while there is no express ruling on the question of medical attendance some expressions of the court tend to the effect that subsistence would include medicine.

If a seaman contracts disease by his own excesses or faults and in defiance of the counsel and command of his superior officers, the vessel is not chargeable with the expense of his cure.

Where the negligence of a seaman contributes to the injury while the ship will not be mulcted in damages it will be held responsible for its negligence contributing to the injury to the extent of paying for the direct care, attention, medical services, and expenses required for the injured person. *The Wanderer* (1884) 20 Fed. Rep. 140.

If a sick seaman instead of accepting the master's offer of assistance, abandons the services of the vessel and seeks medical aid on shore, he will forfeit his right to be cured at the ship's expense. *The Bark Cambridge* (1877) 4 Sawy. 253.

Where a seaman in a foreign port is taken on shore at his own solicitation from a vessel properly provided with a chest of medicine, and there receives medical assistance and advice, the expenses thereof are to be deducted from his wages. *Pierce v. Patton* (1853) Gilp. 435.

Where a seaman in a foreign port contracts an ordinary disease without any fault of his own and remains on board of a vessel which is properly provided with a chest of medicine, the expense for the attendance and advice of a physician, if evidently necessary for the safety of his life, are to be deducted from his wages. *Holmes v. Hutchinson* (1833) Gilp. 447.

cribes the duty, but directs, and may at any time direct, the means and method of doing the work." 14 Am. & Eng. Encyclop. Law, p. 745. If it be, as these authorities indicate (and it cannot be otherwise), that the decisive test of this relationship, or even one of its decisive tests, is that the master has the right to select the mode of the servant's employment, and that the master's uncontrolled will is the law of the servant "in the means and methods" by which this end is to be reached, then it cannot be maintained that these surgeons were the servants of this corporation. They were not employed to do ordinary corporate work, but to render services requiring special training, skill, and experience. To perform these services so as to make them effectual for the saving of life and limb, it was necessary that these surgeons should bring to their work, not only their best skill, but the right to exercise it in accordance with their soundest judgment and without interference. Not only was this the right of these surgeons, but it was as well a duty that the law imposes. If the railroad authorities had undertaken to direct them as to the method of treatment of the injured man, and this method was regarded by them as unwise, they would have been "bound to exercise their own superior skill and better judgment, and to disobey their employers, if in their opinion the welfare of the patient

required it." *Union Pac. R. Co. v. Artist*, 9 C. C. A. 14, 60 Fed. Rep. 865, 28 L. R. A. 581. In accordance with this view, it has been uniformly held, so far as we have been able to discover, that, having selected surgeons skilled and competent in their profession, the corporation discharged every duty that humanity or sound morals impose, and that it is to no extent liable for the mistakes they may subsequently commit. In *South Florida R. Co. v. Price*, 82 Fla. 46, the declaration was that the surgeon, employed by the defendant to render surgical aid to its employes injured in its service, set the plaintiff's arm in an unskilled and negligent manner, and that for this the corporation was liable. To this claim the court says: "Even though we shall admit it to be within the corporate powers of such a company to obligate itself to the rendition of medical or surgical aid to its sick or injured employes, by assuming it as a duty or otherwise, or to become liable, under any circumstances, for any negligence of any such surgeon acting in the line of his profession, still it seems to be well settled that it will have performed its entire duty in that respect when it employs a person of ordinary competency and skill in that profession and that, having done so, it cannot be made liable for the carelessness or negligence of such surgeon in the performance of his duties as such." In

If a seaman is placed in the marine hospital and leaves of his own accord, he cannot hold the ship liable for expense afterwards incurred on treatment in a private hospital to which he is admitted. *Raymond v. The Ella S. Thayer* (1887) 40 Fed. Rep. 308.

If the seaman leaves the hospital contrary to instructions and thereby renders necessary much additional treatment, he cannot compel the ship to pay for the additional services. *Richardson v. The Juliette* (1843) 3 N. Y. Legal Obs. 23.

The fact that the seaman, given his choice as to remaining on board the ship or being sent on shore to a hospital, chooses the latter, will not exempt the ship from liability from expense while there. *Johnson v. Doubty* (1827-30) 1 Ashm. 165.

In *Pray v. Stinson* (1843) 21 Me. 402, it was held that if the vessel had on board the requisite medicine chest it was not liable for physicians' bills although the physician was called without request from the seaman because the danger was such that the law of the place as well as the feelings of humanity required that he should be called.

Effect of hospital treatment.

The hospital service of the United States is not intended to supersede the maritime law which imposes the obligation on a vessel to take care of a seaman becoming injured in its service. *The Chandos* (1880) 6 Sawy. 544; *Peterson v. The Chandos* (1880) 4 Fed. Rep. 645.

The United States statutes providing for a hospital fund for the benefit of injured seamen did not take away the right of the seaman to be cured at the expense of the ship. *Holt v. Cummings* (1883) 102 Pa. 213, 43 Am. Rep. 189.

But no allowance can be made to an injured seaman for medical attendance, if he was sent to a hospital at the expense of the ship. *The Centennial* (1881) 4 Woods, C. C. 50, 10 Fed. Rep. 397.

Liability of ship for negligence in treatment.

The owner of the vessel may be liable for the negligence of the master in his manner of treating 28 L. R. A.

a disabled seaman. *Peterson v. Swan* (1884) 19 Jones & S. 46.

But the ship will not be responsible for the treatment received by an injured sailor at a marine hospital. *Campbell v. The Frank Gilmore* (1890) 43 Fed. Rep. 313.

Duty to provide against scurvy.

The ship may be liable for failure to provide articles of diet which may be necessary to prevent the scurvy. *Anderson v. The Rence* (1890) 46 Fed. Rep. 808; *Baxter v. Doe* (1898) 142 Mass. 588.

III. Apprentices.

The master is bound to furnish medical assistance to apprentices. *Reg. v. Smith* (1897) 3 Car. & P. 153.

And sickness is not a ground for discharging an apprentice. *King v. Hales-Owen* (1718) 11 Md. 278.

The master is bound to pay for medical attendance on an apprentice from the very nature of the relation between master and apprentice. *Esaley v. Craddock* (1826) 4 Rand. (Va.) 423.

But in South Carolina it was held that a master is not, without special contract, liable for medicine administered to and attendance on his apprentice where the master did not send for the physician, and where the services were not rendered under his roof. *Percival v. Nevill* (1819) 1 Nott & McO. 423.

IV. Slaves.

In *Sweet Water Mfg. Co. v. Glover* (1859) 20 Ga. 299, it is intimated that the master must pay for the medical expense of his slave.

In *Dunbar v. Williams* (1813) 10 Johns. 249, it is said: "If medical aid or other assistance be rendered to a slave in a case of necessity which does not admit of a previous application to the master, the person rendering the assistance would probably be entitled to compensation from the master; and the law would raise an implied assumpsit on the ground that the master was legally bound to make the requisite provision for the slave."

H. P. F.

Union Pac. R. Co. v. Artist, 9 C. C. A. 14, 60 Fed. Rep. 365, 23 L. R. A. 581, the facts were that each employé of the railroad was required to contribute out of his wages 25 cents a month, and the corporation out of its general treasury contributed from \$2,000 to \$4,000 per month, to establish a hospital and employ physicians and surgeons for the care of its wounded and sick employés, without any charge to them or profit to the railway. On these facts it was held that the company was not liable for an injury to one of its employés from the malpractice of a surgeon doing service in the hospital. The court says, through Judge Sanborn: "The result is that the doctrine of *respondent superior* has no application to this case. The only contract the law implies here is the agreement

on the part of the company to use reasonable care to select and obtain skillful physicians and careful attendants, and, if the company performed that contract, it was responsible no further." In accord with these are the cases of *Laubheim v. De Koninglyke Nederlandsche Stoomboot Maatschappij*, 107 N. Y. 228; *O'Brien v. Cunard S. S. Co.* 154 Mass. 272, 18 L. R. A. 329; *Secord v. St. Paul, M. & M. R. Co.* 18 Fed. Rep. 221; *McDonald v. Massachusetts Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 529, and *Richardson v. Carbon Hill Coal Co.*, 6 Wash. 52, 20 L. R. A. 333.

We think the sanction of authority and of reason is with the ruling of the circuit judge on this point. Other objections have been disposed of orally.

The judgment is affirmed.

IOWA SUPREME COURT.

Isaac GATTON, Appt.,
v.
CHICAGO, ROCK ISLAND & PACIFIC
R. CO.

(.....Iowa.....)

1. There is no national common law.
2. Interstate commerce is not subject to common-law regulations as to discriminating charges of common carriers, in the absence of congressional action.
3. Overcharges by a common carrier on interstate shipments made prior to the taking effect of the interstate commerce act of congress cannot be recovered by the shipper by the application of common-law doctrines.

(May 23, 1895.)

APPEAL by plaintiff from a judgment of the District Court for Jasper County in favor of defendant in an action brought to recover back alleged overcharges of freight which had been paid by plaintiff to defendant. *Affirmed.*

The facts are stated in the opinion.

Mr. Alanson Clark, with *Messrs. C. C. Nourse and Rickel & Crocker*, for appellant.

Messrs. Robert Mather, H. S. Winslow, and E. E. Cook, for appellee:

The constitution itself provides that congress shall have the power (and this is construed to be an exclusive power) to regulate this kind of commerce, and that declaration supercedes any common law rule which might have existed on that subject.

Lyddy v. Long Island City, 104 N. Y. 218; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S.

465, 24 L. ed. 527; *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996; *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122, 4 L. ed. 529; *Brown v. Maryland*, 25 U. S. 13 Wheat. 419, 6 L. ed. 678.

There is no such thing as a common law of the United States.

Wheaton v. Peters, 33 U. S. 8 Pet. 591, 8 L. ed. 1055; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 563, 14 L. ed. 263; *Bucher v. Cheshire R. Co.* 125 U. S. 583, 31 L. ed. 799; *People v. Folsom*, 5 Cal. 374.

Since in some of the states the common law never existed, the conclusion that a common-law rule cannot apply to interstate shipments, without an express enactment by congress, becomes irresistible.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699 4 Inters. Com. Rep. 92; *Pitchburg R. Co. v. Gage*, 12 Gray, 393; *Bazendale v. Eastern Counties R. Co.* 4 C. B. N. S. 63; *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226; *Ex parte Benson*, 18 S. C. 38, 44 Am. Rep. 564; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731.

The existence of the power to regulate commerce in congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from states.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804; *Sherlock v. Al-ling*, 93 U. S. 99, 23 L. ed. 819; *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584; *Kendall v. United States*, 37 U. S. 12 Pet. 524, 9 L. ed. 1181; *The Scotland*, 105 U. S. 24, 26 L. ed. 1001; *Re Burrus*, 136 U. S. 586, 34 L. ed. 500.

In *Wabash, St. L. & P. R. Co. v. Illinois*,

NORM.—Recent conflict on the question presented in the above case, in federal decisions referred to in the opinion of the court, has emphasized the importance of the subject and awakened widespread interest therein notwithstanding the many expressions in older federal cases to the general effect that no federal common law exists. While the express decision of the Supreme Court of the United States is needed to settle the question, and there- 28 L. R. A.

fore the present decision by a state court may possibly be overruled, the interest in the question and the elaborate review of the subject to be found in the present case seem amply to justify its publication in this series of reports.

For the general subject of the adoption of the common law in the United States, see *note to McKennon v. Winn* (Okla.) 22 L. R. A. 501.

118 U. S. 557, 30 L. ed. 244, the court says: "We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law."

If the state of Iowa had enacted a statute forbidding discriminations of that character in shipments from Iowa to Illinois, it is beyond controversy that the statute would have been void under the doctrine of the *Wabash Case*. It must follow that any common-law rule which may have been adopted, in any way, in Iowa, either by direct legislative authority or by implication, is equally invalid to prevent such discrimination.

Carton v. Illinois Cent. R. Co. 59 Iowa, 148, 44 Am. Rep. 672; *State v. Chicago & N. W. R. Co.* 70 Iowa, 162; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308; *Swift v. Philadelphia & R. R. Co.* 4 Inters. Com. Rep. 633, 58 Fed. Rep. 668.

Seventeen cases have expressly held that there is no common law of the United States.

Wheaton v. Peters, 33 U. S. 8 Pet. 591, 8 L. ed. 1055; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 18 How. 563, 14 L. ed. 263; *Bucher v. Chesire R. Co.* 125 U. S. 583, 31 L. ed. 789; *People v. Folsom*, 5 Cal. 874; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804; *Parkersburg & O. R. Transp. Co. v. Parkersburg*, *Kendall v. United States*, *The Scotland*, and *Re Burrus*, *supra*; *Re Barry*, 42 Fed. Rep. 113; *United States v. Hudson*, 11 U. S. 7 Cranch. 32, 8 L. ed. 259; *United States v. Coolidge*, 14 U. S. 1 Wheat. 415, 4 L. ed. 124; *United States v. Worrall*, 2 U. S. 2 Dall. 384, 1 L. ed. 425; *Swift v. Philadelphia & R. R. Co.* *supra*; *Swift v. Philadelphia & R. R. Co.* 64 Fed. Rep. 59; *United States v. Railroad Bridge Co.* 6 McLean, 517; *Lorman v. Clarke*, 2 McLean, 572.

Kinne, J., delivered the opinion of the court.

1. The petition in this action is in 239 counts, all of which save in dates of shipments, cars and kinds of stock shipped, and place from which shipped, are alike. The allegations are that the defendant is a railway corporation organized under the laws of the states of Iowa and Illinois, and engaged in the business of a common carrier, owning and operating its lines of railroad in and through said states, and that it has for more than ten years last past so owned and operated said road. It is then averred that, on live stock shipped from various points in Iowa over the defendant's line of road to Chicago, the defendant charged plaintiff's assignors the regular tariff rate per car, and that during the same time other parties were also engaged in shipping live stock over the defendant's road from the same places to Chicago, Ill., to each of whom the defendant allowed and paid a rebate or drawback of \$17 on each and every car of live stock so shipped, thereby requiring plaintiff's assignors to pay \$17 per car more than the rate per 33 L. R. A.

car exacted of these other shippers; that said shipments so made by plaintiff's assignors were upon like conditions and similar circumstances as the shipments made by said other parties, and the services rendered by the defendant were the same in all of said cases; that the sums charged plaintiff's assignors were unreasonable and extortionate, and \$17 per car in excess of a fair and reasonable rate; that the rate charged was, under the circumstances, an unfair and unjust discrimination. Other necessary allegations are made. The plaintiff prayed for a judgment of \$10,000. The defendant denies most of the material allegations of the petition, pleads the statute of limitations, in an amendment, and, as a separate defense, defendant pleads that all of said shipments were interstate shipments, and pertained exclusively to commerce between the states; that when said shipments were made the congress of the United States had not enacted any statute regulating or pertaining to shipments of that character; that the power to regulate commerce among the several states is vested exclusively in congress, and at the time said shipments were made there was no statute, or any rule of common law, governing or applicable to said shipments, or forbidding any discrimination or preference in rates. To this amendment plaintiff demurred, in substance, because, in the absence of an act of congress, the common law was in force, and governed as to such shipments, and prevented unjust discrimination, or the charging of unreasonable rates; that the common-law inhibitions were not regulations of commerce; that the state law prohibiting unjust discrimination by a common carrier is not obnoxious to the Constitution of the United States; that such discrimination is contrary to public policy. This demurrer was overruled. The plaintiff excepted, and electing to stand upon his demurrer, and refusing to plead further, the court dismissed his petition, and rendered judgment against him for costs, to which he also excepted.

2. In this case we have had the benefit of exhaustive and able arguments, at the bar and in print, by eminent counsel. In addition to the printed argument filed by the appellant's counsel, we have been furnished with like arguments by C. C. Nourse and Messrs. Rickel & Crocker, who have cases pending involving the same question. We fully appreciate the importance of the question presented, and have devoted much time to its investigation, as well as to an examination of the large number of cases referred to by counsel. The question raised by the demurrer is whether overcharges by a common carrier on interstate shipments, made prior to the taking effect of the interstate commerce act, can be recovered by the shipper. On the one hand, it is insisted that prior to the enactment of that act the common law afforded a remedy in such cases; that the common-law rule forbidding common carriers from making unjust discrimination between shippers for like services rendered under the same circumstances was not violative of the provisions of the Constitution of the United States which invested con-

gress with the power to regulate commerce between the states. Appellee contends that as the right to regulate commerce between the several states was, by the constitution, vested exclusively in congress, and, as congress had enacted no law with reference thereto, there was afforded no relief in such cases; that there was no common law applicable to the United States, as a nation.

It is conceded that prior to the passage of the interstate commerce act there was no statute of the United States which affected the right of a carrier of interstate shipments to make discriminations in freight charges, or to give rebates to one shipper, and to withhold them from another shipper. We think it must also be held that, before congress legislated on this subject of interstate commerce, no state statute could affect charges or discriminations made by a carrier in respect to such shipments. Of this, however, we shall have more to say hereafter. Assuming, then, that the right of recovery, if any exists in this case, must be found outside of the statutes of the state, we inquire, Where is it provided for? In determining as to whether there is, or rather was, any common law applicable generally to the United States, as a nation, we may be aided by a consideration of some facts connected with the early history of our country.

It is clear that prior to the Revolutionary War the common law was in force in all of the colonies. Each colony, subject to certain restrictions and limitations, determined its own system of local or municipal law. Each adopted so much of the common law of England as it deemed suited to the wants and necessities of its people. "The colonists who established the English colonies in this country undoubtedly brought with them the common and statute laws of England, as they stood at the time of their emigration, so far as they were applicable to the situation and local circumstances of the colony." *United States v. Reid*, 58 U. S. 12 How. 363, 13 L. ed. 1024. "Our ancestors brought with them its general principles, and claimed it as their birthright, but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness v. Pacard*, 27 U. S. 2 Pet. 187-144, 7 L. ed. 374-377. As is said in *Re Barry*, 42 Fed. Rep. 114, in speaking of the common law, "it came to them, and was appropriated by them, and became an integral portion of the laws of the particular states, before the United States government had an existence." The Congress of 1774 unanimously resolved that the colonies "are entitled to the common law of England." Journal of Congress, Declaration of Rights of the Colonies; Act 14, 1774, pp. 27-81. Story says that the uniform doctrine ever since the settlement of the colonies, and the uniform principle which has been conformed to in practice, has been that the common law is our birthright and inheritance, "and that our ancestors brought hither with them, upon their emigration, all of it which was applicable to their situation." 1 Story, Const. § 167; 1 Kent, Com. 471, and notes. In *Pavolet v. Clark*, 13 U. S. 9 Cranch, 332, 3 L. ed. 749, it is said, "We take it to be a clear

principle that the common law in force at the emigration of our ancestors is deemed the birthright of the colonies, unless so far as it is inapplicable to their situation, or repugnant to their other rights and privileges." *United States v. Worrall*, 2 U. S. 2 Dall. 384, 1 L. ed. 425, Fed. Cas. No. 16,766. "There is no doubt that the common law is the basis of the laws of those states which were originally colonies of England, or carved out of such colonies. It was imported by the colonists, and established, so far as it was applicable to their institutions and circumstances." *Morris v. Harris*, 15 Cal. 227-252. In *Cooley, Const. Lim.* pp. 84-87, it is said: "From the first the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law, as then existing in England, was not suited to their conditions and circumstances in the new country, and these particulars they omitted as it was put in practice by them. They also claimed the benefit of such statutes as from time to time had been enacted in modification of this body of rules.

The evidence of the common law consisted in part of the declaratory statutes we have mentioned, in part of the commentaries of such men learned in the law as had been accepted as authority, but mainly in the decisions of the courts applying the laws to actual controversies. While colonization continued—that is to say, until the war of the Revolution actually commenced—these decisions were authority in the colonies, and the changes made in the common law up to the same period were operative in America also, if suited to the condition of things here. The opening of the war of the Revolution is the point of time at which the continuous stream of the common law became divided, and that portion which has been adopted in America flowed on by itself, no longer subject to changes from across the ocean, but liable still to be gradually modified through changes in the modes of thought and of business among the people, as well as through statutory enactments."

The common law, then, existed in this country prior to the Declaration of Independence, but it was not a national common law. It was the local law of each colony. They had not yet formed a new nation. Now, when, if at all, did this common law which had become the heritage of the colonists cease to be applicable to the colonies severally, or when did it take on its national character? Surely, not by the Act of Independence, which made the colonies "free and independent states." The mere fact of the emerging of the colonies from their colonial condition into that of independent states did not ingraft the common law, which had been severally adopted by the colonies, into a general system of national law. It is said that when they became independent they were governed by the common law of England, so far as they had tacitly adopted it as suited to their condition, by the statutes of England amendatory of the common law, and by the colonial statutes. Judge Cooley says that the common law of England, and the statutes amendatory of it, "constituted the American

common law, and by this, in great part, are rights adjudged and wrongs redressed in the American states to this day." Cooley, Const. Lim. p. 37. Here the learned author clearly recognizes that the common law he speaks of as being adopted in this country is the common law as adopted by the separate colonies, and not a common law of general national application. As is said in *Re Barry*, 43 Fed. Rep. 127: "Although the people brought with them, on their emigration to this country, the essential principles of the common law, and embodied them in their institutions, yet this was not done by them in a national capacity (at that time no such character or capacity was contemplated), but as distinct communities, independent of each other." The situation in this respect was not changed by the articles of confederation. As is well said by Prof. Fiske in his work on the Critical Period in American History (page 97): "The articles simply defined the relation of the states to the confederation, as they had already shaped themselves. Indeed, the articles, though not fully ratified till 1781, had been known to congress and to the people, ever since 1776, as their expected constitution, and political action had been shaped in general in accordance with the theory on which they had been drawn up." As yet we discover no reason for saying that there was any national common law prior to the adoption of the Constitution of the United States. The apparent necessity of taking from the states, and granting to the general government, the power to regulate commerce, was an early, if not the first, reason for calling a constitutional convention. Indeed, this power was vested in congress, only after a struggle in the convention, and by virtue of a concession made on the part of the New England states, whereby consent was given to an extension of the foreign slave trade for twenty years. Fiske, 263, 264. The Southern states feared that "the New Englanders would get all the carrying trade into their own hands, and then charge ruinous freights for carrying rice, indigo, and tobacco to the North and to Europe." Fiske, 263. It would seem that all such fears must have been groundless, if the principles of the common law as to carriers—that they should charge only reasonable rates for their services—should be adopted and established as a national system of jurisprudence, as appellant claims was in fact done. It is a historical fact that the ratification of the constitution had only been accomplished when the very question now before us—as to whether there is a common law of the United States—was the subject of serious consideration in the legislative assemblies, and of judicial inquiry in the courts. On January 11, 1800, the general assembly of the state of Virginia adopted an instruction to their representatives in the United States senate. That document reads: "The general assembly of Virginia would consider themselves unfaithful to the trust reposed in them, were they to remain silent whilst a doctrine has been publicly advanced, novel in its principle and tremendous in its consequences,—that the common law of Eng-

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land is in force under the government of the United States. It is not, at this time, proposed to expose at large the monstrous pretensions resulting from the adoption of the principle. It ought never, however, to be forgotten, and can never be too often repeated, that it opens a new tribunal for the trial of crimes, never contemplated by the federal compact. It opens a new code of sanguinary criminal law, both obsolete and unknown, and either wholly rejected, or essentially modified in almost all its parts, by state institutions. It arrests or supersedes state jurisdictions, and innovates upon state laws. It subjects the citizen to punishment according to the judiciary will, when he is left in ignorance of what this law enjoins as a duty, or prohibits as a crime. It assumes a range of jurisdiction for the federal courts which defies limitation or definition." They then instruct their senators "to oppose the passing of any law founded on or recognizing the principle lately advanced, that the common law of England is in force under the government of the United States; excepting from such opposition such particular parts of the common law as may have a sanction from the constitution, so far as they are necessarily comprehended in the technical phrases which express the provisions delegated to the government, and excepting also such other parts thereof as may be adopted by congress as necessary and proper for carrying into execution the powers expressly delegated." Duponceanu, Jur. p. 225. The Virginia instructions were no doubt caused by the consideration of this question in 1798 in the case of *United States v. Worrall*, 2 U. S. 2 Dall. 384, 1 L. ed. 425, Fed. Cas. No. 16,766. That was an indictment for an attempt to bribe a commissioner of the revenue of the United States. In that case the court says the question is "whether the courts of the United States can punish a man for any act before it is declared by a law of the United States to be criminal." It is there said: "It is attempted, however, to supply the silence of the constitution and statutes of the Union by resorting to the common law for a definition and punishment of the offense which has been committed. But in my opinion the United States, as a federal government, have no common law, and consequently no indictment can be maintained in these courts for offenses merely at the common law. If, indeed, the United States can be supposed, for a moment, to have a common law, it must, I presume, be that of England, and yet it is impossible to trace when or how the system was adopted or introduced. . . . He who shall travel through the different states will soon discover that the whole of the common law has been nowhere introduced,—some states have rejected what others have adopted,—and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another. But the common law of England is the law of each state, so far as each state has adopted it. . . . But the question recurs, When and how have the courts of the

United States acquired common-law jurisdiction in criminal cases? The United States must possess the common law themselves, before they can communicate it to their judicial agents. Now, the United States did not bring it with them from England, the constitution does not create it and no act of congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England, or modified as it exists in some of the states; and, of the various modifications, which are we to select?" In *United States v. Hudson*, 11 U. S. 7 Cranch, 32, 3 L. ed. 259, Justice Johnson, in discussing the question of the common-law jurisdictions of the federal courts, says: "Although this question is brought up now, for the first time, to be decided by this court, we consider it as having been long since settled in public opinion. In no other case for many years has the jurisdiction been asserted, and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative." *United States v. Coolidge*, 14 U. S., Wheat. 415, 4 L. ed. 124, Peter S. Duponceau, provost of the law academy of Philadelphia, was an early and eminent advocate of the theory that the common law was adopted as a federal system. In his work on Jurisdiction, he says: "I am well aware that this doctrine of the nationality of the common law will meet with many opponents. There is a spirit of hostility abroad against this system, which cannot escape the eye of the most superficial observer. It began in Virginia in the year 1799 or 1800, in consequence of an opposition to the alien and sedition acts. A committee of the legislative body made a report against those laws, which was accepted by the house, in which it was broadly laid down that the common law is not the law of the United States. Not long afterwards the flame caught in Pennsylvania, and it was for some time believed that the legislature would abolish the common law altogether. Violent pamphlets were published to instigate them to that measure. The whole, however, ended in a law for determining all suits by arbitration in the first instance, at the will of either party, and another prohibiting the reading and quoting in courts of justice of British authorities of a date posterior to the Revolution. . . . It was not long before this inimical disposition towards the common law made its way into the state of Ohio. In the year 1819 a learned and elaborate work was published in that state, in which it was endeavored to prove, not only that the common law was not the law of the United States, but that it had no authority in any of the states that had been formed out of the old Northwestern Territory. . . . In other states, attacks upon the common law, more or less direct, have appeared from time to time." Duponceau, Jur. pp. 102, 103. In his same work, and in support of his contention that the constitution adopted the common law of England as a national system of law, the author says: "But why need I go into such a wide argument to prove what I consider a self-evident principle? We live in the midst of

the common law; we inhale it at every breath, imbibe it at every pore, we meet it when we walk, and when we stay at home; it is interwoven with the very idiom that we speak; and we cannot learn another system of laws without learning at the same time another language. We cannot think of right or wrong, but through the medium of ideas that we have derived from the common law." This may all be true, as applied to the existence of the common law as the local law of the states; but, in and of itself, it does not tend to establish the claim that we have a common law of the United States, national in its character and application. The doctrine that by the adoption of the constitution the people had accepted and established the heretofore existing common law as a rule of national action, and of general application, was not only, in the early history of our nation, originally combated, but was denied by the courts in the cases in which it was then discussed as we have attempted to show. We have treated at some length of the historical phase of this question, as, to our minds, the subsequent discussion of the question will thereby be the better understood.

3. From the foregoing discussion it is clear that any rule of the common law affecting interstate shipments, to be effectual as to such shipments, must have had the legislative sanction of the congress of the United States, or, in the absence thereof, the rules of the common law must have become a part of the system of laws of the national government, the same as they became a part of the legal system of many of the states of the Union. The Constitution of the United States provides "that judicial power shall extend to all cases in law and equity, arising under this constitution; the laws of the United States, and treaties made, or which shall be made, under their authority: . . . to all cases of admiralty and maritime jurisdiction." Article 3, § 2. It is contended that the above provision is a clear recognition of the existence of the several systems of law, equity, and admiralty, and that by this constitutional provision the systems are not created, but their existence is simply recognized, and the extent of federal jurisdiction in regard thereto fixed. Now, it is to be observed that, as to admiralty and maritime jurisdiction, the language used is without restriction or limitation. It is, "the federal power shall extend . . . to all cases of admiralty and maritime jurisdiction." It is not provided that the judicial power shall extend to all cases of law and equity jurisdiction, without limitation. But the provision is that it "shall extend to all cases in law or equity, arising under this constitution, the laws of the United States," etc. So it will be seen that, as to admiralty, jurisdiction extends "to all cases of admiralty and maritime jurisdiction," while, as to law and equity, the judicial power is extended to all cases which arise under the constitution, the laws of the United States, and treaties. In the latter case there is a fixed limitation as to the extent of judicial power. The particular cases to which such power is extended are expressly pointed out. If the

provision was that the judicial power should extend to all cases of law and equity jurisdiction, or its equivalent, the meaning would obviously be different. So, then, the jurisdiction thus conferred by the constitution as to cases in "law and equity" is limited by what follows as to cases arising under the constitution, etc. In other words, it seems to us that to give the words "in law and equity," as used in the constitution, the meaning contended for, is to ignore the meaning and effect of the qualifying words which follow them. Reading the entire sentence, it is reasonably clear that the words "in law and equity" are not used to describe a system or systems of jurisprudence then or heretofore in existence. The jurisdiction is as to cases in law or equity "arising under" the constitution, laws, and treaties. We are then to look to the constitution, the laws of the United States, and to its treaties, to determine what rights are given. The rights conferred by this provision do not arise by reason of a constitutional recognition of the common-law system, but are conferred, as to cases at law or in equity, by the constitution itself, the laws of the United States, or by its treaties. If not embraced within these, they cannot be said to be given. Now, a supposed right is sought to be enforced at law or in equity, but such right, if it exists at all, must arise—that is, exist or be given—by the Constitution or laws of the United States, or its treaties. The constitution and laws of the United States fix, establish, and give certain rights. In the attempt to assert or defend such rights, "cases" arise. In some of them the remedy applicable would be furnished by an application of the rules of the common law; in others, by principles of equity. So there are cases "at law or in equity," so far as the proper method of procedure or remedy is concerned; but as to the rights given, upon which such cases are based, they are to be found by a resort to the Constitution, laws of the United States, and its treaties. Jurisdiction, then, is not conferred by any express or implied recognition or adoption of the common law; but when it attaches under the Constitution, laws, or treaties of the United States, the remedies afforded for the enforcement of the rights thus granted are to be in accordance with the course of the common law. In brief, the position we take is that the provision of the Constitution of the United States under consideration is to be interpreted as providing that rights are conferred by the Constitution, laws of the United States, and its treaties, while the remedies for the securing of these rights are to be as at common law, or according to the principles of equity, as the case may be. It is said in *Robinson v. Campbell*, 16 U. S. 8 Wheat. 223, 4 L. ed. 375: "By the laws of the United States, the circuit courts have cognizance of all suits of a civil nature, at common law and in equity; in cases which fall within the limits prescribed by these laws. . . . The court therefore thinks that, to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be at common law, or in equity,—not according to the practice of

state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." In *Irvine v. Marshall*, 61 U. S. 20 How. 564, 15 L. ed. 998, it is said: "With regard to the fourth objection,—want of jurisdiction in the courts of the United States, in the absence of express statutory provisions, to recognize and enforce a resulting trust,—. . . It is a sufficient response to say that the jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily implied, by and under the Constitution and laws of the United States. Those courts are created courts of common law and equity, and under whichever of these classes of jurisprudence such rights or duties may fall, or be appropriately ranged, they are to be taken cognizance of and adjudicated according to the settled and known principles of that division to which they belong. By the language of the constitution, it is expressly declared that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority. By the statute which organized the judiciary of the United States, it is provided that the circuit courts shall have jurisdiction of suits of a civil nature at common law or in equity. In the interpretations of these clauses of the constitution and the statute, this court has repeatedly ruled that by 'cases at common law' are to be understood suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized, and equitable remedies administered. . . . Can those courts, consistently with their duty, refuse to exert those powers and that jurisdiction for the protection of rights arising under the constitution and laws, in the acceptance in which both have been interpreted and sanctioned?" These cases, we think, support our conclusion that rights are to be given by the Constitution, the laws of the United States, or its treaties, but remedies for such rights are to be pursued in accordance with the course of the common law. If we are right in this view, it follows that the Constitution does not confer upon the courts of the United States full common-law jurisdiction, in a national sense, as claimed by appellant.

4. Section 8 of article I of the Federal Constitution provides that "the congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In this section it is further provided that congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." It may be that, even though the common law was a part of our national system of laws, and that under it a right was given to recover in a case like that at bar, still such right would be taken away by the provision of the constitution above quoted, in view of the fact that the power therein conferred has been held to be exclusive in congress. It

has often been held that the power thus conferred was exclusive; that it had the effect to prohibit legislation thereon, so far as it pertained to interstate commerce, and to a regulation thereof. "Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to congress, in the same words in which it is given over the other, and in both cases it is necessarily exclusive." *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465-469, 24 L. ed. 527-529. "Whatever subjects of this power are, in their nature, national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as requires exclusive legislation by congress." *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996. "Whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act upon it." *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 123, 4 L. ed. 529; *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678. In *Smith v. Alabama*, 124 U. S. 465-473, 31 L. ed. 508-510, 1 Inters. Com. Rep. 804, it is said: "As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases the existence of the power to regulate commerce in congress has been construed to be not only paramount, but exclusive, so as to withdraw the subject, as the basis of legislation, altogether from states." *Hall v. De Cuir*, 95 U. S. 485-507, 24 L. ed. 547-554. So it was held in *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 847, and *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, that the inaction of congress with reference to legislation touching interstate commerce is equivalent to a declaration that such commerce shall be free and untrammelled. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Mobile County v. Kimball*, 102 U. S. 697, 26 L. ed. 240; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 498, 30 L. ed. 696; *Leisy v. Hardin*, 185 U. S. 109, 34 L. ed. 182, 3 Inters. Com. Rep. 86; The Federal Power over Commerce, by William Draper Lewis (pages 122, 123); *Carlton v. Illinois Cent. R. Co.* 59 Iowa, 151, 44 Am. Rep. 672. From the foregoing discussion it will be observed that, as to the regulation of interstate commerce, the power of congress is exclusive, and it is none the less so though congress may not have legislated with respect thereto. In either event the states have no power to regulate such commerce.

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5. No right of recovery, then, in this case, is or can be given by virtue of the statutes of the states, it being a matter exclusively within the jurisdiction of congress. No statute of the United States creates a right in such a case. If, then, there exists any right of recovery, it must be by virtue of the existence of the common law as a recognized part of our national system of jurisprudence. We have said that the Constitution of the United States did not, of itself, recognize the existence of the common law as a system of jurisprudence of national application. Even if it should be conceded that efficacy could be given to such a system, and make it of national application, in the absence of constitutional or statutory recognition, by means of judicial decisions of the United States Supreme Court,—a point not necessary for us to decide,—do the decisions of that court go to that extent? That court has never determined the precise question involved in this action, but it has passed upon questions of interstate commerce, and its attempted regulation by the states. In *United States v. Worrall*, 2 U. S. 2 Dall. 384, 1 L. ed. 425, Fed. Cas. No. 16,766, a case where one was tried under an indictment for attempting to bribe a commissioner of the revenue of the United States,—it was held that the defendant could not be punished, inasmuch, as there was no federal law declaring the act done to be a crime. It is therein said: "It is attempted, however, to supply the silence of the constitution and statutes of the Union by resorting to the common law for a definition and punishment of the offense which has been committed. But in my opinion the United States, as a federal government, have no common law. . . . If, indeed, the United States can be supposed, for a moment, to have a common law, it must, I presume, be that of England, and yet it is impossible to trace when or how the system was adopted or introduced. . . . But the question recurs, When and how have the courts of the United States acquired a common-law jurisdiction in criminal cases? The United States must possess the common law themselves, before they can communicate it to their judicial agents. Now, the United States did not bring it with them from England, the constitution does not create it, and no act of congress has assumed it. . . . Upon the whole it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common-law authority relating to crimes and punishments has not been conferred upon the government of the United States, which is a government of limited jurisdiction; but judges cannot remedy political imperfections, nor supply any legislative omissions." The same question was decided in the same way by the United States Supreme Court. *United States v. Hudson*, 11 U. S. 7 Cranch, 82, 3 L. ed. 259. In *United States v. Railroad Bridge Co.*, 6 McLean, 517, Fed. Cas. No. 16,114, referring to this common-law question, it is said: "The instrumentality of the judiciary can be invoked only by the government to give effect to its laws, civil or criminal, but the judicial

power cannot precede that of legislation. The rule of action on all questions of policy within the federal power must be prescribed by congress. There is no federal common law, which pervades the Union, and constitutes a rule of judicial action. But in all the states the common law is in force, in a greater or less degree. Its existence and extent are shown by the statutes of the states, respectively, and the usages of the courts. But there is no common law in regard to regulations of navigation. These must be adapted to the peculiar circumstances of a country, and the facilities which exist for traffic. In this respect the legislation of congress is the only remedy known to the constitution." Again it is said, "There is no unwritten or common law of the Union. *Lorman v. Clarke*, 2 McLean, 568-572, Fed. Cas. No. 8,516. It is held in *Wheaton v. Peters*, 38 U. S. 591, 657, 658, 8 L. ed. 1055, 1079: "It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common-law right is asserted, we must look to the state in which the controversy originated." In *Bucher v. Cheshire R. Co.*, 125 U. S. 583, 31 L. ed. 799, it is said, "There is no common law of the United States, yet the main body of the rights of the people of this country rest upon, and are governed by, principles derived from the common law of England, and established as the laws of the different states." In *Smith v. Alabama*, 124 U. S. 465-475, 31 L. ed. 508-511, 1 Inters. Com. Rep. 804;—a case relating to the licensing of locomotive engineers by a state,—in speaking of the common law as it prevails in the several states, it is said: "It does not emanate from the authority of the national government, nor flow from the exercise of any legislative powers conferred upon congress by the Constitution of the United States, nor can it be implied as existing by force or any other legislative authority than that of the several states in which it is enforced. . . . But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or, if the local law is held not to apply when the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by congress, or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carrier to the public, or to individuals. In other words, if the laws of the particular state do not govern that relation, and prescribe the rights and duties which it implies, then there is, and can be, no law that does, until congress expressly supplies it, or is held by implication to have supplied it, in cases

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within its jurisdiction over foreign and interstate commerce. The failure of congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which, until displaced, covers the subject. . . . There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England, as adopted by the several states, each for itself, applied as its local law, and subject to such alterations as may be provided by its own statutes." Again, in *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691, 700, 27 L. ed. 584, 587, it is said: "Be this, however, as it may, it is an undoubted rule of universal application that wharfage for the use of all public wharves must be reasonable; but then the question arises, by what law is this rule established and by what law can it be enforced? By what law is it to be decided whether charges are or are not extortionate? There can be but one answer to these questions. Clearly, it must be by the local municipal law, at least until some superior or permanent law has been prescribed. At Parkersburg, it is the law of West Virginia. The rule referred to is a rule of the common law, undoubtedly, but it has force in West Virginia because the common law is the law of that state, and not because it is the law of the United States. The courts of the United States do not enforce the common law, in municipal matters in the states, because it is the federal law, but because it is the law of the state." In *Kendall v. United States*, 37 U. S. 12 Pet. 524-621, 9 L. ed. 1181, 1219, the court says: "The common law has not been adopted by the United States as a system in the states generally, as has been done with respect to this district," (Columbia.) Again, in the case of *The Scotland*, 105 U. S. 24-32, 26 L. ed. 1001-1004, it is said, "As for the civil and common laws, they are only municipal laws, where they have the force of laws at all." In *Re Barry*,—a case decided in the United States circuit court of the southern district of New York, which is approved by the Supreme Court of the United States in the case of *Re Burrus*, 136 U. S. 586, 34 L. ed. 500, and which is found reported in 136 U. S. 597, 34 L. ed. 514, and also in 42 Fed. Rep. 113,—it was held that the United States circuit court could not exercise the common-law function of *parens patriæ*, and therefore had no jurisdiction over the matter, there being no statute conferring jurisdiction. In the course of that opinion, it is said (136 U. S. 605, 34 L. ed. 506, 42 Fed. Rep. 113): "Though the point has been labored with ability by a late jurist of eminence in this department of legal learning, to deduce from the circumstances attendant upon the establishment of this government that the common law became embodied in it, as an efficient principle of its authority and action (Duponcau, Jur. 85-90), yet the doctrine has never been declared or sanctioned by our courts. So far as the decisions have gone, they tend to repudiate the principle *in toto*. *United States v. Hudson*, 11

U. S. 7 Cranch, 32, 8 L. ed. 259; *United States v. Coolidge*, 14 U. S. 1 Wheat. 415, 4 L. ed. 124." On page 617, 186 U. S., 510 of 34 L. ed., and page 118, 49 Fed. Rep. it is said: "Nor has the common law been adopted by the United States as a system applicable to the states generally, and to be administered as such in the national courts. *Kendall v. United States*, 37 U. S. 12 Pet. 624, 9 L. ed. 1220. This has been done specifically, by act of congress, in relation to the District of Columbia. Id. 621, 9 L. ed. 1219. But in respect to the states the common law is regarded in force only as adopted or modified by the constitution, statutes, or usages of the states, respectively. It came to them, and was appropriated by them, and became an integral portion of the laws of the particular states, before the United States government had an existence." The case of *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 80 L. ed. 244, was where a statute of Illinois provided that if any railroad company shall, within that state, charge or receive for transporting passengers or freight of the same class the same or a greater sum for any distance than it does for a longer distance, it shall be liable to a penalty for unjust discrimination. The railway company made such a discrimination in regard to goods transported over the same road or roads from Peoria, in Illinois, and from Gilman, in Illinois, to New York, charging more for the same class of goods carried from Gilman than from Peoria; the former being 86 miles nearer to New York than the latter, this difference being in the length of the line within the state of Illinois. The court held that the statute must be construed to include a transportation of goods, under one contract and one voyage, from the interior of the state of Illinois to New York; that such statute was void, as an interference with interstate commerce. That case quotes approvingly from *Mobile County v. Kimball*, 102 U. S. 691-702, 26 L. ed. 238-241, where it is said, "For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system." Continuing, in the *Wabash Case*, the court says, "And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the congress of the United States under the commerce clause of the constitution." In the recent case of *Swift v. Philadelphia & R. R. Co.*, 58 Fed. Rep. 858, 4 Inters. Com. Rep. 638, and 64 Fed. Rep. 59, it was held by the circuit court of the United States for the northern district of Illinois that there was no federal common law.

Whenever this question of the existence of a federal common law, as contradistinguished from the common law adopted by the several states, has arisen in the state courts, it has been decided that no such law exists. In *People v. Folsom*, 5 Cal. 379, it

is said: "Now, there is no common law of the United States, as contradistinguished from the individual states, and the courts of the United States, instead of administering the common law, or any particular system, conform to the laws of the states where they are situated; so that the acquisition of California did not extend over the common law." In *Norris v. Harris*, 15 Cal. 227-252, the same doctrine is reaffirmed. And so in *Garner v. Wright*, 52 Ark. 885, 888, 6 L. R. A. 715, it is held that no presumption obtains as to the existence of the common law in states like Louisiana and Texas, whose jurisprudence is not based upon the common-law system. Judge Cooley, in his able work on Constitutional Limitations, says the United States courts have no "common-law jurisdiction." Cooley, Const. Lim. p. 526. In an article in the Forum of April, 1894, entitled, "Has the interstate commerce law been beneficial?" written by Adlace F. Walker, formerly a member of the interstate commerce commission, and an eminent lawyer, we find the following: "Yet, under our combined state and federal system of government, there was no way in which they could be judicially applied to commerce crossing state boundaries until the passage of the interstate commerce law."

We now proceed to a consideration of authorities claimed by appellant to support the contrary view.

It is said that in *Oss v. United States*, 81 U. S. 6 Pet. 172-208, 8 L. ed. 859-870, it is held that the "liability of the parties must be governed by the rules of the common law." And, to the same effect, we are cited to *Duncan v. United States*, 82 U. S. 7 Pet. 435, 8 L. ed. 739. Neither of these cases, to our minds, affords the slightest reason for holding that we have a national common law. The first case was an action upon a bond executed to the United States by a navy agent and his sureties, in the state of Louisiana, conditioned that the agent would faithfully account for public moneys which came into his hands. Suit was brought by the government, in the state of Louisiana, for a breach of the bond, in the United States district court. Under the Louisiana law the United States would have been entitled to take judgment against each surety only, for his proportion of the bond, and the trial court applied that rule. The Supreme Court of the United States held that liability was to be determined by the place of performance of the contract, and applied the common-law rule, because, by act of congress, the common law was in force in the District of Columbia,—the place of performance of the contract. The other case was decided on the same principle. *Swift v. Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865, was a case touching negotiable paper, and the court said: "But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or an-

cient local usage, but they deduce the doctrine from the general principles of the commercial law." Now, there was nothing in this case indicating that the court decided this case on the theory that there was a national common law. On the contrary, the New York court had based its decision on the general principles of commercial law. What commercial law? Why, manifestly, as interpreted by the courts of that state, as applicable in that jurisdiction. The federal court held it was not bound by such interpretation of the state court. To the same effect are the cases of *Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 580, and *Brooklyn City & N. R. Co. v. National Bank of New York*, 102 U. S. 14, 26 L. ed. 61. *Penn. v. Holme*, 62 U. S. 21 How. 481, 16 L. ed. 198, relates to the forum—law or equity—of the trial, and not to the ascertainment of rights as given at common law. *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, involved no question of interstate commerce. Lockwood, who was injured, was being transported upon a free pass from Buffalo to Albany, both places being within the same state. It was held that the question of the power of the carrier to exempt itself by contract from liability placed upon it at common law was to be decided by the federal court upon the grounds of public policy. And it was expressly said in a later case that the law applied in *Lockwood's Case* was the law of the state of New York. *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804. In *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449, the main question was whether the proceeding to condemn property by the general government was a suit at common law. The opinion is to the effect that power was conferred by acts of congress to condemn, but no machinery or method by which condemnation should be made had been enacted. The question was whether, in the absence of express legislation, the government had power, by proceeding at common law, to perfect condemnation. By a reading of the opinion, it will be observed that the existence of the power or right to condemn was given or existed outside of the common law, and the discussion turned upon the question as to whether the exercise of the right should or should not be according to the course of the common law,—a question as to the means of exercising the right, and not as to determining the existence of it. It was a question, in other words, pertaining to the remedy, not the right. The case of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 28 L. ed. 291, does not necessarily involve the question of interstate commerce. The court says that the constitution of Colorado, prohibiting no discrimination "within the state," imposes no greater obligation upon the company than the common law would have done. At most the holding in this case seems to be to the effect that, so far as transportation wholly within the state was concerned, in the absence of legislative regulation, the railway company would own such duties to the public as the common law,

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or some custom having the force of law, had established for its government. We discover no grounds for claiming that the common law referred to in the opinion was any other than that of the state of Colorado. In *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, it is said: "But, passing beyond the matter of authorities, the question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property; but it rests upon those considerations of right and justice which have been gathered into the great body of rules and principles known as the 'common law.' There is no question as to the power of the state to legislate, and change the rules of the common law, in this respect, as in others, but in the absence of such legislation the question is one determinable only by the general principles of that law." Now, if this common law referred to in the foregoing opinion is susceptible of being abrogated by the legislature of the state, as is held, then, clearly, the writer did not refer to a national common law at all. If the language used refers to a national common law, it is a holding that a state legislature might abrogate and render ineffective such laws, and if such a doctrine were followed to its logical result, and applied to the case at bar, it would amount to saying that although there was a national common law, as a system of jurisprudence, of the general government, by means of which a right was given plaintiff for redress in this case, still the state, at its election, could step in and deprive the suitor of such right, though we apprehend that, if such right was so given by virtue of a national system of jurisprudence adopting the common law for the general government, the state could no more interfere with it, if it pertained to a matter over which the general government had exclusive jurisdiction, as to interstate commerce, then it could successfully set aside the express will of congress, as evidenced by the existing interstate commerce act. It is quite clear that the words "common law," used in the opinion, refer to the common law as enacted, adopted, or recognized by the individual states. In *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, it is said: "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction, which, therefore, is gradually formed by the judgments of this court, is the application of the constitution, and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority." In the same case it is said: "A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a par-

ticular state. . . . This is illustrated by the case of *New York Cent. R. Co. v. Lookwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, where the common law prevailing in the state of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law, as applied, was none the less the law of that state." Now, the common law above spoken of, which rests upon national authority, is not that which existed at the time of the adoption of the constitution; nor can it be, in the light of the language used by the court, a common law which is vitalized into life by the statutes or decisions of the several states. There is, however, nothing in the language used justifying the contention that such a common law as the learned justice speaks of could interfere with the constitutional power of congress to regulate interstate commerce. Reference is also made to the case of *Chicago & N. W. R. Co. v. Osborne*, 10 U. S. App. 430, 8 C. C. A. 347, 52 Fed. Rep. 912, 4 Inters. Com. Rep. 257. In speaking of the condition of affairs prior to the enactment of the interstate act, the court said: "It was the first effort of the general government to regulate the great transportation business of the country. That business, though of a quasi public nature, and therefore subject to governmental regulation, had, as a matter of fact, been carried on by private capital, through corporations. The fact that it was of a quasi public nature always prevented the owners of capital invested in it from charging, like owners of other property, any price they saw fit for its use. A reasonable compensation was all that they could exact, and he who felt aggrieved by any charge could invoke the aid of the courts to protect himself against it." Whatever construction may be placed upon this language is a matter of no moment, as the case itself did not involve any question of interstate transportation prior to the taking effect of the interstate commerce act. It is, therefore, not authority for plaintiff's contention. We do not see that the case of *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, sustains appellants' contention. That was a case where in it was held that the equity jurisdiction of the federal courts is uniform throughout the country, and that such jurisdiction is not to be determined by any state rule or law statute, civil or common law. *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346, simply decides that as to the court of claims, in the absence of other provisions by congress, the rules of evidence as found in the common law should govern the action of the court. No interstate question was involved. No question of whether there was a national common law which conferred a right was in the case. To the same effect is *United States v. Clark*, 96 U. S. 87, 24 L. ed. 696. It must be conceded that there have been many cases in which the United States Supreme Court has determined contracts to be against public policy. *Oscanyan v. Winchester Repeating Arms Co.* 108 U. S. 261, 26 L. ed. 539; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 23 L. R. A.

16 How. 314, 14 L. ed. 953; *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 868; *Trist v. Child*, 88 U. S. 21 Wall. 441, 22 L. ed. 628; *Hanauer v. Doane*, 79 U. S. 12 Wall. 842, 20 L. ed. 489; *Thomas v. Richmond*, 79 U. S. 12 Wall. 849, 20 L. ed. 453; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 643, 32 L. ed. 819.

We cannot take up and consider every case cited, but it may be profitable to speak of some other cases relied upon by appellants. Counsel rely upon the following language found in *Butcher v. Cheshire R. Co.*, 125 U. S. 580, 31 L. ed. 797: "There is no common law of the United States, and yet the main body of the rights of the people of this country rest upon, and are governed by, principles derived from the common law of England, and established as the laws of the different states." Here is a clear recognition of the fact that the only common law in this country is that established or recognized by the several states. Further on in the same case it is said: "When, therefore, in an ordinary trial in an action at law, we speak of the common law, we refer to the law of the state as it has been adopted by statute, or recognized by the courts, as the foundation of legal rights." We are referred to the case of *Cook v. Chicago, R. I. & P. R. Co.* 81 Iowa, 557, 9 L. R. A. 764, 8 Inters. Com. Rep. 353. That was a case, in its facts, like the one at bar, except the question made by the demurrer in this case was not raised in that case. We cannot, therefore, treat that case as determining the question of the existence of a national common law. The case was based upon a common-law liability, it is true, but its applicability to an interstate shipment as a rule of national law was not involved. A multitude of cases from state courts might be cited touching the common-law rule applicable to common carriers. As, however, they do not involve a consideration of the question of such liability as applied to interstate shipments, they shed no light upon the question under consideration, and we do not discuss them. Counsel claims that the case of *Fuller v. Chicago & N. W. R. Co.*, 31 Iowa, 208, 209, is decisive of the question presented. That case was affirmed by the United States Supreme Court in [*Chicago & N. W. R. Co. v. Fuller*], 84 U. S. 17 Wall. 560, 21 L. ed. 710. That case involved the question as to the validity of a statute of this state which required railroad companies to fix rates, and post copies thereof at stations and depots. In the course of its opinion the federal court said: "In all other respects, there is no interference. No other constraint is imposed. Except in these particulars, the company may exercise all its faculties as it shall deem proper. No discrimination is made between local and interstate freights, and no attempt is made to control the rates that may be charged. If the requirements of the statute had in question were, as contended by the counsel for the plaintiff in error, regulations of commerce, the question would arise whether, regarded in the light of the authorities referred to, and of reason and principle, they are not regulations of such a character as to be valid until

superseded by the permanent action of congress." If the above stood as the judgment of that court, without modification, there might be reason for claiming that a state statute regulating rates might be effective in the absence of national legislation as to interstate shipments. But that question seems to be finally set at rest, against appellant's contention, in the case of *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 80 L. ed. 244, and other cases referred to. Now, the case of *Hart v. Chicago & N. W. R. Co.*, 69 Iowa, 490, was one where it was contended that the provision of our statute providing that no rule or regulation contained in any contract or receipt of a common carrier should exempt such carrier from any liability which would otherwise exist, was invalid as a regulation of commerce. It was held that the law was not open to that objection. That decision was based upon the so-called "*Granger Cases*," and others therein cited. These cases are reviewed in the opinion in the *Wabash Railway Case*, *supra*, and it was there held that "it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law." It is not to be denied that there are expressions to be found in some of the opinions of the Supreme Court of the United States which apparently justify appellant's contention. Thus, it has been said in some cases that the question of "what constitutes a question of carriage is not a question of local law, upon which the decisions of a state court must control. It is a matter of general law, upon which this court will exercise its own judgment." *Myrick v. Michigan Cent. R. Co.* 107 U. S. 109, 27 L. ed. 327; *Robbins v. Chicago*, 67 U. S. 2 Black, 418, 17 L. ed. 398; *Brooklyn City & N. R. Co. v. National Bank of New York*, 102 U. S. 14, 26 L. ed. 61; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612. We incline to the opinion that in nearly all of the cases relied upon the common law which is referred to in the decisions of the United States courts is that common law adopted by the several states, and that the federal courts in determining questions of a general character, of national importance, will not feel bound to follow the construction of the common law which may have been adopted by the courts of the several states, but will give it their own construction. In such cases, however, they are not administering a national common law, but only that adopted or recognized by the several states. In this view it may well be said that "the courts of the United States administer the common law in many cases." *Cooley*, Const. Lim. p. 80. So they do, but it is the common law as existing in the several states. And, in the same view, it is true that "legislative and constitutional provisions are common in the United States, prohibiting discriminations, but are usually regarded as simply declaratory of the common law." *Southern Exp. Co. v. St. Louis, I. M. & S. R. Co.* 3 Am. & Eng. R. R. Cas. 26 L. R. A.

608, *note*, 10 Fed. Rep. 869. It is insisted by appellant that the interstate commerce act itself is a recognition by congress of the fact that prior to its enactment there existed common-law rights and liabilities pertaining to interstate commerce, and that by the provisions of said act these rights are saved to suitors. The section relied upon is section 22 of the Act, and it reads as follows: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition thereto." By its express terms, this provision relates to remedies. It is not even intimated that there exist rights conferred by a national common law. Again, the provision is made applicable to statutes as well as remedies at common law. No distinction is made between them, as to their force and effect when either may be applied to interstate commerce. Now, this provision of that statute, that it shall not abridge or alter remedies existing by statute, must refer to such statutes as do not attempt to regulate interstate commerce in violation of the constitutional provision; and, in like manner, the provision that it shall not alter or abridge remedies existing by common law applies only to such common-law rules as do not interfere with such commerce; or the provision may refer to state statutes, or common law adopted by the several states, regulating commerce only within the state.

Counsel contend that the common law of the several states is "one entire body or system of law, and its rules and principles are the same," no matter in what state they may be administered. If it be true that the rules and principles of the common law are the same in all of the states,—a proposition which we think is hardly true,—still it is certain that the same common law is differently construed in different state jurisdictions. Thus, in one state it may be held that the common law did not permit discriminations, and, in another, that it did. Hence it is that we find the federal courts, in certain cases, some of which we have cited, holding that in determining what the common law, as enacted, adopted, or recognized by the state, is, they will not be bound by the interpretation given thereto by the state courts. Again, it is undeniable that in any state in which the common law may be in force the legislature may alter it, or set it aside. So, if appellant's contention is correct, and the common law applicable to each state should control, as to regulating charges for interstate commerce, we might have one common-law rule affecting such shipments in Iowa, and a different rule in Illinois, or the same rule differently interpreted. The result would be that an act of the carrier of an interstate shipment through Iowa and Illinois might be legal in one state, and illegal in the other. It is manifest that such a state of affairs cannot exist. So, too, in this connection, it may be said that inasmuch as the constitutional right conferred upon congress to regulate interstate commerce is exclusive,—and, as we have shown, it is held that, in the absence of legislation by con-

gress upon the subject, it was manifest that congress intended to leave such commerce free and unfettered by any positive regulations,—such intention would be contravened as much by any common-law rules operating as regulations of such commerce as by an express statute of the state having a like effect. In other words, the power to regulate interstate commerce has, by the Federal Constitution, been withdrawn, as a subject of legislation, from the several states, and the constitutional provision seems to us to be equally effective as against such regulations based upon any common-law rule in force in a state. This view, we think, is clearly supported by the cases heretofore cited.

Reliance is placed upon article 7 of Amendments to the Federal Constitution, which provides that: "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." That article relates only to the federal courts. It establishes the right, so far as the method of trial is concerned, and, in defining such right, speaks of suits at common law as distinguished from those in equity. That, it seems to us, is its only effect.

It is said, if, prior to the passage of the interstate commerce act, the rules of the common law did not govern as to interstate shipments, there was in fact no law affording redress in such a case as this, and that it is not to be supposed that such is the case. It is to be remarked that until recent years the idea prevailed that rights such as are claimed in the case at bar might be given by the statutes of the several states until such time as congress should chose to act. That that idea was incorrect is fully shown in the case of *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 80 L. ed. 244, heretofore referred to. Within a few months after this decision was made, congress passed the interstate commerce act. It may be conceded that the view we adopt would work a hard-

ship as to cases which arose before the passage of the interstate commerce act; but, be that as it may, the want of a proper law giving a right of recovery in cases like this cannot affect the proper construction of the provisions of the Federal Constitution.

We have read with care the opinion in the case of *Swift v. Philadelphia & R. R. Co.*, 58 Fed. Rep. 858, 4 Intern. Com. Rep. 638, and in 64 Fed. Rep. 59, decided by the United States circuit court for the northern district of Illinois, wherein the precise question involved in this case is decided, and it is held that there is no national common law; also the opinion in the case of *Murray v. Chicago & N. W. R. Co.*, 62 Fed. Rep. 24, decided by the circuit court of the United States in the northern district of Iowa, wherein a contrary conclusion is reached. The federal supreme court, which must finally settle this conflict in opinion, has, as yet, not passed upon the question involved in this case. It has, however, as we think we have shown, repeatedly declared that there was no common law of the United States. We think the language used in the opinions of that court is absolutely inconsistent with the theory contended for,—that the United States, as a nation, has recognized the existence of a national common law applicable to a case like that at bar.

There are other reasons which impress us with the correctness of the result reached by the lower court, but we must forego a discussion of them. Our conclusion is that there is no national common law; that the state cannot regulate interstate commerce, in the absence of congressional action, either by express statutory enactment, or through the medium of the common law which may be recognized as in force in such state; that the right claimed in this case would amount to a regulation of commerce between the states, as defined by the Federal Supreme Court, and hence is in contravention of the Federal Constitution. The demurrer was properly overruled.

Affirmed.

ILLINOIS SUPREME COURT.

William S. POPE, *Appt.*,

v.

Joseph HANKE.

(155 Ill. 617.)

1. The intention of the parties to a purchase of grain for future delivery, in

NOTE.—The limitation of the principle of comity by refusal to recognize a contract which is against the public policy of the forum although it may be valid under the law of the place in which the contract was made has an unusually good illustration in the above case. For illustrations of the same rule in insurance cases, see *Rose v. Kimberly & C. Co. (Wis.)* 27 L. R. A. 556, and *Seamans v. Temple Co. (Mich.)*, *ante*, 430.

For the general subject of notes given for gambling consideration, see *Snoddy v. American Nat. Bank (Tenn.)* 7 L. R. A. 706, and *note*.

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See also 39 L. R. A. 835.

respect to the delivery, where there is a claim that the intent was to make an option contract to be settled by payment of differences, is a question for determination by the jury on a consideration of the evidence.

2. A broker who is privy to the unlawful design of the parties to an option contract, and brings them together for the purpose of making it, cannot recover for any services or losses incurred in the transaction.

3. A negotiable note given for differences on a settlement of an illegal option contract which the statute expressly declares shall be void is not itself void in the hands of an innocent holder for value before maturity, unless the statute expressly or by necessary implication declares that such note shall be void.

4. Comity between different states does not require a law of one state to be executed

in another, where it would be against the public policy of the latter state.

5. The validity of a negotiable note in the hands of a bona fide holder in the state where the contract was made, although the consideration of the note was the settlement of differences under an illegal option contract, does not require its enforcement by the courts in another state in which the statutes make such notes void even in the hands of a bona fide holder, and make the transactions out of which the consideration arose criminal.

(November 22, 1894.)

A PPEAL by plaintiff from a judgment of the Appellate Court, Fourth Department, affirming a judgment of the Circuit Court for Clinton County in favor of defendant in an action brought to compel payment of certain promissory notes. *Affirmed.*

Statement by Magruder, J.:

This is an action upon three notes, amounting in the aggregate to \$8,881.53, all dated "St. Louis, Mo., Oct. 1st, 1890," signed by appellee, payable to the order of D. P. Grier Grain Company, at "St. Louis, Mo.," in two, four, and six months after date, respectively, with interest at 7 per cent per annum, and indorsed by the payee therein. Besides the counts upon the notes, the declaration contains the common counts. The pleas are the general issue and two special pleas. The first special plea is that the notes were given by defendant to D. P. Grier Grain Company, in settlement of an amount due "on a certain gaming contract whereby the said D. P. Grier Grain Company gave the defendant a certain option to sell certain wheat and corn, which the said defendant did not intend to deliver, nor the said D. P. Grier Grain Company intend to receive, the said notes being given to pay said D. P. Grier Grain Company the difference between the market price on the day of settlement and the price at which said defendant took said option;" concluding that the contract is contrary to the statute, and the notes void. The second special plea is of the same tenor as the first, except that it alleges the contract was made in the state of Missouri, and concludes that, under the statute of Missouri, the notes are wholly void. Replication to special pleas is that the notes sued on were made and delivered by defendant to said D. P. Grier Grain Company, and by said company were sold, and assigned by indorsement thereon, for a valuable consideration, to plaintiff, and were delivered to and received by him before the maturity of the same, without any notice of defect or illegality of consideration for the same, all without the state of Illinois, in the city of St. Louis, in the state of Missouri, and by the laws of Missouri are valid in the hands of plaintiff, etc. Further replication is that the cause of action is founded on a legal contract, and not upon any gambling contract.

This case was tried by agreement before the circuit judge, without a jury. The court was asked to hold as law, in the decision of this case, seven propositions, in writing, which were submitted by plaintiff's counsel;

and of these five were held as law, and two were refused. The refused propositions are as follows: (1) "The notes sued on are Missouri contracts, and, under the laws of that state, they were up to the time of their maturity negotiable paper. As the rights and obligations of the parties became fixed by the laws of that state, the courts of this state will declare and enforce them. If, therefore, before they matured, plaintiff took them for value, and without notice of any infirmity in or defense to them, then he became and is an innocent purchaser of them, for value, before maturity, and is entitled to recover in this case the full amount of them, regardless of what the transaction may have been out of which they arose." (2) "In order to bring purchases and sales of grain for future delivery within the prohibition of the statutes of Missouri, there must be a mutual intention on the part of the seller not to deliver, and on the part of the buyer not to receive, the grain. In the absence of such mutual intention, the law will protect the rights of the innocent party to the transactions, and will enforce them as against the guilty; and if the broker of the guilty party to such transaction acts in good faith for his principal, believing his principal to be dealing in good faith, and without notice or knowledge to the contrary, he is not *particeps criminis* with his principal, and he also is entitled to recover losses on such transactions as against his principal. But whether the notes in the hands of the Grier Grain Company were subject to the defense set up in this case or not, if, as a matter of fact, they were acquired by the plaintiff before maturity for value, and without knowledge of any infirmity or defense, they became valid and binding obligations on the defendant, in the hands of the plaintiff, as an innocent purchaser." Exceptions were taken to the refusal of these propositions. Plaintiff objected to all testimony tending to elicit the consideration of the notes, or to impeach their validity, or to show the character of the dealings between the defendant and the D. P. Grier Grain Company. Exceptions were taken to the overruling of these objections. Plaintiff introduced in evidence the act of the legislature of Missouri approved May 9, 1889, entitled "An act to prohibit fictitious and gambling transactions in agricultural products and other commodities and stocks and bonds," and the sections thereof incorporated into the Revision of 1889 of the statutes of that state, and also the opinions in the following cases: *Crawford v. Spencer*, 92 Mo. 498; *Cockrell v. Thompson*, 85 Mo. 510; and *Hill v. Johnson*, 38 Mo. App. 333.

The circuit court found the issues for the defendant, and rendered judgment in his favor for costs. This judgment has been affirmed by the appellate court. The present appeal is prosecuted from such judgment of affirmance.

Messrs. H. D. Laughlin, R. C. Lambe, and M. P. Murray for appellant.
Messrs. VanHoorebeke & Ford, for appellee:

Mo. Stat. § 5211 provides:

"1. All bonds, etc., founded on a gambling consideration shall be void.

"2. All bonds, etc., the consideration of which is money or property won at any game or gambling device, shall be void, etc."

Crawford v. Spencer, 92 Mo. 498, held the transaction to be a gaming one, but that the Statute of 1879 would not avail against an assignee.

In other cases recovery has been refused.

Waterman v. Buckland, 1 Mo. App. 45; *Downing v. Ringer*, 7 Mo. 585. See also *Chitty*, Cont. 232; *Olson v. Nelson*, 8 Minn. 53; *Atina Ins. Co. v. Harvey*, 11 Wis. 894; *Melchoir v. McCarty*, 81 Wis. 252, 11 Am. Rep. 605.

The legislature which met after the opinion in *Crawford v. Spencer*, *supra*, was filed, on May 9, 1889, passed "an act to prohibit fictitious and gambling transactions in agricultural products, other commodities and stocks and bonds."

This legislation being enacted right after the decision in *Crawford v. Spencer*, *supra*, was filed, is significant. There can be no question that it was to cover the point made by the court in the case and remedy the existing evil.

Schneider v. Turner, 6 L. R. A. 164, 180 Ill. 38; *Thatcher v. People*, 79 Ill. 602; *Ohiniquy v. People*, 78 Ill. 577; *Downing v. Ringer*, *Olson v. Nelson*, *Atina Ins. Co. v. Harvey*, and *Melchoir v. McCarty*, *supra*; *Trader's Bank of Chicago v. Alsop*, 64 Iowa, 97; *First Nat. Bank of Lyons v. Oskaloosa Pkg. Co.* 66 Iowa, 41; *First Nat. Bank of Preston v. Carroll*, 8 L. R. A. 275, 80 Iowa, 11; *Barnard v. Backhaus*, 52 Wis. 593; *Eberingham v. Meighan*, 55 Wis. 354; *Tenney v. Foote*, 4 Ill. App. 594; *Beveridge v. Hewitt*, 8 Ill. App. 467; *Coffman v. Young*, 20 Ill. App. 76.

The intent of the parties must govern; the form of the contract is by no means conclusive of the nature of the transaction.

Colderwood v. McCrex, 11 Ill. App. 545; *Coffman v. Young*, 20 Ill. App. 76; *Carroll v. Holmes*, 24 Ill. App. 453; *Griswold v. Gregg*, 24 Ill. App. 884; *Schneider v. Turner*, 27 Ill. App. 220; *Corcoran v. Lehigh & F. Coal Co.* 87 Ill. App. 577; *Locke v. Towler*, 41 Ill. App. 66; *Pickering v. Cense*, 79 Ill. 328; *Lyon v. Oulbertson*, 83 Ill. 33, 25 Am. Rep. 349; *Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414; *Soby v. People*, 184 Ill. 66; *Cothran v. Ellis*, 125 Ill. 496.

Dealing in "futures" or "options" as they are commonly called, to be settled according to the fluctuations of the market, is void, by the common law, for it is contrary to public policy.

Fortenbury v. State, 47 Ark. 188; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Gregory v. Wendell*, 40 Mich. 432; *Clay v. Allen*, 63 Miss. 426; *Tantum v. Arnold*, 42 N. J. Eq. 60; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Dunn v. Bell*, 85 Tenn. 681; *McGrew v. City Produce Exchange*, 85 Tenn. 572; *Seelingson v. Lewis*, 65 Tex. 216, 57 Am. Rep. 598; *Louvy v. Dillman*, 59 Wis. 197; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225; *Barlett v. Smith*, 18 Fed. Rep. 268; *Hents v. Jewell*, 4 Woods, C. C. 656; *Ounningham v. National* 28 L. R. A.

Bank of Augusta, 71 Ga. 400, 51 Am. Rep. 266; *Rumsey v. Berry*, 65 Me. 570.

A void contract cannot be validated by any form of ratification.

McCormick v. Nichols, 19 Ill. App. 334; *White v. Sutherland*, 64 Ill. 181; *Waterman v. Buckland*, 1 Mo. App. 45.

A contract against public policy will not be enforced anywhere.

Beveridge v. Hewitt, *Cothran v. Ellis*, and *Irwin v. Williar*, *supra*.

If a contract is valid where made, yet if against public policy or repugnant to the policy or positive institutions of the state where suit is brought, it will not be enforced.

Phinney v. Baldwin, 16 Ill. 108, 61 Am. Dec. 62; *Oheving v. Johnson*, 5 La. Ann. 678, 52 Am. Dec. 610; *Greenwood v. Curtis*, 6 Mass. 358, 4 Am. Dec. 145; 2 Kent, Com. 7th ed. 567, 570, 571; *Story*, Conf. L. §§ 29, 38, 327; *Mumford v. Cauty*, 50 Ill. 875, 99 Am. Dec. 525.

Magruder, J., delivered the opinion of the court:

The judgment of the appellate court affirming the judgment of the circuit court is conclusive upon the issues of fact tendered by the pleadings. The transactions between the D. P. Grier Grain Company and the appellee were mere speculations upon the future prices of grain. The contracts for the delivery and sale of the grain in the future were not made with the intention that any grain should be received or delivered, but with the understanding that each transaction should be settled by the payment of the difference between the contract price and the market price at the time fixed. It is well settled that all such contracts are mere wagers, or gambling contracts and are void. *Schneider v. Turner*, 180 Ill. 28, 6 L. R. A. 164; *Cothran v. Ellis*, 125 Ill. 496; *Barnard v. Backhaus*, 52 Wis. 593; *Crawford v. Spencer*, 92 Mo. 498; *First Nat. Bank of Lyons v. Oskaloosa Pkg. Co.* 66 Iowa, 41. Such is the law in Missouri, where the notes sued on are admitted to have been executed. In *Crawford v. Spencer*, *supra*, the supreme court of Missouri said: "The law is now settled that a sale of goods to be delivered in the future is valid. Such a contract is valid though there is an option as to the time of delivery, and though the seller has no other means of getting them than to go into the market and buy them; but if, under the guise of such a contract, valid on its face, the real purpose and intention of the parties is merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but the difference between the contract and market price only paid, then the transaction is a wager, and the contract is void." Such also is the law in Illinois, where the present suit has been brought. In *Schneider v. Turner*, *supra*, we said: "All contracts for the purchase and sale of property with the understanding or agreement of the parties (whether that agreement is expressed on the face of the contract or exists by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the difference between the contract and market

prices, are mere wagers or gambling contracts, and void." All gambling contracts are void at common law. *Ibid.*

The evidence tends to show that the notes were given for the balances found to be due upon the settlement of the differences above referred to. It is said that both parties must be shown not to have had the intention to deliver the goods, and to have had the intention of settling the differences only. Proof of such mutual intention was held to be necessary in *Crawford v. Spencer, supra*. The propositions held as law in favor of the plaintiff in the present case distinctly announce that, in order to bring purchases and sales of grain for future delivery within the prohibition of the statutes of Missouri, there must be a mutual intention on the part of the seller not to deliver, and on the part of the buyer not to receive, the grain. This intention may be established, not merely by the assertions of the parties, but by all the attending circumstances of the transactions. *Crawford v. Spencer, supra*. Here, appellee swears that, when he dealt with the D. P. Grier Grain Company, he dealt in options, and went to them for that purpose; that the three notes sued upon "were given for a balance for options;" and that he "had bought grain, and it fell in value, and the three notes made the difference." He had a mill at Trenton, but its capacity was only 200,000 bushels per annum, and yet the accounts and statements introduced in evidence show the volume of transactions between the parties to have amounted, in a period of a little more than three months, to 2,190,000 bushels of wheat, 1,240,000 bushels of corn, and 60,000 bushels of oats. There could have been no delivery of all this grain at the mill. The proof tends to show that all the purchases and sales during one month of the time were made on the same day, or within a day or two. The question of intention is a question for the jury, to be determined by a consideration of all the evidence. *Hill v. Johnson, 38 Mo. App. 383*.

It is claimed, however, by appellant, that the D. P. Grier Grain Company acted merely as brokers in making sales and purchases for appellee, and that they acted in good faith, whatever may have been the intention of appellee. The propositions held as law by the trial court state that the transactions would be legal and binding if the grain company, at the request of Hanke, bought and sold grain for his account in good faith, and with no understanding that it was not to be received or delivered. The evidence tends to show that the sales and purchases were conducted by the brokers in their own names; that Hanke's name was never disclosed as principal in the transactions; and that it was never disclosed to him what persons the brokers were dealing with in his behalf. The brokers were parties to the illegal contracts, and privy to the illegal intent of their principals. The notes were given to them for differences growing out of the illegal ventures. Hence, the present case comes within the rule announced in *Erwin v. William, 110 U. S. 499, 28 L. ed. 225*, where it was said: "When the broker is privy to the unlawful 38 L. R. A.

design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services or losses incurred by himself, on behalf of either, in forwarding the transactions."

But it is claimed that what has been said applies only to the immediate parties to the contract; and that although the payee in these notes, the D. P. Grier Grain Company, may have no right of recovery upon them, yet the illegality of their consideration cannot be urged as a defense against appellant, upon the alleged ground that the notes are negotiable paper, and were purchased by the appellant before maturity for a valuable consideration, in good faith, and without notice of their illegal consideration. The case of *Crawford v. Spencer, supra*, is referred to as authority for the contention that such notes are valid in the hands of an innocent holder, under the laws of Missouri. It was held in that case that a provision in the Revised Statutes of Missouri of 1879 (section 5722), making all notes void "when the consideration is money or property won at any game or gambling device," did not apply to such contracts as those here involved, and that a note based upon such an illegal consideration as that for which the notes here sued upon were given was not void in the hands of a bona fide indorsee. After the *Crawford Case* was decided, the legislature of Missouri passed an act on May 9, 1889, "to prohibit fictitious and gambling transactions in agricultural products," etc. Certain sections of this act appear in the Revised Statutes of Missouri as sections 3931, 3932, 3934, 3936, etc. Said section 3931 provides that "all purchases and sales, or pretended purchases and sales, or contracts and agreements for the purchase and sale of . . . grain, . . . either on margin or otherwise, without any intention of receiving or paying for the property so bought, or of delivering the property so sold, and all the buying or selling, pretended buying or selling, of such property, on margin or optional delivery, when the party selling the same, or offering to sell the same, does not intend to have the full amount of property on hand or under his control to deliver up such sale, or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the full amount of the same if purchased, are hereby declared to be gambling and unlawful, and the same are hereby prohibited." Section 3932 provides that it shall not be necessary, in order to commit the offense defined in section 3931, that both the buyer and seller shall agree to do any of the acts above prohibited; but the said offense shall be complete against any corporation, partnership, or person thus pretending or offering to sell or buy, whether the offer to sell or buy is accepted or not. Section 3936 provides that "all contracts made in violation of this act [article] shall be considered gambling contracts, and shall be void." Section 3931 also provides that any person found guilty of violating the provisions thereof shall be fined in a sum not less than \$300, nor more than \$8,000. The foregoing provisions were in

force when the notes sued on in this case were executed, and when the transactions upon which they are based occurred.

The point is made by counsel for appellant that there is no statute in Missouri which declares notes given for money becoming due by reason of the transactions forbidden in section 3931 to be void instruments, and that therefore such notes cannot be regarded as void as against bona fide holders thereof. We have been referred to no decision in Missouri made since the passage of the Act of 1889 which determines the question of the validity of such a note in the hands of an innocent holder. The general rule is that illegality of consideration, even though such consideration grows out of an act prohibited by statute, cannot be set up against the bona fide assignee of a note, unless the statute expressly or by necessary implication declares the note to be void. 1 Dan. Neg. Inst. §§ 197, 808; 3 Kent, Com. § 79, 80; Story, Prom. Notes, § 192; 1 Parsons, Notes & Bills, p. 218; Tiedeman, Com. Paper, §§ 178, 280; 2 Randolph, Com. Paper, § 517. The provision in the Missouri Statutes of 1879 which was considered in *Crawford v. Spencer*, *supra*, was that "all . . . bonds, bills, notes and securities, when the consideration is money or property won at any game or gambling device, shall be void, and may be set aside," etc. Mo. Rev. Stat. 1879, § 5722. But as such purchases and sales and contracts and agreements as are mentioned in said section 3931 have been decided to be not embraced within the terms of that provision, and as it has not been shown that there is any statute in that state declaring notes given for money due on such purchases and sales or contracts and agreements to be absolutely void, the question arises, whether such notes are void in the hands of an innocent holder merely because the purchases and sales or contracts and agreements which form the consideration are declared to be void. Some of the expressions in the text-books are to the effect that, where a statute expressly declares the contract or transaction which forms the consideration of the note or bill to be void, the note or bill is illegal and void, even in the hands of a bona fide holder for value; but the weight of authority sustains the position that, while such note or bill is void as between the parties to it, it is not void as against the holder for value without notice, unless the statute also declares the note or bill itself to be void. Mr. Daniel, in his work on Negotiable Instruments (sec. 808), thus succinctly states the doctrine: "In all cases where the statute does not declare the instrument void, bona fide ownership for value being proved, the holder is entitled to recover." The same view was expressed by this court in *Eagle v. Kohn*, 84 Ill. 292, where we said: "The doctrine is laid down generally that in those cases in which the legislature has declared that the illegality of the contract shall make the security, whether bill or note, void, the defendant may insist on such illegality, though the plaintiff took the bill or note bona fide, and gave a valuable consideration for it. Chitty, Bills, 115, and cases cited in *note*. But, unless it has been

so expressly declared by the legislature, illegality of consideration will be no defense in an action at the suit of a bona fide holder without notice of the illegality, unless he obtained the bill or note after it became due. Id. 116. . . . Illegality is not the circumstance which avoids negotiable securities in the hands of a bona fide holder, as it is seen that illegality of consideration, in the absence of express declaration by the legislature that the securities shall be void, will be no defense against a bona fide holder, without notice of the illegality. It is by force of the peremptory words of the statute declaring them void that they are held to be void in the hands of an innocent indorsee without notice." In the cases of *Traders Bank of Chicago v. Alsop*, 64 Iowa, 97, and *Barnard v. Backhaus*, 52 Wis. 598, it appears that there were statutes declaring the notes based upon the illegal considerations to be void. See also *Vallett v. Parker*, 6 Wend. 615. To hold such notes void in the absence of a statutory provision declaring them void would be to materially obstruct the circulation of negotiable instruments, and thereby seriously embarrass mercantile transactions. Hence we are inclined to think that, upon the record presented in this case, where it appears that the appellant was a purchaser before maturity for value of the notes sued upon in good faith, and without notice of any defects, the defense set up in the special pleas would not have been good as against him, if the suit had been brought in Missouri. The supreme court of that state in *Crawford v. Spencer*, *supra*, says: "The note is not void, in the hands of an indorsee before maturity, simply because based upon such a consideration."

This being so, can a recovery be had in this state upon the notes here sued upon? The general rule is that the validity of a contract is to be governed by the law of the place where it is made (*Phinney v. Baldwin*, 16 Ill. 108, 61 Am. Dec. 62; *Mumford v. Canty*, 50 Ill. 870, 99 Am. Dec. 525); and, in the application of this principle to notes, it is held that the laws of the state where a note is made will govern as to the defenses which can be set up against a recovery thereon. *Evans v. Anderson*, 78 Ill. 558; *Anstedt v. Sutter*, 80 Ill. 164; *Yeatman v. Cullen*, 5 Blackf. 240; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Woodruff v. Hill*, 116 Mass. 810. While it is true, however, that one state or nation will recognize and execute the laws of another through comity, yet the principle of comity does not permit the enforcement of foreign laws which are prejudicial to the interests of the state where they are sought to be enforced. A contract made in one state will not be enforced in another when to do so would contravene the criminal laws of the latter state, or would be against the express prohibition of its laws. Comity between different states does not require a law of one state to be executed in another when it would be against the public policy of the latter state. No state is bound to recognize or enforce contracts which are injurious to the welfare of its people, or which are in violation of its own laws. *Mumford*:

v. Cauty, supra; Story, Conf. L. § 327; *Faulkner v. Hyman*, 143 Mass. 58; *Hill v. Spear*, 50 N. H. 258, 9 Am. Rep. 205; *Fisher v. Lord*, 68 N. H. 514.

Section 180 of the Criminal Code of Illinois provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, . . . or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than \$10.00 nor more than \$1,000.00, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts and shall be void." 1 Starr & C. Anno. Stat. p. 791. Section 181 provides as follows: "All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn or entered into or executed by any person whatsoever, where the whole or any part of the consideration thereof shall be for any money, property or other valuable thing won by any gaming or playing at cards, dice, or any other game or games, or by betting on the side or hands of any person gaming, or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election, or unknown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet to any person or persons so gaming or betting, or that shall during such playing or betting so play or bet, shall be void and of no effect." *Id.* p. 792. Section 186 provides that "no assignment of any bill, note, bond, covenant, agreement, judgment, mortgage, or other security or conveyance as aforesaid, shall, in any manner, affect the defense of the person giving, granting, drawing, entering into or executing the same, or the remedies of any person interested therein." *Id.* p. 794. We held in *Chapin v. Dake*, 57 Ill. 295, 11 Am. Rep. 15, that a draft assigned in payment of a gambling debt was void in the hands of a subsequent bona fide holder. In *Tenney v. Foote*, 4 Ill. App. 594, it was held that the notes described in section 181 included notes the consideration of which, in whole or in part, arose out of the gambling transactions mentioned in section 180;

and that a note given for such differences as are hereinbefore described was void under section 181. The opinion of the appellate court in *Tenney v. Foote, supra*, was approved by this court in *Tenney v. Foote*, 95 Ill. 99, and the latter case has been since approved in *Pearce v. Foote*, 118 Ill. 228, 55 Am. Rep. 414. See also *Cothran v. Ellis*, 125 Ill. 496; *Soby v. People*, 184 Ill. 66.

It thus appears that, under the statutes of this state and the decisions construing them, the notes sued on are absolutely void. The contracts upon which they are based are declared to be gambling contracts, and void; the transactions in which they have their origin are prohibited by the Criminal Code of the state; and those engaging in them are subject to punishment by fine or imprisonment. We have held that dealing in futures or options is productive of mischievous results, and have characterized it as a "dangerous evil," and "a vice that has in recent years grown to enormous proportions." *Pearce v. Foote, supra*. We have also said that such dealing "is not only contrary to public policy, but it is a crime,—a crime against the state, a crime against religion and morality, and a crime against all legitimate trade and business;" and that there is demanded "at the hands of the courts of the country a faithful and rigid enforcement of the laws which have been ordained for the suppression of this gigantic evil and blighting curse." *Cothran v. Ellis, supra*. In view of the character of the transactions here involved as thus characterized, we think that our own law should be applied in determining whether a recovery should be had in this suit, and that comity does not require us to ignore the statute of Illinois, under which these notes are void even in the hands of an innocent holder, in order to permit a defense which would be allowed under the law of a foreign state. The enforcement of such foreign law would contravene the Criminal Code of this state, and would be in opposition to its public policy, and to the express prohibition of its statutory enactments, and would be prejudicial to the interests of its people. We are therefore inclined to hold that no recovery can be had upon the notes, and that the rulings of the circuit court were correct.

The judgments of the Circuit and Appellate Courts are accordingly affirmed.

SOUTH DAKOTA SUPREME COURT.

William B. SMITH, Admr., etc., of Fred A. Smith, Deceased, *Appt.*,

v.

CHICAGO, MILWAUKEE & ST. PAUL R. CO., *Resp't.*

(.....S. Dak.)

*1. In an action under the provisions of

*Headnotes by CONSON, P. J.

section 5499, Comp. Laws, brought by a father, as administrator of the estate of his deceased son, who was of age, and who left no widow or child, and who was killed by the negligence of a railroad company, the father, if entitled to recover at all, was only entitled to recover such pecuniary damages as he sustained as such father (he being the only heir); and the charge of the court, so instructing the jury, was not erroneous.

2. When, in such action, the only evi-

NOTE.—For damages in an action for wrongful death, see *Morgan v. Southern Pac. Co.* (Cal.) 17 L. R. A. 71, and *note*; also *O'Donnell v. Maine Cent.* 33 L. R. A.

R. Co. (Me.) 25 L. R. A. 658; *Bright v. Barnett & R. Co.* (Wis.) 26 L. R. A. 524.

dence as to the damage sustained by the father was that he (the father) was sixty-four years of age; that his son, at the time of his death, was over twenty-eight years of age; that he had lived with the father since he attained his majority, except one year; and that he was strong, healthy, and a good laborer,—a verdict for nominal damages only will not be disturbed in this court on appeal.

(April 18, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Moody County limiting his recovery of nominal damages in an action brought to recover for personal injuries resulting in death and which were alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Lynn & Sullivan, Palmer & Rogde, and F. E. Gill for appellant.

Mr. G. P. Cary, with Messrs. Winsor & Kittredge and H. H. Field, for respondent.

Corson, P. J., delivered the opinion of the court:

On the night of May 6, 1889, one Fred. A. Smith, an unmarried man, about twenty-eight years of age, while acting as brakeman on defendant's railway, was killed in a collision between the freight train on which he was employed, as brakeman, and an empty freight car, that had, from some cause, left a side track, and run onto the main track, and which, it is alleged, was negligently left upon said side track, improperly and negligently secured. The said Fred. A. Smith left no widow or children, but a father, William B. Smith, who took out letters of administration upon his estate, and brings this action as such administrator, to recover the sum of \$20,000, as damages caused the estate by his death.

The complaint is in the usual form, and the answer is, in effect, a general denial, except as to the due incorporation of the defendant, which is admitted. The only allegation in the complaint necessary to be specially referred to is the following: "That deceased died insolvent, and left unliquidated debts and claims against his estate, and left surviving him an aged father and mother, largely dependent upon him for support." There is only one question presented by the record in this case for our consideration, and that is as to the measure of damages that the plaintiff was entitled to recover. The only evidence upon the subject of damages was that given by the plaintiff, and was, in substance, as follows: That he was the father of the deceased, and was sixty-four years of age; that his son, the deceased, was at the time of his death of the age of twenty-eight years and six months; that deceased had lived with plaintiff, except about one year that he was absent in Montana; that physically deceased was strong and healthy,—a good laborer, and that at the time of his death he owed debts (amount not stated).

We shall assume, for the purposes of this decision, without deciding, that the action was properly brought by the plaintiff, as administrator, and that he was the only party beneficially interested in the verdict and judgment, as no objection to the form of the action was
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made by the defendant and respondent, and the plaintiff and appellant cannot be heard to question the regularity of his own proceeding in this court. We deem it necessary to make this statement, that it may not be assumed that we have decided that the action was properly brought in the name of the administrator, or can be maintained by a father, as heir or administrator, when there is no widow or children.

This action was brought under the provisions of section 5499 of the Compiled Laws, which reads as follows: "If the life of any person or persons is lost or destroyed by the neglect, carelessness, or unskillfulness of another person or persons, company, or companies, corporation or corporations, their or his agents, servants, or employes, then the widow, heir, or personal representatives of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover damages for the loss or destruction of the life aforesaid." The court, in its charge to the jury, after reading to them the foregoing section, instructed them as follows: "That is, for the loss which has been occasioned to those who are dependent upon the deceased person,—the pecuniary loss which they have suffered by reason of his being taken away. At common law, which is the law known as the law distinguished from the statute of a state, no one could recover for the death of a person that was caused by negligence, for the reason that an action of that character—an action for tort or wrong and negligence is of that character—did not survive the person that was killed, and it was only under the statute that a recovery, under any circumstances, can be had. And I say to you, gentlemen, that it is the construction to be placed upon that statute that, in case the plaintiff in this action is entitled to recover, he can only recover for the loss that he himself (he being the sole surviving heir of the deceased person) has actually sustained by reason of the taking away of his son; that is the pecuniary loss,—what has it taken away from him by way of support, if anything?" This portion of the charge was duly excepted to, and fairly presents the question as to the measure of damages in this class of cases. The learned counsel for the appellant contend that the plaintiff was not limited to such pecuniary damages only as he might be able to prove, but that, when it was shown that he was the father and the only heir, he was entitled to recover such damages as the jury might, in view of all the circumstances of the case, deem proper to give, taking into consideration the robust health, age, and industry of the young man, and the fact that the father had a reasonable expectation of pecuniary advantage, had the young man remained alive. The learned counsel for the respondent insist that the charge of the court was absolutely correct, and is sustained by the weight of authority, and that the verdict of the jury, under the evidence, could not have been other than it was.

In discussing the question involved in this case, it will be necessary to call attention to the fact that, as the section we have quoted originally stood in the Code of Civil Procedure, the word "damages," in the last line, was pre-

ceded by the word "punitive," so that the section (877) originally read, "and recover punitive damages for the loss," etc. In 1887 the word "punitive" was stricken out. Laws 1887, § 1, chap. 27. This is an important fact, as showing the intention of the legislature to change the rule allowing a recovery for "punitive," exemplary, or vindictive damages, and to limit parties to a recovery for actual or compensatory damages only. In view of this action by our state legislature, in striking out the word "punitive" from the section, we think we are fully justified in holding that a party, under this section, can only recover actual or compensatory damages. The action is a new one given by the statute, and is in no sense a continuation of the right vested in the deceased in his lifetime. With his death his right to damages terminated, and the right did not survive, as part of his estate. The action given to the widow, heir, or personal representative is given to enable them to recover such damages as will compensate them for the loss of the life of the deceased, and not as a punishment to the defendant for its negligence. As often stated, the widow and heirs of persons whose lives have been lost by the negligence of others, at common law, were not permitted to recover for the loss of the life thus lost. However great that loss might be to widow, children, or heirs, the common law afforded them no relief. To remedy this apparent defect in the common law, the legislatures of most of the states have provided that actions might be maintained by certain relatives, to recover such damages as they have sustained in the loss of the life of one by whose death they have sustained actual pecuniary damages. *Belding v. Black Hills & N. P. R. Co.* 38 S. Dak. 369. The rule of damages governing this class of cases is very clearly stated by *Mr. Justice Mitchell*, in the recent case of *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 5. In that case the court says: "There is nothing better settled than the principle on which damages are to be assessed under these statutes is that of pecuniary loss, and not as a *solatium*. No compensation can be given for wounded feelings, or loss of comfort and companionship of a relative, nor for the pain and suffering of the deceased. The true and only test is, What sum will compensate the next of kin for the pecuniary loss sustained by them by the death of the deceased? Or, in other words, what, in view of all the facts and circumstances in evidence, was the probable pecuniary interest of the beneficiaries in the continuance of the life of the deceased? . . . But, as already remarked, the damages, under the statute, are wholly compensatory for pecuniary loss, and exclude all punitive or exemplary elements, as well as all solace for loss of society, or compensation for the injured feelings of the survivors or the suffering of the deceased." The supreme court of California, in the well considered case of *Morgan v. Southern Pac. Co.* (decided in 1892) 85 Cal. 510, 17 L. R. A. 71, thus states the rule of damages in this class of cases. "An action to recover damages for the death of a relative was not known to the common law. It is of recent legislative origin. There are statutes in many of the American states providing for such an action, and it has been quite uniformly held

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that in such an action the plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff on account of the death of the relative; that sorrow and mental anguish caused by the death are not elements of damage; and that nothing can be recovered as a *solatium* for wounded feelings. The authorities outside of this state are almost unanimous to the point above stated. The following are a few of such authorities: *Pennsylvania R. Co. v. Vandever*, 86 Pa. 298; *Lehigh Iron Co. v. Rupp*, 100 Pa. 98; *St. Louis, I. M. & S. R. Co. v. Freeman*, 86 Ark. 41; *Atchison, T. & S. F. R. Co. v. Brown*, 26 Kan. 443; *Pennsylvania Co. v. Lilly*, 78 Ind. 252; *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280, 87 Am. Dec. 391; *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 466; *Kesler v. Smith*, 66 N. C. 154; *March v. Walker*, 48 Tex. 372; *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278; *James v. Christy*, 18 Mo. 162; *Hyatt v. Adams*, 16 Mich. 180; *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 308; *Blake v. Midland R. Co.* 18 Q. B. 98." And in the late case of *Van Brunt v. Cincinnati, J. & M. R. Co.*, 78 Mich. 530, the supreme court of Michigan says: "We have always held in these actions—although it may be, as claimed by plaintiff's counsel, that the difference between the two sections 8392 and 8314 has never been specially called to our attention before—that the damage must 'be based upon well-defined facts or known circumstances in the case,—such facts as are susceptible of some proof under the well-settled rules governing the admissibility of testimony,'—and that the damages must be given in reference to pecuniary injury, and that any injuries which are not susceptible of being compensated by a money consideration must be excluded as elements to be taken into consideration by the jury in determining the amount of damages in this class of cases. . . . In this case the proofs showed no person pecuniarily injured by the death of plaintiff's intestate. No action lies, in this case, out of the mere relation of father and child. The father was in no way injured by the loss of his son's earnings, or deprived of any reliance for his own support. *Clinton v. Laning*, 61 Mich. 359. The circuit judge was correct in taking the case from the jury for the reason assigned by him."

It will be noticed that in the above case the facts were quite similar, and in fact almost identical, to those in the case at bar, and that the granting of a nonsuit by the trial court was affirmed. It will have been observed in the case at bar that substantially the only fact upon which the plaintiff relies to recover is the fact that he is the father of the deceased. It did not appear that since his son came of age he had contributed one dollar to the support of his father, or that his father had any reason to expect that he would contribute anything in the future. The plaintiff therefore showed no pecuniary loss for which he could recover. In the quite analogous case of *Ocherokee & P. Coal & Min. Co. v. Limb*, 47 Kan. 469, the supreme

court of Kansas says: "It is contended that the verdict is excessive, and unsupported by testimony showing that the next of kin sustained pecuniary loss by the death of Daniel Limb. In this respect there is a fatal lack of testimony. It is not shown that the parents of the deceased ever received any support from him, nor that they were dependent upon him, to any extent, for support or assistance. Neither is there any evidence in the record to show their pecuniary condition. . . . This is an action for compensation only, and no damages can be recovered by the plaintiff below, except for the pecuniary loss which the parents sustained by the death of the son. The burden was on the administrator to show that loss occurred. If there was no evidence that his life had been of actual benefit to the parents, or that any benefits might be reasonably expected by the continuance of his life, then no more than nominal damages could be recovered. *Atchison, T. & S. P. R. Co. v. Weber*, 83 Kan. 543, 53 Am. Rep. 543. There must have been evidence either of actual benefits, or those in expectation, before the jury can give substantial damages; and an attempt to assess such damages without proof would be to indulge in mere conjecture, which is not permissible." And in *Fordyce v. McCants*, 51 Ark. 509, 4 L. R. A. 296, the supreme court of Arkansas says: "In this case the plaintiff can recover substantial damages for the father of the deceased only by showing that deceased gave assistance to his father, contributed money to his support, or that the father had reasonable expectations of pecuniary benefits from the continued life of his son, the reasonable character of this expectation to appear from the facts in proof. These should furnish the measure of damages. In the absence of such proof, only nominal damages can be recovered." It will be seen from these decisions that the charge of the circuit court was clearly correct, and that the verdict of the jury was the only verdict that they could have properly found, under the evidence.

Our attention has been called to only one case that holds a contrary doctrine. That is 28 L. R. A.

Illinois Cent. R. Co. v. Barron, 73 U. S. 5 Wall. 90, 18 L. ed. 591. But that case stands entirely alone, and, for some reason, no reference seems to have been made to it in any of the late cases cited. In Illinois, in which state that case arose, and in which it was tried in the United States circuit court, the supreme court does not follow the doctrine of the *Barron Case*. In the case of *Chicago v. Schollen*, 75 Ill. 468 (decided eight years after the *Barron Case*), the supreme court of that state says: "Where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, proof of such relationship would warrant a recovery of nominal damages only; but where the deceased is a minor, and leaves a father entitled to his services, the law presumes there has been a pecuniary loss, for which compensation, under the statute, may be given. In such case the pecuniary loss may be estimated from the facts proven, in connection with the knowledge and experience possessed by all persons in relation to matters of common observation." We have examined the other cases cited by appellant's counsel, and find that all, or nearly all, are cases of the death of minor children. In such cases, as we have seen, from the case cited from 75 Ill., *supra*, a different rule governs, and properly so. See also *Rockford, R. I. & St. L. R. Co. v. Delaney*, *supra*. If, in the case at bar, the son had been a minor, the father would have had a legal right to his services during his minority; but after his majority no such legal right existed, and the benefits thereafter would depend upon the capability of the son, and his disposition to confer benefits upon his father. No such disposition being shown in this case by proof that he had ever contributed anything, since he became of age, to his father's support, the jury could not have legally found that the father suffered any pecuniary damage from the loss of his son. The charge of the court, the verdict, and judgment of the trial court being, in our opinion, clearly right, the judgment of the circuit court is affirmed.

All the Judges concur.

NEBRASKA SUPREME COURT.

Erick ERICKSON

FIRST NATIONAL BANK of Oakland
et al., Appts.

(.....Neb.....)

1. Where a promissory note has been materially altered without the knowledge or consent of the maker, and the holder relies upon a subsequent ratification of the instrument by the maker, such ratification must be pleaded in order to be of any avail.
2. The fact constituting an estoppel in pais must be pleaded.
3. The fraudulent erasure of the name of the original payee of a promissory note, after its execution by a party to the instrument and the substitution of another, without the consent of the maker, is a material alteration.
4. Such an alteration invalidates the paper as to the maker, who has not assented to or ratified the change, even in the hands of a bona fide holder for value.
5. A court of equity has no jurisdiction to enjoin the transfer or collection of such a

*Headnotes by NORVAL, Ch. J.

NOTE.—Injunction against negotiation of note.

There seems to have been originally some hesitation in granting the aid of an injunction to prevent the passing of negotiable paper into the hands of a bona fide holder so as to cut off defenses. But the more modern cases show that the practice is now well established to give such relief whenever it is demanded by equitable principles.

In *Berkeley v. Brymer*, 9 Ves. Jr. 355, the court refused to hear affidavits in support of an injunction against negotiating a bill of exchange.

And in *Poor v. Carleton*, 3 Sumn. 70, in which the attempt was made to enjoin the transfer of shares of stock, *Judge Story* in argument said: "Thus, for example, thirty years ago it seems to have been thought by Lord Eldon that an injunction to restrain the negotiation of a negotiable instrument was an extraordinary interference of the court," but he further states that this doctrine has since been completely abandoned.

In *Ferrine v. Striker*, 7 Paige, 598, 4 L. ed. 238, the court in denying equitable relief against a usurious note said: "If this note was negotiable so that it had been or could be sued in the name of a third person who knew nothing of the usury or who not being the usurer could not be examined as a witness for the borrower in a court of law it might be a proper case to come into this court for a perpetual injunction."

But the granting of relief in cases of this kind is not by way of absolute right but is a matter of sound discretion to be exercised by the court as it thinks proper according to the circumstances of each case. And the injunction will not be awarded where the note is overdue before the suit is brought. *Galusha v. Flour City Nat. Bank*, 1 Hun, 573, 4 Thomp. & C. 68.

An injunction does not destroy the negotiability of the instrument. *Winston v. Westfeldt*, 22 Ala. 760, 58 Am. Dec. 273.

In cases where the note is void.

If the note is void in the hands of the payee but might be valid in the hands of an indorsee before maturity the transfer may be enjoined.

38 L. R. A.

note, since the maker has an adequate remedy at law.

6. The fact that a party is apprehensive that his witnesses, by whom he expects to establish his defense against a note, may die or move away, is not alone sufficient ground to enjoin the negotiation of the instrument, since the testimony of witnesses may be perpetuated under the provisions of the code of civil procedure.

(April 5, 1895.)

APPEAL by defendants from a judgment of the District Court for Burt County in favor of plaintiff in an action brought to enjoin the negotiation of a promissory note.
Reversed.

The facts are stated in the opinion.

Mr. Ira Thomas, for appellants:

The change of the payee of the note, being a material alteration, rendered the note absolutely void in the hands of whomsoever it might come to as appellee and is a complete defense at law.

Palmer v. Largent, 5 Neb. 223; *State Sav. Bank of St. Joseph v. Shaffer*, 9 Neb. 1; *Townsend v. Star Wagon Co.* 10 Neb. 616, 35 Am. Rep. 498; *Davis v. Henry*, 18 Neb. 497; *Barnes*

The negotiation of a note given to prevent criminal prosecution for an offense of which the maker is not guilty may be enjoined. *Moeckly v. Gorton*, 78 Iowa, 202.

If notes are extorted from a judgment debtor by abuse of legal process the court will enjoin their negotiation. *Thurman v. Burt*, 68 Ill. 129.

If plaintiff is entitled to have the note delivered up to be cancelled he may have an injunction against the transfer of it to a third person. *Ferguson v. Fisk*, 28 Conn. 501.

Negotiation of notes given for money won at play may be enjoined. *Lloyd v. Gurdon*, 3 Swanst. 180; ——— *v. Blackwood*, 3 Anstr. 851.

The negotiation of notes given for a debt incurred in speculation in cotton futures may be enjoined. *Beer v. Landman* (Tex.) 30 S. W. Rep. 64.

In *Lyster v. Stickney*, 12 Fed. Rep. 609, an injunction was allowed against notes executed under duress which were not due at the time of the filing of the bill.

Where a note is issued to one as trustee for another who became insolvent the trustee may be enjoined from transferring the note where there is fraud and failure of consideration in the transaction. *Belohradsky v. Kuhn*, 60 Ill. 547.

The negotiation of a note given to avoid prosecution for alleged illegal practice of medicine will be enjoined. *Hullhorst v. Soharnier*, 15 Neb. 62.

Where there are outstanding notes against a person, a great part of which represent usurious interest on former evidences of debt which have been renewed, and there is reason to fear that the holder of them will not sue them himself but will transfer them before maturity to others, the maker may have an injunction against their negotiation. *Wilhelmson v. Bentley*, 25 Neb. 473.

In *Smith v. Haytwell*, 1 Amb. 66, 3 Atk. 506, an injunction was granted to restrain defendant from parting with a note alleged to be void because given on a marriage brokerage agreement, the court saying: "This does not fall within any of the ordinary rules of injunctions. But it falls within the reason of cases where there have been probates of false wills surreptitiously obtained where the court

v. *VanKeuren*, 81 Neb. 165; *Randolph, Com. Paper, note* to section 1777.

To cut off a defense to a promissory note in the hands of a third person, the transferee must allege and prove that the note was transferred by indorsement.

Britton v. Berry, 20 Neb. 325; *Camp v. Sturdevant*, 16 Neb. 693; *Doll v. Hollenbeck*, 19 Neb. 689; 8 *Randolph, Com. Paper*, p. 991.

A court will grant a perpetual injunction only when a party shows a clear right thereto. *Spangler v. Cleveland*, 43 Ohio St. 526; 10 *Am. & Eng. Encyclop. Law*, p. 784.

An estoppel *in pais* occurs "when one by his words or conduct willfully causes another to believe in a certain state of things and induces him to act on that belief, so as to alter his own previous condition."

Wise v. Newatney, 26 Neb. 88; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618.

Before the purchase of the note Erickson was visited by the bank president, when a conversation was had in which the intention was expressed to purchase the note. He permits the bank to purchase without a word of caution or inquiry.

Erickson should be estopped to deny his liability on this note, and therefore the injunction denied.

If a partnership existed between Erickson

and Munk in this venture, then Munk was authorized to make the alteration.

Mace v. Heath, 80 Neb. 620; 8 *Randolph, Com. Paper*, p. 844; *May v. Cain*, 84 Neb. 652.

Mr. H. H. Bowen, for appellee:

The mere existence of a remedy at law is not in itself sufficient ground for refusing relief in equity by injunction.

Watson v. Sutherland, 72 U. S. 5 Wall. 74, 18 L. ed. 580; *Irwin v. Lewis*, 50 Miss. 363; *Boyce v. Grundy*, 28 U. S. 8 Pet. 210, 7 L. ed. 655; 10 *Am. & Eng. Encyclop. Law*, p. 791.

Where a draft entirely failed, but being transferable might greatly harass the plaintiff by being the foundation of other suits an injunction was granted.

Ferguson v. Fisk, 28 Conn. 501. See also, *Hullhorst v. Scharner*, 15 Neb. 62; *High, Inj. 2d ed.* § 1875; *Wilhelmson v. Bentley*, 25 Neb. 478.

Waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and the intention to relinquish.

Henry & C. Co. v. Fisherick, 87 Neb. 207.

In the case of a surety discharged by a material alteration in a note, a subsequent promise to pay will not bind him unless made upon some new consideration.

Warren v. Fant, 79 Ky. 1.

has restrained the executors from parting with the assets *pendente lite*."

In *Hood v. Aston*, 1 *Russ. Ch.* 412, an injunction was issued to prevent a transfer by the holder of a partnership bill of exchange who took it with knowledge that it was given by one of the partners for his individual debt. The court says that it was "claimed that the mischief which plaintiff may sustain from negotiation of it is not of the kind which this court will avert by injunction, especially upon *ex parte* application," but says: "I do not recollect such a doctrine to have been at any time within my experience the law of this court. It is true that application for injunctions of the sort now moved for have become much more frequent than they were in former days; but the reason is that in the present state and form of the transactions of mankind there is increased necessity for them, necessity which is not likely to become less."

Fraud or failure of consideration.

In *Osborne v. Bank of United States*, 23 U. S. 9 Wheat. 738, 6 L. ed. 204, which was an action to enjoin proceedings by a state officer to tax a United States bank in which the further relief was prayed that defendant be enjoined from transferring money which he had taken from complainants in payment of the tax, the court granted the injunction upon the ground *inter alia* that a court will always interpose to prevent the transfer of a specific article which if transferred will be lost to the owner. Thus the holder of negotiable securities indorsed in the usual manner, if he has acquired them fraudulently, will be enjoined from negotiating them because if negotiated the maker or indorser must pay them.

An injunction may issue at the time of serving the subpoena to prevent the negotiation of a bill of exchange given for goods which the seller refused to deliver. *Patrick v. Harrison*, 8 *Bro. Ch.* 476.

Where notes were given for the purchase price of land the chief value of which was the standing timber, and it appeared that the timber had previously been sold to a third person, the court granted an injunction to restrain the negotiation of the notes. *Ziegler v. Beasley*, 44 *Ga.* 55.

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The negotiation of notes may be enjoined which were given in advance for rent upon property subject to mortgage after proceedings are instituted for the foreclosure of the mortgage and eviction of the tenant. *Thompson v. Feathers*, 45 *La. Ann.* 120.

If notes are given to an insolvent for the purchase price of property as to which he was guilty of fraudulent misrepresentations to induce the purchase they may be impounded in his hands by injunction. *Bridges v. Robinson*, 2 *Tenn. Ch.* 720.

The transfer of a note may be enjoined where it was given for the purchase price of land to an insolvent grantor who was guilty of fraud in effecting the sale, although there has been no attempt at eviction. *Johnston v. Powell*, 84 *Tex.* 523.

If a note is given to secure payment of the contract price of certain work which is found not to be equal to the requirements of the contract, the negotiation of the note may be enjoined although the payee by his answer states that he has no intention of negotiating it. *Crandall v. Grow*, 41 *N. J. Eq.* 482.

In aid of set-off.

A solicitor in bankruptcy was restrained from negotiating a note which he had obtained for his fees where he was indebted to the estate for money collected and not accounted for to a larger amount than the face of the note. *Ex parte Harding*, *Bankr. Cas.* 24.

Where note is held in trust.

If one to whom a piece of negotiable paper has been confided for a special use or limited purpose should in breach of the trust reposed in him attempt to pervert the paper to a different use or purpose equity may enjoin him from doing any act in furtherance of such design. *Atlantic DeLaine Co. v. Treddick*, 5 *R. I.* 171.

Where acceptances were put into the hands of a person upon certain conditions, he to have an interest in them upon performing the conditions, and he made default, the court granted an injunction *ex parte* to prevent his negotiating them. — *v. Bozon*, 3 *L. J. Ch.* 67.

Where notes were indorsed upon a certain con-

Norval, Ch. J., delivered the opinion of the court:

This was an action brought by Erick Erickson in the district court of Burt county to restrain the defendants from negotiation of a certain promissory note executed by the plaintiff and one Erick Munk, and for the cancellation of said note. From a decree in favor of the plaintiff, the defendants have prosecuted an appeal to this court. The petition sets up two grounds for relief, namely: That the plaintiff was induced to sign the note as the surety for one Munk by the false and fraudulent representations of the latter, and that the note, after its execution, has been materially altered and changed by erasing the name of the original payee, and inserting in lieu thereof the name of the First National Bank of Oakland, without the knowledge and consent of the plaintiff. The answer admits that the defendant bank purchased the note, and denies all other averments in the petition. The trial court found that the note had been materially altered as alleged by the plaintiff, and its decision was placed upon that ground alone.

The proofs in the record show that one Erick Munk, an oculist of the city of Omaha, prior to the month of December, 1892, had

made occasional professional visits to Oakland, and upon the 2d day of said month he called upon the plaintiff, and induced him to sign a note as surety in the sum of \$1,500, due in six months, upon the representations of said Munk that he was about to purchase the half interest in the business of one Smith, an oculist and aurist of either Des Moines, Iowa, or Cincinnati, Ohio, and that the note was to be used for that purpose. The note was executed in blank as to payee, it being agreed that Smith's name should be inserted as the payee when his initials should be ascertained, which Mr. Munk subsequently did, by writing in the name of D. B. Smith. Afterwards, without the knowledge or consent of appellee, Mr. Munk erased the name of D. B. Smith, and inserted the name of the First National Bank of Oakland as payee. The note plainly showed that the erasure had been made, and in this condition it was sold by Mr. Munk to the bank, who informed the officers of the bank at the time of what had been done. It also appears that the appellant Beckman, the president of the bank, went to the plaintiff before purchasing the note, and inquired if he had signed a note with Mr. Munk for \$1,500. Erickson replied that he had. The note, however, was not

dition which the payee did not observe it was held that a bill in equity might be maintained to cancel the indorsement and to enjoin the transfer of the notes, although the maker was not shown to be insolvent, since the remedy against them might not be immediately available at law. *Maclean v. Fitzsimons*, 60 Mich. 336.

In *Green v. Pledger*, 3 Hare, 165, 13 L. J. Ch. N. S. 213, 3 Jur. 801, the payee of a promissory note who was alleged to have taken it in consideration of a loan of money which had been fraudulently transferred to him by a third person in fraud of creditors was enjoined from indorsing it until the title to it could be tried at law.

Not where there are other remedies.

An injunction will not be issued to restrain the transfer of notes by a person to whom they are alleged to have been transferred without consideration by an insolvent debtor where there is nothing to show that the transferee is not perfectly able to respond to any claim which might be made against him because of the alleged fraudulent transfer. *Comyns v. Riker*, 48 N. Y. S. R. 860.

The negotiation of securities given for the purchase price of land conveyed with full covenants of warranty will not be enjoined on account of alleged defects in the title not amounting to entire failure of consideration where there has been no disturbance or eviction and no suit is pending by the adverse claimant. *Hile v. Davison*, 20 N. J. Eq. 223.

If a usurious note cannot be transferred so as to cut off the defense of usury, and there is no danger of loss of the proof of usury, equity has no jurisdiction to enjoin the transfer. *Morse v. Hovey*, 9 Paige, 197, 4 L. ed. 665.

In *Thiedemann v. Goldschmidt*, 1 De G. F. & J. 4, 1 L. T. N. S. 50, 8 Week. Rep. 14, an injunction against the indorsees of bills of exchange obtained on a forged bill of lading was refused upon their undertaking to deliver them up if judgment went against them in an action at law which they had brought to collect them.

After maturity.

The transfer of a usurious note will not be en-

joined after the note has matured. *Reilly v. Tolman*, 64 Ill. App. 568.

No action can be maintained to interfere with the transfer of a note past due on the ground that it has been paid but not taken up, in the absence of special circumstances calling for the interference of a court of equity. *Fowler v. Palmer*, 68 N. Y. 533.

Parties in pari delicto.

Negotiation of notes given in payment of pretended land titles, the sale of which amounts to maintenance, will not be enjoined. *Woodworth v. Jones*, 2 Johns. Cas. 422.

The negotiation of a note will not be enjoined although it was void as contrary to the provisions of the banking act while the maker retains possession of the money which they represent. *Elder v. First Nat. Bank of Ottawa*, 13 Kan. 238.

Not where fraud is absent.

The negotiation of a promissory note given for the purchase price of a ship will not be enjoined if the defects which are alleged to have been fraudulently concealed and to constitute a failure of consideration were plainly visible. *Lynch v. Kennedy*, 27 La. Ann. 464.

Not for mere convenience.

A foreign corporation will not be permitted to maintain a suit against citizens of the state to enjoin a transfer of notes because it fears that the transfer may be made so that suit may be brought in states where it has property which may be attached before judgment to the injury of its business. *American Water Works Co. of New Jersey v. Venner*, 45 N. Y. S. R. 441.

Not in hands of innocent holder.

After the notes have reached the hands of a bona fide owner for value their further transfer cannot be enjoined. So an injunction was refused where a son sold a farm under fraudulent misrepresentations and transferred the notes given for the purchase price to his mother in fulfillment of his contract to support her. *Kittridge v. Batsholder*, 47 Vt. 64.

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shown him, nor did he know at the time that it had been altered. Subsequently the bank notified the plaintiff of the purchase of the note. There was introduced on the trial evidence for the purpose of showing that the plaintiff ratified the alteration of the instrument after the delivery and negotiation, with knowledge of the circumstances attending the change of the payee; also evidence for the purpose of establishing an estoppel against the appellee. It is doubtful whether the evidence upon these questions was sufficient to establish either a ratification or an estoppel. Whether it does or not is wholly immaterial, since no such issues were tendered by the pleadings. The alteration is specifically set out in the answer. Whether the instrument had been materially changed after its execution and delivery was raised by the answer, but not so either as to the question of ratification, or whether the plaintiff had been estopped by his acts from denying the validity of the note in question. If the defendants desired to rely either upon an estoppel or ratification, they should have pleaded in the answer the facts upon which they based such defenses. The doctrine is plain, and needs neither authority nor elaboration to substantiate it.

It is urged that a partnership was formed between Erickson and Munk for the purpose of purchasing the business of Mr. Smith, and that by reason thereof Munk was authorized to make the alteration. A sufficient answer to this contention is that no partnership is alleged nor proved. It is conceded, and there is no doubt of it, that the fraudulent erasure of the name of the original payee of a promissory note, after its execution by a party to the instrument and the substitution of another without the consent of the maker, is a material alteration. The doctrine is elementary. *Davis v. Bauer*, 41 Ohio St. 257; *German Bank v. Dunn*, 62 Mo. 79; *Stoddard v. Penntman*, 108 Mass. 366, 11 Am. Rep. 363; *Patch v. Washburn*, 16 Gray, 82; *Bell v. Mahin*, 69 Iowa, 408; *Cumberland Bank v. Hall*, 6 N. J. L. 202. It is equally as well settled that the material alteration of an instrument invalidates it as to the maker who has not assented to or ratified the change, even in the hands of a bona fide holder for value. See cases cited above, and *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369; *State Sav. Bank of St. Joseph v. Shaffer*, 9 Neb. 1; *Davis v. Henry*, 18 Neb. 497; *Hurlbut v. Hall*, 39 Neb. 889.

There can be no question that if suit were brought upon this note against the plaintiff he could avail himself of the defense that he had been discharged by the change of the instrument. The plaintiff having a complete defense at law, is he entitled to relief in equity? We think the answer can only be in the negative. It is a familiar doctrine of equity jurisdiction that the equitable powers of a court may be invoked by a person where the relief afforded at law is not plain or is inadequate, but, where the aggrieved party has a full and complete remedy at law, equity will not interfere by injunction. In 10 Am. & Eng. Encyclop. Law, p. 792, the rule is correctly summarized in the following lan-

guage: "If in an action at law the plaintiff can obtain full and adequate relief, a suit for an injunction cannot be maintained by him. Nor can a defendant invoke the aid of a court of equity upon mere legal grounds, because in such case his defense is available at law. To entitle the defendant to relief, he must have an equitable defense, which is not available at law, or a good defense at law, which, by reason of fraud or accident, without any negligence on his part, he was prevented from using." The text is sustained by numerous authorities cited in the note on the same page.

Applying the same rule to the facts in the case at bar, it is obvious that the appellee is in no position to invoke the interposition of a court of equity. His defense against the note is a legal one, not equitable. Full and complete relief can be had at law. Therefore a court of equity will not lend its extraordinary aid by injunction. If appellee's defense could be cut off by a transfer of the note to a good-faith purchaser, then we concede he would be entitled to restrain such transfer. But, as we have already seen, the note is absolutely void as to the appellee, in whosoever hands it may come, unless there has been a ratification of the change by the appellee, or he has by his own acts and conduct been estopped from denying the validity of the instrument. In *Hullhorst v. Scharner*, 15 Neb. 62, it is held that a court of equity will enjoin the transfer of a negotiable note obtained by duress and fraud; and in *Wilhelmson v. Bentley*, 25 Neb. 473, it was ruled that where a negotiable note was tainted with the vice of usury, and the payee is about to transfer the same to a bona fide purchaser, the maker may enjoin such transfer. These cases are not similar to the one at bar, for the reason that the transfer of the notes in the cases mentioned, to an innocent purchaser for value before maturity, would have cut off all the defenses of the makers. In such cases the makers have the undoubted right to take the initiative, and enjoin the negotiation of the notes, since the remedy afforded at law was wholly inadequate. Where a negotiable note is about to be transferred before due, so as to cut off the defense of the maker, equity, at the suit of the latter, will enjoin the negotiation, and order the instrument to be delivered up for cancellation, but otherwise if the note is non-negotiable. *Perkins v. Striker*, 7 Paige, 598, 4 L. ed. 293; *Morse v. Hovey*, 9 Paige, 197, 4 L. ed. 665. No authority has been cited in the briefs, nor after diligent search have we been able to find a single case, which holds that a court of equity will assume jurisdiction to restrain the transfer or collection of a promissory note which has been materially changed after its execution. But there are numerous adjudications, laying down the rule that equity will not interfere by injunction. See *Dorsey v. Monnett* (Md.) 20 Atl. Rep. 196; *Northern Pac. R. Co. v. Cannon*, 49 Fed. Rep. 517; *Johnson v. Andrews*, 28 Ga. 17; *Globe Mut. L. Ins. Co. v. Reals*, 79 N. Y. 202. *American Water Works Co. of New Jersey v. Vanner*, 45 N. Y. S. R. 441, was an action brought for the purpose, among others, of restraining

the defendants from bringing actions upon, or transferring, certain promissory notes given by the plaintiff, and payable upon demand; the plaintiff claiming the right to set off or counterclaim the indebtedness of the defendants to it. It was held that a court of equity will not interfere by injunction, since the defense claimed against the notes was as available at law as in equity. *Grand Chute v. Winegar*, 82 U. S. 15 Wall. 873, 21 L. ed. 174, was a suit in equity by a municipal corporation to enjoin the obligee of certain bonds issued by the corporation from prosecuting suits on such bonds, and to cancel the same, on the ground that the bonds were issued without authority and in violation of law. Relief was denied because the plaintiff had a perfect and complete defense to the bonds at law. It was held in *Allerton v. Belden*, 49 N. Y. 873, that the interposition of a court of equity may be sought when equitable relief exists against the note, unless, from the form of the note, the defense is not available at law. That was an action by an accommodation indorser of a note discounted at a usurious rate of interest to annul the note, suit being brought after the maturity of the instrument; it being alleged in the bill that the makers were insolvent, that plaintiff had requested the holder to bring an action on the note, and that he declined to do so, but intended to delay action until plaintiff's security became worthless, and proof of usury impossible. Relief was denied. The court in the opinion says: "The allegations in his complaint disclose a perfect defense at law to any action which might be brought against him on his indorsement, and no fact is stated showing any necessity for the interposition of a court of equity, or entitling the plaintiff to become an actor in the matter. The mere fact that a party has made an agreement, or given security, which is void for usury, is not, and never was, sufficient to entitle him to apply to a court of equity to have the contract annulled. The right to this relief exists only where, from the form of the security, the defense cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title to bond, or some other necessity for the interposition of a court of equity is shown."

In *Fowler v. Palmer*, 63 N. Y. 538, it is held that an action cannot be maintained to cancel a note, and to restrain the bringing of a suit thereon, or for selling or disposing of a promissory note past due, upon the ground that it has been paid. *Venice v. Woodruff*, Id. 463, was an action to have a certain bond delivered up and canceled, and to restrain the holders from transferring them. The bonds were void even in the hands of a bona fide holder. It was decided that the suit could not be maintained. In the opinion of the court it is said: "The cases in which a court of equity exercises its jurisdiction to decree the surrender and cancellation of written instruments are, in general, where the instrument has been obtained by fraud, when a defense exists that would be cognizable only in a court of equity, where the instrument is negotiable, and by a transfer the

transferee may acquire rights which the present holder does not possess, and when the instrument is a cloud upon the title of the plaintiff to real estate. . . . There must exist some circumstance establishing the necessity of a resort to equity, to prevent an injury which might be irreparable, and which equity alone is competent to avert. If the mere fact that a defense exists to a written instrument were sufficient to authorize an application to a court of equity to decree its surrender and cancellation, it is obvious that every controversy in which the claim of either party was evidenced by writing could be drawn to the equity side of the court, and tried in the mode provided for the trial of equitable actions, instead of being disposed of, in the ordinary manner, by a jury. Whether, therefore, the question be regarded as one of jurisdiction or of practice, it is established, by the latter decision, that some special ground for equitable relief must be shown, and that the mere fact that the instrument ought not to be enforced is insufficient, standing alone, to justify a resort to an equitable action." Upon principle we are constrained to hold that plaintiff is not entitled to enjoin the transfer or collection of the note.

It is argued that the remedy afforded at law is not so speedy as in equity, since he must wait the pleasure of the holders of the note to bring suit thereon, before he can make his defense, and by that time the witnesses to prove the alteration of the instrument may have died or moved away. The fact that the bank had failed to bring an action upon the note, and that the defense may be lost by reason of his witnesses being scattered, is insufficient to invoke the powers of equity. We are not aware of any authority which sustains an equitable action upon such ground, and it is not believed that any such can be found. The appellee has ample authority, under the provisions of section 421-427 of the Code of Civil Procedure, to perpetuate the testimony of his witnesses, even before a suit is brought against him. *Allerton v. Belden*, *supra*; *Minturn v. Farmers Loan & Tr. Co.* 8 N. Y. 498; *Globe Mut. L. Ins. Co. v. Reals*, 79 N. Y. 202.

The decree of the District Court is reversed, and the action dismissed.

EIDEMILLER ICE CO.

v.

David GUTHRIE et al., Appts.,

(42 Neb. 238.)

*1. The owner of a mill, who has the right to maintain a pond, or flow back

*Headnotes by HARRISON, J.

NOTE.—In connection with the above case on the subject of conflicting claims to ownership of ice, see *Brown v. Cunningham* (Iowa) 12 L. R. A. 583, and note; *Barrett v. Rockport Ice Co. (Me.)* 16 L. R. A. 774; *Concord Mfg. Co. v. Robertson* (N. H.) 18 L. R. A. 679; *Marsh v. McMidler* (Iowa) 20 L. R. A. 538; *Wright v. Woodcock* (Me.) 25 L. R. A. 499.

the water of a stream upon the land of another, and to use such water to operate his mill, possesses, as to the water, the dominant right, and, while not the absolute owner of ice which may form on the pond, is entitled to have it remain there during the time and whenever its so remaining will be or is useful and necessary to the legitimate exercise of his right to use the water as motive power for the mill, or to successfully operate the mill; but the owner of the land, if upon a non-navigable stream, may make any use he desires of ice which forms over and above so much of the bed of the stream to which his ownership extends as does not interfere with or injure the rights of the mill owner.

2. If the owner of a mill and the dam subservient thereto wantonly and unnecessarily draws the water from, or lowers the water in, the pond, and by so doing injures or destroys the ice privileges of the owner of land bordering upon the pond, he thereby renders himself liable in damages to such owner.

3. An injunction will not be granted or sustained where the injury complained of in the petition filed is not shown to be such as to be irreparable, or the party without a full and adequate remedy at law.

4. An injury may be said to be irreparable when it is of such a character or nature that the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard (Wilson v. Mineral Point, 39 Wis. 164); and we will add if such as may be atoned for in damages, if in the particular case it is shown that the party who must respond is insolvent, and for that reason incapable of responding in damages, it is irreparable.

(October 16, 1894.)

APPPEAL by defendants from a decree of the District Court for Nuckolls County in favor of plaintiff in a suit brought to enjoin defendants from drawing water from a dam in such a way as to injure plaintiff's ice. *Reversed.*

The facts are stated in the opinion.

Messrs. W. F. Buck and H. W. Short for appellants.

Messrs. J. W. Green and Searle & Coleman, for appellee:

The Eidemiller Ice Company suffered irreparable injury, and it has no adequate remedy at law.

Jerome v. Ross, 7 Johns. Ch. 815, 2 L. ed. 805, 11 Am. Dec. 484; *Gilbert v. Arnold*, 30 Md. 29.

The injury must be of a peculiar nature, so that compensation in money cannot atone for it; where from its nature it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable.

Gause v. Perkins, 58 N. C. 179, 69 Am. Dec. 728.

An injury will be irreparable and will be enjoined if of such a nature that it cannot be adequately compensated in damages or cannot be measured by any pecuniary standard.

Wilson v. Mineral Point, 39 Wis. 160; *Com. v. Pittsburgh & C. R. Co.* 24 Pa. 160, 62 Am. Dec. 872; *Gilbert v. Arnold*, *supra*.

The property described in the plaintiff's

petition was purchased and at great expense fitted up for the express purpose of harvesting the ice formed upon the river flowing along and through the premises. The value of the premises and the outlay of money was seriously affected, in fact permanently destroyed, by the destruction of the ice. The buildings and machinery were comparatively worthless from this wanton trespass, and the Eidemiller Ice Company was prevented by these acts from enjoying the property in the character in which it was fitted to be used and enjoyed, to wit, for carrying on the ice business.

Gardner v. Newburgh Trustees, 2 Johns. Ch. 162, 1 L. ed. 332, 7 Am. Dec. 526; *Belknap v. Belknap*, 2 Johns. Ch. 463, 1 L. ed. 452, 7 Am. Dec. 548; *Mitchell v. Dors*, 6 Ves. Jr. 147; *Merced Min. Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262; *McLaughlin v. Kelly*, 22 Cal. 211; *United States v. Gear*, 44 U. S. 3 How. 121, 11 L. ed. 523; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Thomas v. Oakley*, 18 Ves. Jr. 184; *More v. Massini*, 32 Cal. 590; *Boggs v. Merced Min. Co.* 14 Cal. 379; *Wilson v. Mineral Point*, *supra*; *Shipley v. Ritter*, 7 Md. 408, 61 Am. Dec. 371; *Davis v. Reed*, 14 Md. 152; *White v. Flannigan*, 1 Md. 525, 54 Am. Dec. 668; *Dudley v. Hurst*, 67 Md. 44.

A disturbance or deprivation of the right of a riparian owner to the use and enjoyment of a stream of water in its natural state is an irreparable injury for which an injunction will lie.

Holsman v. Boiling Spring Bleaching Co. 14 N. J. Eq. 385; *Erhardt v. Bourro*, 113 U. S. 597, 28 L. ed. 1116; *Frederick v. Groshon*, 30 Md. 436, 96 Am. Dec. 591; *United States v. Gear*, 44 U. S. 3 How. 121, 11 L. ed. 523; *Webber v. Gage*, 39 N. H. 182; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550.

An injury which cannot be measured by any pecuniary standard, or which it is impossible or hardly possible to measure, is regarded as irreparable.

Joyce, Doctrines and Principles of Injunction, 218; *Watson v. Sutherland*, 72 U. S. 5 Wall. 74, 18 L. ed. 580; *London & N. W. R. Co. v. Lancashire & Y. R. Co.* L. R. 4 Eq. 174; *Com. v. Pittsburgh & C. R. Co.* 24 Pa. 159, 62 Am. Dec. 372; *Piscataqua Bridge Proprietors v. New Hampshire Bridge*, 7 N. H. 85; *Milbau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Wilson v. Mineral Point*, 39 Wis. 160; *Burnley v. Cook*, 18 Tex. 586, 65 Am. Dec. 79; *Manhattan Mfg. & Fertilizing Co. v. New Jersey Stock Yard & Market Co.* 23 N. J. Eq. 161.

In analogy to this are actions to protect the good will of a business and agreements not to carry on a trade. In all these cases an injunction to restrain their violation will be granted.

8 Pom. Eq. § 1844, *note*, 1855; *Ropes v. Upton*, 125 Mass. 258; *McClurg's App.* 58 Pa. 51; *Harrison's App.* 78 Pa. 196, 21 Am. Rep. 9; *Richardson v. Peacock*, 28 N. J. Eq. 151; *Baumgarten v. Broadway*, 77 N. C. 8; *Berger v. Armstrong*, 41 Iowa, 447; *Caswell v. Gibbs*, 33 Mich. 331; *Butler v. Burleson*, 16 Vt. 176; *Guerand v. Dandele*, 32 Md. 561, 8 Am. Rep. 164.

The title to ice is in the landowner.

Bigelow v. Shaw, 65 Mich. 341; *Washington Ice Co. v. Shortall*, 101 Ill. 48, 40 Am. Rep. 196; *State v. Pottmeyer*, 30 Ind. 287; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Mill*

River Woolen Mfg. Co. v. Smith, 34 Conn. 462;
Paine v. Woods, 108 Mass. 173.

The grievances complained of were trespasses upon the property rights of defendant in error of which it has the right to complain.

Stevens v. Kelley, 78 Me. 445, 57 Am. Rep. 813; *Woodman v. Pitman*, 79 Me. 456; *People's Ice Co. v. Steamer "Excelsior"*, 44 Mich. 229, 38 Am. Rep. 246.

Harrison, J., delivered the opinion of the court:

March 9, 1891, the appellee herein, the Eidemiller Ice Company, hereinafter referred to as the "company," instituted an action against Robert and David Guthrie, partners under the firm name and style of Guthrie Bros.; and, in order that a full understanding of the issues may be had, we think it best to copy the petition and answer. The original petition was demurred to, and an amended one filed, which was as follows: "Comes now the Eidemiller Ice Company, a corporation duly incorporated and doing business as such, and complaining of Robert Guthrie and David Guthrie, partners doing business under the firm name and style of Guthrie Bros., defendants, says: (1) That said plaintiff is duly incorporated under the laws of the state of Kansas, and doing business as such in the states of Kansas and Nebraska, and as such authorized to sue and be sued. (2) The said plaintiff is the owner of lots numbered three (3) and four (4) in section No. twenty-seven (27) in township No. one (1) north, range No. seven (7) west of the sixth P. M., in Nuckolls county, Nebraska, according to the United States survey thereof, and containing about forty acres of land. (3) That defendants are the owners of a milldam located on the Republican river, at about the distance of one thousand feet to the south of plaintiff's said premises, which has remained in the same condition as it now is for several years last past, which said dam backs the water up and upon plaintiff's premises, but confines the waters thereof, during the greater portion of the year, to the river bed of said Republican river, which is about two hundred feet in width at the point where it courses along and through plaintiff's said premises. (4) That upon and along the south and west line of plaintiff's said land and premises courses the said Republican river, which river is, and for a long time past has been, permanently dammed by said defendants as aforesaid, making the water in the bed of the river, where it courses along and through plaintiff's said premises, at an average depth of about five feet, at its usual stage and condition, while the mill of defendants is being operated, and said milldam used and kept in its usual condition for milling purposes and use, on which said river bed is annually frozen a large amount of ice, of great value to plaintiff. (5) That plaintiff purchased said premises described in the second paragraph of this petition for the purpose of erecting thereon ice-storage houses, and for the purpose of harvesting and storing the ice so frozen on said river bed, where it courses on, upon, and along plaintiff's said premises, and that

plaintiff has expended large sums of money in constructing ice-storage houses on their said premises, to wit, the sum of about three thousand dollars (\$3,000), and that plaintiff, in and about their said business of cutting and storing ice on said premises, have expended other and divers large sums of money, and that, in the conducting of plaintiffs' business, plaintiffs have now outstanding large and valuable contracts for the delivery of ice, by them to be cut and stored on said premises, and that plaintiffs so constructed their said storage houses and embarked in said business with the full knowledge of defendants, and without any objection on their part, and that plaintiffs now have their said storage house about half filled; and plaintiffs' said contract for future delivery of ice cannot be filled and kept on their part unless they are able to fill their storage house with ice, and their said storage and other improvements and expenditures will be of no use or value to plaintiff unless it is allowed to fill the same, all of which is necessary to be done. (6) That on or about the 9th day of March, A. D. 1891, ice had formed on the surface of said river adjacent and opposite to the premises hereinbefore described as belonging to plaintiff, to a great thickness, to wit, about twelve inches, which said ice was merchantable and of great value, and that said plaintiff had, by its servants and agents, taken possession of and appropriated said ice adjacent to and opposite to said premises by surveying and marking the same off into squares and blocks, and had defined its said possession of said ice adjacent and opposite to said premises by marking and staking the same off into squares and blocks; and said plaintiff was then and there, by its servants and agents, engaged in cutting and removing said ice, and storing said ice for preservation in its said storage houses. (7) That on the 9th day of March, A. D. 1891, said defendants, in person, and by and through their orders and direction to their employes, did open the flood gates and spillways of their said dam across said river, for the sole and only purpose of drawing off the water from underneath the ice upon and along plaintiff's said premises, which plaintiff was then and there cutting and harvesting and storing as aforesaid, and that defendants might by so doing prevent plaintiff from so cutting and storing said ice, and that said defendants are preparing to, and threaten to, open still other flood gates and spillways for those purposes, and none other. (8) Said plaintiff says that if said defendants persist in so opening said flood gates and spillways, and drawing off said water, it will render it impossible for plaintiff to cut and harvest said crop of ice, for the reasons, among others, that it will allow said ice to rest upon the mud and slimy bottom of said body of water and river bed, covering the ice with mud and impurities, and cause it to crack and break into irregular pieces, and to honeycomb and float away when the water shall again rise thereunder; thus rendering it valueless, and impossible for plaintiff to cut and harvest and preserve the same fit for

use. (9) That all of said acts of defendants in opening said flood gates and spillways, and in drawing off said water, were done, and are threatened to be done, without the consent of plaintiff. (10) That the injuries so caused to plaintiff and its said land and improvements, and its use and occupation thereof, and to plaintiff's said business, are continuing injuries; that plaintiff's improvements and storage house aforesaid are permanent, and calculated for and adapted to use as aforesaid from year to year. And, if defendants shall continue to so draw off said water and open said flood gates and spillways, plaintiff's premises and improvements will be rendered unfit for use, and the ice so by plaintiff taken possession of, marked off into squares, staked off, and taken possession of by plaintiff as aforesaid, opposite to and adjacent to their said premises, will be destroyed, and that, from the nature of the injury, damages cannot be computed in money, and the plaintiff has no adequate remedy at law. The plaintiff therefore prays for a temporary order of injunction restraining the defendants, and each of them, from opening said flood gates and spillways, and from drawing off the water from under said ice, either by themselves in person, or by their agents and employes, until the final hearing of the case, and that upon such final hearing said temporary order of injunction may be made perpetual, and that the plaintiff recover from the defendants the sum of five thousand (\$5,000) dollars, its damages in the premises, and for such other and further relief as is just and equitable."

To this the appellants filed their answer, and at a subsequent date filed an amended answer, as follows: "Come now the defendants, and, for their answer to the plaintiff's petition in this case, say: First. That said petition does not state sufficient facts to constitute a cause of action in this case in favor of said plaintiff and against defendants. Second. That the pretended plaintiff has no right to prosecute its alleged action in this court, for the reason that at the commencement of this action said plaintiff had no legal capacity to sue and be sued in this state; that said plaintiff was at the time of the commencement of said cause of action a non-resident corporation, and had not become a domestic corporation, under the laws of this state. Third. That defendants admit that they are the owners of the milldam located on the Republican river, and that said dam is located about one thousand feet south of lots numbered three (3) and four (4) in section twenty-seven (27), township one (1) north of range seven (7) west of the sixth P. M., Nuckolls county, Nebraska, which dam has been constructed for many years, and has remained in the same condition that it now is for several years last past, except certain improvements thereto made some time prior to the commencement of this action. They admit that said dam caused the water at that point in the Republican river to rise a certain distance higher and above the ordinary height of the water in the bed and channel of said river, and when the sluice gates constructed in said dam, and as a part

of said dam, are closed, that said dam causes the water at that place, and for some distance above said dam, to rise a certain distance higher than the usual depth of water in the bed and channel of said river at that place. They admit that the waters so backed up by defendants' dam are confined and remain within the natural banks of said river at that place, but the defendants expressly deny that said dam backs the water up or upon the land alleged and described in plaintiff's petition as belonging to said plaintiff, and further expressly deny that the course of said river, or that its channel or bed, passes through or over the said land as claimed by the plaintiff. Fourth. Defendants further admit that usually there is a large amount of ice frozen annually at that place on said river, but deny that the plaintiff in the case has any special right or interest or ownership to or in said ice. Fifth. The defendants deny that the plaintiff is the owner of lots numbered three (3) and four (4) in section twenty-seven (27), township one (1) north, range seven (7) west of sixth P. M., Nuckolls county, as described in second paragraph of plaintiff's petition, and allege that whatever interest or rights said plaintiff has to or in said land, if any, were acquired, and are held, owned, and controlled, if at all, by said plaintiff, subsequent to and subject to the rights of these defendants, all of which said plaintiff well knew at the time of its alleged purchase or acquirement of interest, of any it has, in the said lots three (3) and four (4) in section twenty-seven (27), above referred to, and that, if said plaintiff has expended any money, in the way of buildings or improvements, on said alleged acquired lots, it has done so with the full knowledge of the facts that these defendants had erected a permanent milldam across said Republican, as hereinbefore described, and that said defendants had vested rights in said milldam and the backwaters of said river above said dam, and the right to raise the water in said river above the natural depth of the water in the channel and bed of said river, and to back the water of said river, for a certain distance above the said dam, upon lots numbered three (3) and four (4) in section twenty-seven (27), as described in plaintiff's petition. Sixth. These defendants, further answering, deny that on March 9, 1891, or at any other time, they opened their flood gates or spillways in their said dam across the Republican river for the purpose of injury to the ice on said river, or for the purpose of injury to plaintiff's alleged rights in said ice for its purpose of injury to the plaintiff's business interests and contracts, or to injure the plaintiff in any way, and affirm that they have not used said dam, or their rights, water-power, and water privileges in connection with said dam at any time, except when necessary for the operation of their vested rights in said dam and millrace, and the necessary and successful operation of the mill, and for no other purpose. Seventh. Defendants, further answering, say that they have been in open and notorious possession of, and enjoyed the exclusive right to, the privileges, the milldam, flood gates, sluice gates, and spillways and

millrace at and across the Republican river, located at the point hereinbefore described, for about fifteen (15) years last past, during all of which time they operated said mill, with all the privileges and appurtenances thereto, including said milldam, flood gates, sluice gates, spillways and millrace, and that the right of the exclusive control and use of said dam, water-power, flood gates, sluice gates, spillways and millrace are necessary for the successful operation of their mill located on said Republican river. Eighth. That these defendants own and operate a flouring mill by use of its water-power and water privileges derived from the construction and maintenance of their aforesaid milldam; that they have invested in said mill, milldam, millrace, and the other necessary appurtenances for the construction, maintenance, and operation of their aforesaid flouring mill a large amount of money, to wit, a sum not less than twenty thousand (\$20,000) dollars, and that the exclusive control and use of said milldam and its appurtenances and the water privileges heretofore had by these defendants are necessary to the protection of defendants' interests and investment hereinbefore described and without which they would be subject to great inconvenience and injury. Ninth. The defendants further allege that more than ten years ago they obtained from the then owners of said lots three (3) and four (4) in section twenty-seven (27), township one (1) north, range seven (7) west of sixth P. M., Nuckolls county, Nebraska, the water privileges along said lots three (3) and four (4), and over and across the Republican river adjacent thereto, with all the rights and title of said owners thereof, and that they have been in continuous, open, and notorious possession and use thereof to the present time, in and by virtue of a deed thereto, which instrument is of record with the county clerk of Nuckolls county, Nebraska. Tenth. That these defendants have vested rights and both legal and equitable title to said water privileges and to said millpower and milldam, and the lots adjacent thereto, and have maintained their said mill and milldam, and the appurtenances thereto, at a great cost and outlay of money, all of which will be rendered valueless to these defendants and to the public, as a mill, if the order of injunction prayed for by the plaintiff be made perpetual, and will be a total loss to these defendants. Eleventh. These defendants say they have been damaged by the issuance of the temporary order of injunction granted by the county court of Nuckolls county in this case, in the sum of one thousand (\$1,000) dollars. Twelfth. The defendants deny each count, and each and every allegation in the several counts, in plaintiff's petition, not herein expressly admitted. Defendants, further answering, say that they are worth \$25,000 over and above all exemptions and liabilities, which property is in Nuckolls county, Nebraska, and within the jurisdiction of this court. Defendants therefore pray that said injunction may be dissolved, and a perpetual injunction be denied to the plaintiff, and that it go hence without day, and that the plaintiff take nothing by its writ, and for

judgment against the plaintiff for \$1,000 costs, and such other relief as equity may suggest."

The reply filed by the company was a general denial of all new matter contained in the answer. A motion was filed by appellants to vacate the injunction, and after some preliminary proceedings the case was tried by the court; the following journal entry showing fully the findings of the court, and the disposition made of the cause: "Now, on this 23d day of March, 1892, this cause came on to be heard upon the motion of the defendants to vacate and set aside the injunction heretofore granted in this case, and was submitted to the court, on consideration whereof said motion of the defendants is hereby overruled, to which ruling of the court the defendants except. Whereupon the plaintiff, in open court, dismissed as to any claim for damages in this action, without prejudice; and now, on this 24th day of March, this cause came on to be heard upon the petition, answer, and reply, and the evidence, and was submitted to the court, on consideration whereof the court finds: (1) That said plaintiff is duly incorporated under the laws of the state of Kansas, and that articles of their incorporation, together with the resolution of its board of directors, by them adopted, accepting the provisions of an act relating to foreign corporations, and enabling them to become domestic corporations of this state, is now on file in the office of the secretary of state of Nebraska, and doing business in the states of Kansas and Nebraska. (2) That said plaintiff is the owner of, and in possession of, lots numbered three (3) and four (4) in section twenty-seven (27) in township number one (1) north, range number seven (7) west of the sixth P. M., in Nuckolls county, Nebraska, according to the United States survey thereof. (3) That the Republican river courses along and through said premises, and that said river, on the 9th day of March, A. D. 1891, was frozen over with good, clear, merchantable ice, to the thickness of eight to nine inches, which said plaintiff was then and there engaged in cutting and harvesting and storing in ice-storage houses which plaintiff had on and before said date erected on their said premises on the bank of said river, and that said ice-storage houses were of a permanent nature, and of the value of about three thousand dollars. (4) That said defendants are copartners, and are the owners of a milldam located on and across said river, about one thousand feet below the premises of said plaintiff, which said dam causes the waters of said river to stand at an average depth of five feet where it courses along and through plaintiff's said premises. While the mill owned and operated by the defendants is being operated by the use of said dam and the water flowing therefrom, the flood and sluice gates in said dam are kept closed. That said milldam is about two hundred feet in length, and at its eastern end it is provided with four flood or sluice gates, each of these gates being about six feet in width, and extending downwards two feet below the bed of said river when said sluice gates are closed. (5)

That on the 9th day of March, A. D. 1891, while the plaintiff was engaged, by and through their agents and employes, in harvesting, cutting, and storing said ice so formed on said river, where it coursed along and through plaintiff's said premises, the said defendants raised said flood and sluice gates in their said dam, and then and there and thereby drew the water from underneath the ice belonging to said plaintiff, and caused said ice to drop into the bed of said river, thereby cracking and injuring said ice, and forcing plaintiff to stop its work. That on the evening of said day said defendants closed their said gates, whereupon said water and ice in said river rose to their natural and usual position. That on the 10th day of March, A. D. 1891, there was served upon defendants a temporary order of injunction, issued out of this court in this case, enjoining the defendants from opening the said flood or sluice gates in their said dam, and from drawing off the water from underneath the ice belonging to said plaintiff. That on the morning of the 10th of March, 1891, the plaintiff, with about seventy employes and six teams, resumed the work of cutting, harvesting, and storing of said ice on their said premises, whereupon the defendants, at about eight o'clock on said morning of said day, again raised the said flood or sluice gates of their said dam, again thereby drawing the water from under the ice of said plaintiff causing it again to drop into the bed of said stream, rendering it impossible for plaintiff to proceed with the harvesting and storing of said ice, and thus forcing plaintiff and its employes to quit the work. That, at about eleven o'clock of that day, defendants again closed said flood gates, sometimes called 'sluice gates,' and that thereupon the water and ice in the bed of said river again resumed its usual and ordinary position. That thereupon, at about one o'clock in the afternoon of said 10th day of March, 1891, said plaintiff again resumed the cutting and storing of said ice on its said premises, and that immediately upon said plaintiff's resuming its said work said defendants again raised said flood or sluice gates in their said dam, and again drew the water from under plaintiff's ice, again letting it into the bed of said stream, causing the water to flow over it, and cover it with sand and impurities, and ruin a portion of plaintiff's said ice, and that on the night of the 11th of March said gates were again closed, and the water and ice in said river again resumed their relative position. That about seven o'clock on the morning of the 12th of March, 1891, the plaintiff again resumed said work of harvesting and storing said ice, and that thereafter, in the morning of the said 12th of March, defendants again opened said gates in said dam, and thereby drew off the water from underneath said ice, and that the repeated dropping of said ice upon the bed of said river destroyed said ice, and rendered it wholly unfit for storage and unfit for use, and entirely valueless, thereby rendering it impossible for plaintiff to fill its said ice house to exceed one third of its capacity.

(6) That the opening of said gates in said

dam by said defendants on said dates was not necessary to the proper operation of defendants' mill, nor were they so opened for the purpose of operating the same; but the court finds that the defendants opened the same for the purpose of destroying plaintiff's ice, and preventing plaintiff from harvesting the same. (7) That, in the conducting of the milling business by said defendants, they have never, before March, 1891, found it necessary to open said gates while the ice was formed on the waters confined by said dam, and fit to be harvested and stored, and that it was not necessary for the conducting of defendants' business in March, 1891, to open said gates. (8) That plaintiff's harvesting and storing of said ice did not diminish the volume of water flowing to plaintiff's mill, but that when said gates were closed there was flowing over the top of said milldam a sheet of water across the whole length of said dam from six to eight inches in depth. (9) The court finds generally upon the issues joined in favor of the plaintiff. It is therefore considered, ordered, and adjudged by the court that the defendants be, and they hereby are, perpetually enjoined from opening the flood gates or sluice gates of their said milldam while ice suitable for cutting is forming on the backwater confined by said dam, and while the ice formed thereon remains suitable for cutting and harvesting; and the defendants are perpetually enjoined from drawing off the water of said dam, through the flood gates or sluice gates of their said dam, while the ice which may hereafter be formed thereon remains suitable for harvesting and storing. It is further ordered, considered, and adjudged by the court that the injunction heretofore granted in this case also be and remain in full force as it now stands. It is further considered and adjudged by the court that the plaintiff recover from the defendants its costs in this action, taxed at \$——."

From this decree the Guthrie Bros. have perfected an appeal to this court. It is contended by counsel for appellants that, by reason of their ownership of the mill and the dam which flowed the water, or held it back, and created the pond of still water, a portion of which, by the action of the frost, had congealed and formed the ice which the company was cutting and storing, they were the owners of and entitled to the ice, claiming the right by virtue of a transfer made September 27, 1887, from the then owner of the land, to appellants, and the length of time they had maintained the dam in the river, and exercised the right which they assert, authorized them to flow the land, or to back water over it, in such manner and quantity as was necessary to maintain the dam and operate their mill. There is, or probably it may more correctly be stated, there was, some contrariety of opinion, as expressed in the decision of the courts, in reference to which one is the owner of ice upon a mill pond,—the party who erected the dam, and owns the right to the water, and to flow or hold it back, or the party holding the legal title to the land (the riparian owner); but where the stream is of the char-

acter of the one which figures in this case, *i. e.* not navigable, we are satisfied both reason and precedent support the doctrine that the riparian owner has the right to use all the water which it is necessary for him to employ for any purpose, and to cut and remove the ice which may form upon the stream adjoining his land, in any quantity or to any extent, for his own use, or to store for sale, provided he does not, by so doing, diminish or decrease the flow of water to the mill, below what is required to successfully operate or run the mill. *Gould, Waters, § 191, and cases cited; Stevens v. Kelley, 78 Me. 445, 57 Am. Rep. 813; Brookville & M. Hydraulic Co. v. Butler, 91 Ind. 184, 46 Am. Rep. 580, and cases cited; Washington Ice Co. v. Shortall, 101 Ill. 46, 40 Am. Rep. 196.* "The riparian owner and the person who flows have each a qualified right in the ice which forms in an artificial pond, *i. e.* the mill owner has the right to have the ice remain, if its removal will appreciably diminish the head of water at his dam, and the riparian owner the right to cut and remove the ice, if its removal will not appreciably diminish such head." *Bige-low v. Shaw, 65 Mich. 841; Paine v. Woods, 108 Mass. 172; Searle v. Gardner (Pa.) 12 Cent. Rep. 420; Cummings v. Barrett, 10 Cush. 186; Marsh v. McNider, 88 Iowa, 390, 20 L. R. A. 333; Howe v. Andrews, 62 Conn. 398.* The rights of a mill owner in the water of the stream upon which his mill is situated, and in which he has constructed a dam, and to the full and necessary supply of water, have been recognized in this court. *Culter v. Garbe, 27 Neb. 312.*

It is further argued that the injunction granted in this case is too indefinite and uncertain, and if fully complied with by appellants, in its full scope, it will render the mill privileges valueless, to quite a large and appreciable extent. The evidence tended to or did establish that the head of the race by which the water was conducted to the mill from the reservoir or pond at times became clogged or partially filled with sand or broken ice, or other matter which obstructed the free and full flow of the water, and when this was sufficient to become apparent at the mill, by the lack of water sufficient in the race to furnish power, when applied to the machinery, to run the mill to its fullest capacity, the gates were raised, the spillways opened, and by thus allowing the water to escape at the dam a current was formed at the head of the race, some distance above, sufficient to sluice it, or remove the sand or other obstructions. Appellants claimed that this was the least expensive and most efficacious manner in which the object sought could be accomplished, and that they did it and had so done during all the years (about 15) they had been operating this mill. If so, this was one of the necessary and reasonable uses of the water confined by their dam, connected with the most successful and economical running of the mill, and one which they would have a right to exercise at any time when the conditions were such that without so doing the full and complete operation of the mill would be retarded. If it is

true that the above was the cheapest and most efficacious manner in which this sluicing or cleaning the head of the race could be done, and was requisite to a successful operation of the mill, then they had a right to resort to it whenever it was needed. At the time the injunction in this case was first granted the company had been cutting ice on the mill pond for about thirty days, when the appellants raised the gates in the dam and allowed the water to escape, and ruined the remaining ice, which the company purposed storing, and to which, if they were the owners of the land and bed of the stream, they were entitled, if its harvesting did not appreciably diminish the flow of the water to appellants' mill, necessary for its operation. The pleading filed by the company to procure an injunction was directed to the immediate threatened act or acts of the appellants, and the effect produced or which would ensue on or to the ice then upon the pond, and not to the future or other crops of ice. The evidence was similarly directed or limited in its application, and the court confined its findings to the particular instances complained of in the petition, and in issue in this case; but the order of injunction is much more extended and broader in its scope, where it states "that the defendants be, and they hereby are, perpetually enjoined from opening the flood gates or sluice gates of their said milldam while ice suitable for cutting is forming on the backwater confined by said dam, and while the ice formed thereon remains suitable for cutting and harvesting; and the defendants are perpetually enjoined from drawing off the water of said dam, through the flood gates or sluice gates of their said dam, while the ice which may hereafter be formed thereon remains suitable for harvesting and storing. It is further ordered, considered, and adjudged by the court that the injunction heretofore granted in this case also be and remain in full force as it now stands." The injunction was, we think, extended far beyond what was contemplated or warranted by either the pleadings, evidence, or findings of the court (which findings, we think, were fairly sustained by the testimony), and would at least require to be modified, if continued in force. It is true that the court reached the conclusion that at this particular time it was unnecessary for the appellants to raise the gates, and thus lower the water in the dam, but we do not consider that this was a sufficient finding, even when coupled with the further one that it had never before been necessary to raise the gates at the same season of the year, to base such an injunction upon as was made perpetual in this case, restraining and preventing an act which it was clearly shown was a necessity to the appellants in the conduct of their milling business. We further think the order is open to the objection that it is uncertain and indefinite, covering, as it does, and prohibiting, the performance of the act complained of during several weeks, and possibly during several months, of each year,—the time when, and its continuance, to be governed by the formation of ice on the

stream, and its fitness for cutting and storing, and the commencement and continuance of these conditions.

It is further argued by counsel for appellants that the company was not entitled to an injunction, as it had, if injured, a full and adequate remedy at law, in an action for damages. Counsel for the company combat this with the argument that the relief afforded in a suit for damages, if any, could not be made full and adequate, from the very nature of the injury,—involving elements of damage which could not be recovered in an action, and which make up a case so peculiarly constituted as to call for the aid of a court of equity, and the exercise of its controlling powers by injunction. We have no doubt that where the owner of a milldam either maliciously or unnecessarily draws the water from the pond, or materially lowers it, and by so doing destroys the ice privilege, he becomes liable to an action for so doing. In *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 818, and in this case quoting from *Phillips v. Sherman*, 64 Me. 174, it is said: "A wanton or vexatious or unnecessary detention would render the mill owner so detaining liable in damages to those injured by such unlawful detention." And the court adds: "If the owner of the dam has no right unreasonably to detain the water, for the same reason he would have no right wantonly to accelerate it, to the injury of owners above or below." It is true, we presume, that the appellants might abandon their mill and tear out the dam, if they so desired, and thus restore the river to its original condition, and destroy the ice privileges, and do so with impunity, and no one be heard to complain. But that is not this case. They are still operating the mill and still maintain the dam, and desire so to do; and the case must be considered and determined from a view of the conditions and relations of the various parties and properties as they existed, and not what the rights might have been under other conditions or relations. If the water was wantonly or unnecessarily drawn out of the pond, and the ice which belonged to appellants thereby broken, injured, or destroyed, the parties who did it became liable in damages to the owners. *Stevens v. Kelley*, *supra*; *Richards v. Gaufrét*, 145 Mass. 486; *Handforth v. Maynard*, 154 Mass. 414; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; 80 Cent. L. J. 6. If the action for damages will afford adequate relief,—compensation in full for the injury inflicted,—it will suffice, and an action for injunction will not be entertained. It is a well-settled general rule that the remedy by injunction will not be granted unless the plaintiff is about to suffer an irreparable injury, or one for which there is not an adequate remedy at law. *Tygar v. Moffitt*, 18 Neb. 565; 1 High, Inj. p. 28. An irreparable injury, within the meaning of the law of injunctions, has been defined by Pearson, J., in *Gause v. Perkins*, 56 N. C. 177, 69 Am. Dec. 728, as follows: "The injury must be of a peculiar nature, so that compensation in money cannot atone for it; where, from its nature, it may be thus atoned for, if in the particular case the party be in-

solvent, and on that account unable to atone for it, it will be considered irreparable." This is we think quite an accurate and clear definition, and one under which, when applied to the facts and circumstances disclosed by the pleadings and evidence in the present case, and enforced, it must be held that there has not been sufficient showing of irreparable injury, or one which cannot be fully compensated in an action at law for damages. We are fully convinced that in such an action the appellants could receive full and adequate compensation for the loss of their right to cut or harvest the ice, and for the destruction of the ice itself, or for any and all legitimate and competent elements of damage which had been suffered. For the measure of damages in such a case, and a discussion of the rules applicable, see *Handforth v. Maynard*, *supra*; *Stauffer v. Miller Soap Co.* 151 Pa. 380. That a petition or application for an injunction will not be sustained in a case such as the one at bar, see *Cummings v. Barrett*, 10 Cush. 186; *Marshall v. Peters*, 12 How. Pr. 218.

There are some other questions argued in the briefs, but, as the conclusion we have reached on the points so far considered will dispose of the case, we do not deem it necessary to discuss them.

The decree of the district court is reversed, and a decree entered in this court vacating the injunction and dismissing plaintiff's petition, at costs of plaintiff (appellee herein).

Judgment accordingly.

Ragan, Ch. J., took no part in the decision.

Lewis LITTLEFIELD, *Pff. in Err.*,

v.

STATE of Nebraska.

(42 Neb. 223.)

***1. Where authority is conferred upon a municipal body to license and regulate a particular business or occupation as a sanitary measure, such power must be exercised as a means of regulation only, and not as a means of producing revenue.**

2. Authority is conferred by its charter upon the city of Omaha to license and regulate the production and sale of milk within its limits, and it may lawfully exact a reasonable license fee from all persons engaged in such business.

3. While the courts have power to in-

**Headnotes by POST, J.*

NORM.—In connection with the above case on the limitation of amount of license fees, we call attention, without here attempting any complete annotation of the subject, to the cases of *Osborne v. State* (Fla.) 25 L. R. A. 120; *State v. Moore* (N. C.) 22 L. R. A. 472; *Re Stipe* (Ohio) 17 L. R. A. 184; *American Fertilizing Co. v. North Carolina Board of Agriculture* (C. C. E. D. N. C.) 11 L. R. A. 179; *Atkins v. Phillips* (Fla.) 10 L. R. A. 153; *Jacksonville v. Ledwith* (Fla.) 9 L. R. A. 69; *Fayetteville v. Carter* (Ark.) 6 L. R. A. 509; *Chaddock v. Day* (Mich.) 4 L. R. A. 809.

quire into the reasonableness of the fee exacted in the exercise of the power to regulate, a considerable latitude will be allowed for the exercise of legislative discretion over the subject.

4. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license and the regulation of the business to which it applies.

6. Where such an ordinance is clearly within the general powers of a municipal body, it is presumed to be reasonable; and the judicial power of the state will not be exercised to declare it void, unless, from its inherent character or by proofs adduced, it is shown to be unreasonable.

(October 16, 1894.)

ERROR to the District Court for Douglas County to review a judgment convicting defendant of violating a city ordinance in selling milk without a license. *Affirmed.*

The facts are stated in the opinion.

Messrs. Estabrook & Davis, for plaintiff in error:

The license fee cannot be sustained as an exercise of the taxing power.

Concerning useful trades and employments a distinction is to be observed between the power to license and the power to tax. In such cases the former right does not give the authority to prohibit or to use the license as a mode of taxation with a view to revenue.

Dill. Mun. Corp. § 557; *Templeton v. Tekamah*, 32 Neb. 545.

The requirement of a license fee cannot be upheld as an exercise of the police power.

To justify the imposition of a license fee there must be some recognized object within the police power which will be promoted by the exaction of such fee. Under the exercise of the police power there are only four objects which have ever been recognized as proper to sustain the collection of a license fee. Generally only two are admitted.

1. To cover the actual expense of issuing the license.

2. To raise a fund to defray the expenses of supervision of the business.

Cooley, Taxn. 2d ed. 598.

Some courts, however, have recognized two additional objects, namely:

3. To obtain compensation for a benefit conferred on the licensee.

4. To restrict the number of persons engaged in the business.

See Tiedeman, Mun. Corp. § 123, p. 218; *Leavenworth v. Booth*, 15 Kan. 627.

The fee in question cannot be upheld as promoting either of them.

If the city seeks to justify the fee on the first ground it cannot do so, because (a) the fees are not equal; for some licensees they require a payment of \$2 and for others \$10. It costs no more to issue a license to a milk dealer owning ten cows than to one having only two cows. See *State v. Long Branch Comrs.* 42 N. J. L. 364, 36 Am. Rep. 518; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462.

The license fee cannot be upheld on the second ground because the legislature has ex-

pressly provided a fund by general taxation, and has said that the expenses of the board of health shall be paid out of this fund.

No benefit is conferred upon the licensee.

Restriction of the number of persons engaged in the business is not a proper object in the present case.

Messrs. E. J. Cornish and W. S. Shoemaker, for defendant in error:

The object of the license fee is as a means of regulating the business and preventing the sale of adulterated, impure, and unhealthy milk.

Tiedeman, Pol. Powers, p. 276.

There is nothing in the record to indicate that the license fee is excessive.

Tiedeman, Pol. Powers, § 28, p. 274; *People v. Mulholland*, 82 N. Y. 824, 27 Am. Rep. 568; *Chicago v. Bartee*, 100 Ill. 57; *Kinsley v. Chicago*, 124 Ill. 359; Dill. Mun. Corp. 442; 3 Beach, Pub. Corp. 1893, § 1255; *Cincinnati v. Buckingham*, 19 Ohio, 261; *Cincinnati v. Bryson*, 15 Ohio, 643, 45 Am. Dec. 598; Tiedeman, Mun. Corp. § 23.

Mr. George H. Hastings also for defendant in error.

Post, J., delivered the opinion of the court:

The plaintiff in error was by the district court for Douglas county found guilty of the violation of an ordinance of the city of Omaha which prohibits the selling or keeping for sale therein of milk by any person without a license. From the judgment against him, he has prosecuted proceedings in error to this court. The proposition upon which he relies for a reversal of the judgment of the district court is that the ordinance in question, in so far as it exacts the payment from him of a license fee of \$10, is in excess of the authority conferred upon the city, and therefore void. The ordinance is too voluminous to be set out at length in this opinion, but its scope and character are indicated by the title thereof, to wit, "An ordinance regulating the production and sale of milk in the city of Omaha, and providing for the appointment of a milk inspector, and prescribing his duties." The provision thereof with respect to license fees is as follows: "Every person, firm, or corporation producing milk or cream for sale and selling the same in the city of Omaha and every person, firm, or corporation selling or offering for sale or keeping for sale any milk or cream from any milk depot, store, or other establishment or place of business in the city of Omaha and every person selling or delivering milk from any wagon or other vehicle within the city of Omaha shall pay a license fee of \$10.00 per year. Provided that when more than one wagon or other vehicle is used by any person, firm, or corporation in the delivery of milk or cream in the city of Omaha an additional license fee of \$10.00 per year shall be paid for each additional wagon; and provided further that any person owning only one cow and delivering milk by hand shall pay a license fee of \$2.00 per year and any person owning only two cows and delivering milk by hand, or any person delivering milk by hand from any milk depot, store, or other establishment or place of business shall pay a license of \$5.00 per year." The sections

of the city charter which relate to the subject under consideration are: Section 41, chap. 12a, Comp. Stat., entitled "Cities of the Metropolitan Class," by which it is provided that "the mayor and council shall have power . . . to provide for, license, and regulate the inspection and sale of meats, poultry, fish, milk, vegetables, and all other provision or articles of food exposed or offered for sale in said city." Section 80, which provides for a board of health, which "shall have control and supervision of meats, food, and drinks and the inspection, condemnation, use, sale, and disposition thereof. . . . Inspectors of meats, milk, food, and of any and all matters and things relating to the sanitary condition of such city shall be under the control of said board." Section 79, providing for a system of taxation, among other purposes named, "for payment of the expenses of the board of health not exceeding one mill on the dollar valuation in any one year, taxes for said purpose to constitute a special fund therefor."

In the able brief submitted by counsel for the plaintiff in error they concede the power of the city, by ordinance, to prescribe needful and proper rules for the inspection and sale of milk and like commodities therein as a reasonable sanitary measure. They also admit the power of the city to require dealers in such commodities to procure a license, and to exact a reasonable fee therefor. But they argue that it cannot require the payment of a fee in excess of the cost of issuing the license, on the ground that such a demand is unreasonable, and therefore prohibited both by its charter and the general rules defining the powers of municipal bodies. In support of that contention, we are referred to Tiedeman, Pol. Powers, 101; *Leavenworth v. Booth*, 15 Kan. 627; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462; and *State v. Long Branch Comrs.* 42 N. J. L. 364, 36 Am. Rep. 518.

The doctrine of those authorities and many others which we have examined is that the legislature cannot authorize the power of taxation under the pretense of sanitary regulations or other exercise of the police power of the state in the interest of the public health or safety. That principle was distinctly recognized by this court in the recent case of *Smiley v. MacDonald*, 42 Neb. 5, 27 L. R. A. 540, in which the test is said to be whether the measure in question has some relation to the public welfare, and whether such is, in fact, the object sought to be attained. But by "taxation," as the term is here employed, is meant the providing of revenue for the ordinary expenses of state or municipal government. It does not follow, therefore, that an ordinance will be held void simply because it provides for a fund to be derived from license fees. Such a measure will be upheld by the courts whenever it appears to have been designed to promote the welfare of the public, and the revenue derived therefrom is not disproportionate to the cost of its enforcement and the regulation of the business to which it applies. See Cooley, Taxn. 2d ed. 598; Tiedeman, Pol. Powers, 101; Beach, Pub. Corp. 1255; *State v. Ho-*

boken, 41 N. J. L. 71; *People v. Mulholland*, 82 N. Y. 324, 37 Am. Rep. 568; *Van Baalen v. People*, 40 Mich. 258; *Chicago v. Bartes*, 100 Ill. 57; *Kinsley v. Chicago*, 124 Ill. 359. As said by Prof. Tiedeman in the section above cited: "What is a reasonable sum must be determined by the facts of each case; but, where it is a plain case of police regulation, the courts are not inclined to be too exact in determining the expense of procuring the license, as long as the sum demanded is not altogether unreasonable." And in section 23, Tiedeman Mun. Corp., the same author says: "And, although it is a judicial question whether the sum exacted is a reasonable one, a wide latitude is given to the exercise of legislative discretion in the determination of the amount of the license fee." In some of the cases cited, the courts have taken notice without proof that the fee exacted is unreasonable. For instance, in *State v. Hoboken*, *supra*, the court declared as a matter of law that a fee of \$15 for each one-horse car and \$25 for each two-horse car was unreasonable. On the other hand, in *People v. Mulholland* the fee named was not less than \$5, and not more than \$10, to be fixed by the mayor, for each wagon used in selling milk; yet it was held reasonable. And in *Kinsley v. Chicago* the ordinance which was upheld imposed a license fee of \$15 per year upon all venders of meat. In the case at bar there is a stipulation of record by the plaintiff in error to the effect that he was at the time named engaged in selling milk, as charged, in the city of Omaha, without license; and that, in case the ordinance which exacts from him a fee of \$10 is held to be valid, judgment shall be entered as on a plea of guilty. It will thus be observed that the case is submitted to us as if upon demurrer to the information. When the measure which is the subject of the ordinance is, as in this instance, clearly within the general powers of the city, the presumptions are in favor of its reasonableness; and the judicial power of the state cannot be invoked for the purpose of declaring it void unless, from the inherent character thereof or from proofs adduced, it is shown to be in fact unreasonable. See *State v. Trenton*, 53 N. J. L. 132, 11 L. R. A. 410; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Atkins v. Phillips*, 26 Fla. 281, 10 L. R. A. 158; *St. Louis v. Weber*, 44 Mo. 547; *Com. v. Patch*, 97 Mass. 221; Parker & W. Public Health, 312.

By an application of that rule to the case before us, we reach the conclusion that the ordinance assailed is a reasonable exercise of the power conferred by law upon the city. But it is, however, suggested by counsel that the rule as here stated is inapplicable to this case, since, by provision of the constitution all license money belongs to the school fund of the city, and the fees provided for cannot be applied to the purpose of enforcing the ordinance, and are therefore unnecessary and unreasonable. In this connection they refer also to the provision contained in section 79 of the city charter for the levy of a tax to defray the expenses of the board of health, and which is to constitute a special fund for that purpose.

The constitutional provision referred to is section 5, article 8, which reads as follows: "All fines, penalties, and license moneys arising under the general laws of the state shall belong and be paid over to the counties, respectively, where the same may be levied or imposed, and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or the municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue." If that provision applies to ordinances like the one here involved, and which, for the purposes of the present controversy, may be conceded, it follows that the cost of enforcing the ordinance and regulating the business of producing and selling milk must be paid from funds provided by taxation instead of

by license fees. But of what avail is that fact to the accused in this prosecution? Upon what ground can he be heard to complain because the fees realized are not applied directly to relieve the burdens which are by means of his business imposed upon the city? We take notice that provision is made by statute for the levy of a school tax by cities of the metropolitan class not exceeding 2 per cent annually upon their assessed valuation. To the extent that the school fund of the city is enriched by the proceeds of fines and licenses is the necessity for taxation diminished. The fact, therefore, that the expenses incident to an enforcement of the ordinance are payable out of a fund provided by taxation, is a matter of no consequence either to the accused or the city. That view is in accordance with the rule stated by Prof. Tiedeman, as will be observed from the foregoing citations.

It follows that *the judgment of the District Court is right, and should be affirmed.*

CALIFORNIA SUPREME COURT.

PEOPLE of the State of California, *Respts.*,
v.

Charles BUTTON, *Appt.*

(....Cal....)

1. The mere fact that a person first assaulted another whom he killed before the combat terminated does not deprive him of the right under Penal Code, § 197, to kill the other in self-defense after endeavoring to decline any further struggle.
2. One cannot rely upon self-defense for killing another whom he has assaulted in such a manner as to render him incapable of understanding the former's intention to withdraw from the conflict, although such intention is bona fide, and the other attempts to kill him with a deadly weapon.

(April 2, 1895.)

A PPEAL by defendant from a judgment of the Superior Court for San Bernardino County convicting him of manslaughter. *Reversed.*

The facts are stated in the opinion.

Messrs. Byron Waters and William A. Harris for appellant.

Messrs. W. H. H. Hart, Atty. Gen., and Frank F. Oster for the People.

Garoutte, J., delivered the opinion of the court:

The appellant was charged with the crime of murder, and convicted of manslaughter. He now appeals from the judgment and order denying his motion for a new trial. For a perfect understanding of the principle of law involved in this appeal, it becomes necessary to state in a general way the facts leading up to the homicide. As to the facts thus summarized there is no material con-

tradiction. The deceased, the defendant, and several other parties were camped in the mountains. They had been drinking, and, except a boy, were all under the influence of liquor, more or less; the defendant to some extent, the deceased to a great extent. The deceased was lying on the ground, his head resting upon a rock, when a dispute arose between him and the defendant, and the defendant thereupon kicked or stamped him in the face. The assault was a vicious one, and the injuries of deceased occasioned thereby most serious. One eye was probably destroyed, and some bones of the face broken. An expert testified that these injuries were so serious as likely to produce in the injured man a dazed condition of mind, impairing the reasoning faculties, judgment, and powers of perception. Immediately subsequent to this assault, the defendant went some distance from the camp, secured his horse, returned and saddled it, with the avowed intention of leaving the camp to avoid further trouble. The time thus occupied in securing his horse and preparing for departure may be estimated at from five to fifteen minutes. The deceased's conduct and situation during the absence of defendant are not made plain by the evidence, but he was probably still lying where assaulted. At this period of time the deceased advanced upon defendant with a knife, which was taken from him by a bystander, whereupon he seized his gun, and attempted to shoot the defendant, and then was himself shot by the defendant, and immediately died. There is also some further evidence that deceased ordered his dog to attack the defendant, and that defendant shot at the dog, but this evidence does not appear to be material to the question now under consideration.

Upon this state of facts, the court charged the jury as to the law of the case, and declared to them in various forms the principle

NOTE.—For the law of self-defense in general, see *note to Drysdale v. State* (Ga.) 6 L. R. A. 424, 28 L. R. A.

of law which is fairly embodied in the following instruction: "One who has sought a combat for the purpose of taking advantage of another may afterwards endeavor to decline any further struggle; and, if he really and in good faith does so before killing the person with whom he sought the combat for such purpose, he may justify the killing on the same ground as he might if he had not originally sought such combat for such purpose, provided that you also believe that his endeavor was of such a character, so indicated as to have reasonably assured a reasonable man that he was endeavoring in good faith to decline further combat, unless you further believe that in the same combat in which the fatal shot was fired, and prior to the defendant's endeavoring to cease further attack or quarrel, the deceased received at the hands of the defendant such injuries as deprived him of his reason or his capacity to receive impressions regarding defendant's design and endeavor to cease further combat." It is to that portion of the foregoing instruction relating to the capacity of the deceased to receive impressions caused by the defendant's attack upon him that appellant's counsel has directed his assault, and to which our attention will be addressed. The recital of facts indicates to some extent, at least, that the assault upon deceased was no part of the combat subsequently arising in which he lost his life; yet the events were so closely connected in point of time that the court was justified in submitting to the jury the question of fact as to whether or not the entire trouble was but one affray or combat. Section 197 of the Penal Code, wherein it says in effect that the assailant must really and in good faith endeavor to decline any further struggle before he is justified in taking life, is simply declarative of the common law. It is but the reiteration of a well-settled principle, and in no wise broadens and enlarges the right of self-defense, as declared by courts and text-writers ever since the days of Lord Hale. It follows that the declaration of the code above cited gives us no light upon the matter at hand, and from an examination of many books and cases we are unable to find a single authority directly in point upon the principle of law here involved. It is thus apparent that the question is both interesting and novel.

The point at issue may be made fairly plain by the following illustrations: If a party should so violently assault another by a blow or stroke upon the head as to render that party incapable of understanding or appreciating the conditions surrounding him, and the party assailed should thereupon pursue the retreating assailant for many hours and miles with a deadly weapon and with a deadly intent, and upon overtaking him should proceed to kill him, would the first assailant, the party retreating, be justified in taking the then aggressor's life in order to save his own? In other words, did the first assault producing the effect that it did, debar defendant (after retreating under the circumstances above depicted) from taking his opponent's life, even though that opponent at the time held a knife at his

throat with deadly intent? Or, putting it more concisely, did the aggressor by his first assault forfeit his life to the party assaulted? Or, viewing the case from the other side, should a man be held guiltless who without right assaults another so viciously as to take away his capacity to reason, to deprive him of his mind, and then kill him because, when so assaulted, his assailant is unable to understand that the attacking party is retreating, and has withdrawn from the combat in good faith? In other words, may a defendant so assault another as to deprive him of his mind, and then kill him in self-defense, when he is in such a condition that he is unable to understand that his assailant has withdrawn in good faith from the combat? In order for an assailant to justify the killing of his adversary, he must not only endeavor to really and in good faith withdraw from the combat, but he must make known his intentions to his adversary. His secret intentions to withdraw amount to nothing. They furnish no guide for his antagonist's future conduct. They indicate in no way that the assault may not be repeated and afford no assurance to the party assailed that the need of defense is gone. This principle is fairly illustrated in Hale's Pleas of the Crown (page 482), where the author says: "But, if A. assaults B. first, and upon that assault B. reassaults A., and that so fiercely that A. cannot retreat to the wall, or other *non ultra*, without danger of his life, nay, though A. falls upon the ground upon the assault of B., and then kills B., this shall not be interpreted to be *se defendendo*." The foregoing principle is declared sound for the reason that, though A. was upon the ground and in great danger of his life at the time he killed B., still he was the assailant, and at the time of the killing had done nothing to indicate to the mind of B. that he had in good faith withdrawn from the combat, and that B. was no longer in danger. In *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 470, in speaking on this question, the court said: "There is every reason for saying that the conduct of the accused relied upon to sustain such a defense must have been so marked in the matter of time, place, and circumstance as not only clearly to evince the withdrawal of the accused in good faith from the combat, but also such as fairly to advise his adversary that his danger had passed, and to make his conduct thereafter the pursuit of vengeance, rather than measures taken to repel the original assault." It is also said in *State v. Smith*, 10 Nev. 106, citing the Ohio case: "A man who assails another with a deadly weapon cannot kill his adversary in self-defense until he has fairly notified him by his conduct that he has abandoned the contest; and, if the circumstances are such that he cannot so notify him, it is his fault, and he must take the consequences." It is therefore made plain that knowledge of the withdrawal of the assailant in good faith from the combat must be brought home to the assailed. He must be notified in some way that danger no longer threatens him, and that all fear of further harm is groundless. Yet, in con-

sidering this question, the assailed must be deemed a man of ordinary understanding. He must be gauged and tested by the common rule,—a reasonable man. His acts and conduct must be weighed and measured in the light of that test, for such is the test applied wherever the right of self-defense is made an issue. His naturally demented condition will not excuse him from seeing that his assailant has withdrawn from the attack in good faith. Neither his passion nor his cowardice will be allowed to blind him to the fact that his assailant is running away, and all danger is over. If the subsequent acts of the attacking party be such as to indicate to a reasonable man that he in good faith has withdrawn from the combat, they must be so held to so indicate to the party attacked. Again the party attacked must also act in good faith. He must act in good faith towards the law, and allow the law to punish the offender. He must not continue the combat for the purpose of wreaking vengeance, for then he is no better than his adversary. The law will not allow him to say, "I was not aware that my assailant had withdrawn from the combat in good faith," if a reasonable man so placed would have been aware of such withdrawal. If the party assailed has eyes to see, he must see and if he has ears to hear, he must hear. He has no right to close his eyes or deaden his ears.

This brings us directly to the consideration of the point in the case raised by the charge of the court to the jury. While the deceased had eyes to see and ears to hear, he had no mind to comprehend, for his mind was taken from him by the defendant at the first assault. Throughout this whole affray, it must be conceded that the deceased was guilty of no wrong, no violation of the law. When he attempted to kill the defendant, he thought he was acting in self-defense, and, according to his lights, he was acting in self-defense. To be sure those lights supplied by a vacant mind, were dim and unsatisfactory; yet they were all the deceased had at the time, and not only were furnished by the defendant himself, but the defendant in furnishing them, forcibly and unlawfully deprived the deceased of others which were perfect and complete. But where does the defendant stand? It cannot be said that he was guilty of no wrong, no violation of the law. It was he who made the vicious attack. It was he who was guilty of an unprovoked and murderous assault. It was he who unlawfully brought upon himself the necessity for killing the deceased. It cannot be possible that in a combat of this character no crime has been committed against the law. Yet the deceased has committed no offense. Neither can the defendant be prosecuted for an assault to commit murder, for the assault resulted in the commission of a homicide as a part of the affray. For these reasons, we consider that the defendant cannot be held guiltless. Some of the earlier writers hold that one who gives the first blow cannot be permitted to kill the other, even after retreating to the wall, for the reason that the necessity to kill was brought upon himself. 1 Hawk. P. C. 87. While the humane doctrine, and espe-

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cially the modern doctrine, is more liberal to the assailant, and allows him an opportunity to withdraw from the combat, if it is done in good faith, yet it would seem that, under the circumstances here presented, the more rigid doctrine should be applied. The defendant not only brought upon himself the necessity for the killing, but, in addition thereto, brought upon himself the necessity of killing a man wholly innocent in the eyes of the law; not only wholly innocent as being a person naturally *non compos*, but wholly innocent by being placed in this unfortunate condition of mind by the act of the defendant himself. We conclude, therefore, that the instruction contains a sound principle of law. The defendant was the first wrongdoer. He was the only wrongdoer. He brought on the necessity for the killing, and cannot be allowed to plead that necessity against the deceased, who at the time was *non compos* by reason of defendant's assault. The citations we have taken from Hale, the Ohio case, and the Nevada case all declare that the assailant must notify the assailed of his withdrawal from the combat in good faith before he will be justified in taking life. Here the defendant did not so notify the deceased. He could not notify him, for by his own unlawful act he had placed it out of his power to give the deceased such notice. Under these circumstances he left no room in his case for the plea of self-defense.

2. The court gave the following instruction to the jury as to the law bearing upon the facts of the case: "And no man by his own lawless acts can create a necessity for acting in self-defense, and then upon killing the person with whom he seeks the difficulty, interpose the plea of self-defense, subject to the qualification next hereinafter set out. The plea of necessity is a shield for those only who are without fault in occasioning it and acting under it. The court instructs the jury that if you are satisfied that there was a quarrel between the defendant and deceased, in which the defendant was the aggressor, and first assaulted the deceased by means or force likely to produced and actually producing great bodily injury to the deceased, and that the defendant thereafter in the same quarrel fatally shot the deceased, then you must find the defendant guilty, subject to this qualification." This instruction appears to have been given subject to some qualification, and as to the extent and character of the qualification the record is not plain. But, whatever it may have been, the vice of the instruction could not be taken away. The instruction is bad law, and no explanation or qualification could validate it. It is not true that the plea of necessity is a shield for those only who are without fault in occasioning it and acting under it. As we have already seen, this is the rigid doctrine declared by *Sergeant Hawkins*, but not the humane doctrine of *Lord Hale* and modern authority. The latter portion of the instruction is in direct conflict with the *Stoffer Case*, already cited, where the declaration of the same principle in a somewhat different form caused a reversal of the judgment. It was there said: "If this is a sound view of

the matter, the condition of the accused would not have been bettered if he had fled for miles, and had finally fallen down with exhaustion, provided Webb was continuous in his efforts to overtake him. But this view is consistent with neither the letter nor the spirit of the legal principle." The instruction assumes that, if the defendant was the aggressor, the quarrel could subsequently assume no form or condition whereby the defendant would be justified in taking the life of the party assailed. The law of self-defense is to the contrary, and is clearly recognized to the contrary by the provision of the penal code to which we have already referred.

8. The court also gave the jury the following instruction to guide them in their deliberations: "If you find from the evidence that, prior to the time of the shooting of the deceased by the defendant, they had a quarrel and altercation, and that the defendant stamped or kicked the deceased in the face, and that defendant thereafter really and in good faith, although he was the assailant, endeavored to decline any further struggle before the homicide was committed, and that [after the first assault had ceased, and there had an interval elapsed between said first assault and the final assault, making said assaults respectively, although in some degree related to each other, yet substantially distinct transactions, each attended with its own separate circumstances] the deceased procured his gun, and made such an attempt to shoot defendant as gave the defendant reasonable ground to apprehend and fear the deceased was about to take his life, or do him great bodily injury, and that, acting under such reasonable apprehension alone, defendant shot the deceased, then you will acquit the defendant; and this will be your duty, notwithstanding the defendant may have been in the wrong in first assailing or attacking the deceased." That portion of the charge inclosed in brackets embodied a modification of the original charge, as asked by counsel, and we think should not have been inserted. It had a tendency to mislead the jury, and the instruction was perfectly sound without it. The question as to the capacity of the deceased's mind to understand and appreciate was not an element involved in this charge, and with that the court was not then dealing; but, by the modification, it deprived the defendant of the right to go before the jury upon the plea of self-defense, if there was but one assault which led up to the homicide. The right of defendant to act in self-defense was in no way dependent upon the commission of two assaults. If there was but one assault which caused the combat, even though that assault was a part of the combat, and was made by the defendant, still he had the right of self-defense if his subsequent conduct was such as to indicate to the assaulted party that he had withdrawn in good faith from the struggle. The effect of the modification was to plainly intimate to the jury that, if the whole of the affray was but one connected quarrel or altercation, then the defendant under no possible set of circumstances could be justified in law in

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killing his adversary. This is wrong. As to the true solution of the question by the jury which the court was then discussing, it was entirely immaterial whether or not there was one or two assaults.

We think the questions we have discussed dispose of all material matters raised upon the appeal.

For the foregoing reasons, *the judgment and order are reversed*, and the cause remanded for a new trial.

We concur: *Beatty, Ch. J.; Harrison, J.; McFarland, J.; Van Fleet, J.*

Kathryn SINNOTT, *Resp't.*,

v.

J. F. COLOMBET, Treasurer of San José,
App't.

(.....Cal.....)

1. The significance of the word "kindergarten" is within judicial cognizance.
2. Kindergarten classes may be instructed in separate buildings and no studies except those of the kindergarten system taught in such classes, under Pol. Code, § 1606, providing that other studies may be authorized by the board of education but not to the neglect or exclusion of studies named in section 1605, as section 1605 only requires those branches of study "in the several grades in which each may be required."
3. A certificate to teach in a kindergarten is sufficient under Pol. Code, § 1771, as a certificate to teach a branch of education required by a city board of education where such board has adopted the kindergarten as part of the public school system, and no other certificate need be obtained in such case.
4. A fund for the support of primary and grammar schools may be lawfully used to pay salaries of teachers in a kindergarten which has been duly adopted as part of the public primary schools, although when the money was raised by tax the kindergarten had no existence in those schools.

(April 29, 1895.)

A PPEAL by defendant from a judgment of the Superior Court for Santa Clara County awarding a mandamus to compel him to pay money alleged to be due to plaintiff for services as teacher in the public schools. *Affirmed.*

The facts are stated in the commissioner's opinion.

Messrs. Morehouse, Tuttle & Richards for appellant.

Messrs. Wilcox & Patton and H. A. Mason for respondent.

Britt, C., filed the following opinion:

Appeal by defendant from a judgment awarding a peremptory writ of mandate requiring him, as treasurer of the city of San José, to pay a warrant drawn on him by the

NOTE.—For kindergartens as part of the public school system, see *Re Kindergarten Schools* (Colo.) 19 L. R. A. 402.

board of education of the school district constituted by, and in turn comprising, said city, in favor of plaintiff for services rendered by her as teacher in a certain kindergarten school of the district. From the agreed statement of facts on which the case was submitted in the court below, the following matters, among others, appear: Said board of education is chosen under the provisions of the charter of the city of San José (Stat. 1873-74, p. 395), as required by section 1616 of the Political Code. The power to employ teachers in the district is vested in such board exclusively. Since November 25, 1893, plaintiff has been the holder of a special certificate issued to her by the county board of education of Santa Clara county, by the terms of which plaintiff is "entitled to teach any kindergarten class of the public schools" in said county. She has no other teacher's certificate. On December 8, 1893, said city board of education adopted the following order: "Resolved, that the kindergarten system be, and the same is hereby, adopted as a special study to be taught in the public schools of the school district of the city of San José, in the county of Santa Clara, and that classes be organized wherein such special study shall be solely taught. Be it further resolved, that no teacher be employed to teach such classes, and to teach such special study, unless such teacher shall be provided with a special certificate, issued by the proper authority, authorizing the holder thereof to teach the kindergarten system as a special study in the public schools of said school district, and to teach kindergarten classes in said schools; and that no other certificate be required." Thereupon said city board of education caused kindergarten classes to be organized wherein such special study is solely taught in separate school buildings devoted to that purpose. About December 11, 1893, plaintiff was employed by said city board as teacher in one of the kindergarten schools so established, for a term commencing on that date, and to end June 30, 1894, and performed the duties pertaining to such employment from the commencement thereof to January 5, 1894, and earned during that time, at the agreed rate of compensation, the sum of \$67.50. For this sum said board drew its warrant in plaintiff's favor on defendant, as treasurer of the city, against the fund in his hands known as the "Grammar and Primary School Fund," which warrant, upon presentation, he refused to pay; hence this proceeding. Said fund consists of all moneys levied and collected by the city of San José for school purposes within its limits other than for the maintenance of high schools. Defendant, as treasurer, holds money belonging to such fund, several thousands of dollars in amount, which was collected by the municipal authorities as a tax upon the property within the city for the purposes of said fund. At the time of the levy of such tax those authorities (the common council, we assume) "failed, refused, and neglected to levy any separate tax for kindergarten schools, as such, in the city." Appellant maintains, as we understand his argument, that the board of education had no power to adopt the reso-

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lution of December 8, 1893; that, if it had such power, still the kindergarten classes form no part of the grammar and primary school system of the district, and hence moneys raised for the support of the grammar and primary schools cannot be used to pay for instruction of the kindergarten classes; and, if it be held that the kindergarten is part of the primary schools, yet the judgment is wrong, because plaintiff had no certificate authorizing her to teach in those schools.

The case does not disclose the character of instruction had in view by the terms of the resolution, further than the same may be inferred from the word "kindergarten;" but we think we may take judicial cognizance of its significance, as the supreme court of Colorado has apparently done. *Re Kindergarten Schools*, 18 Colo. 234, 19 L. R. A. 469. Thus informed, we find that the term "kindergarten" (meaning literally "a garden of children") was devised by Friedrich W. A. Froebel, German philosopher and educator, to apply to a system which he elaborated for the instruction of children of very tender years. "Children's garden" ought to be taken in its allegorical sense. The child is a plant, the school is a garden, and Froebel calls teachers "gardeners of children." Compayré, *History of Pedagogy*, § 537, Payne's translation. "He saw that the child's inborn desire for activity manifests itself in play, and that children love to play together. His system, therefore, guides this inclination into organized movement, and invests the games (unknown to the child) with an ethical and educational value, teaching, besides physical exercises, the habits of discipline, self-control, harmonious action and purpose, together with some definite lesson of fact." Sennenschein's *Cyclopaedia of Education*, p. 169. The law governing the board warranted its action in adopting such a system into the methods of the schools under its supervision, whether we look to the same as written in the city charter or in the political code, and it need not be determined which controls, if either is exclusive of the other, as seems to be held by the appellant. The city forms a school district governed by the city board of education. Pol. Code, § 1576, amended Stat. 1893, p. 245. It is declared by the charter that the board of education shall have power "to make, establish, and enforce all necessary and proper rules and regulations, not contrary to law, for the government and management of the public schools within the said city, and for carrying into effect laws relating to education, . . . and to determine the course of study and mode of instruction to be pursued in said schools." Stat. 1873-74, p. 415. By section 1665 of the Political Code, amended in 1893, instruction in certain branches of study is made compulsory "in the several grades in which each may be required;" and section 1666, also then amended, reads: "Other studies may be authorized by the board of education of any county, city, or city and county; but no such studies shall be pursued to the neglect or exclusion of the studies in the preceding section specified." Stat. 1893, p. 254. Section 1617, subd. 9, and section 1663 (amended

in 1893), of the same Code, are controlling in the city of San José as elsewhere. They provide for the admission of children to kindergarten classes "in cities and towns in which the kindergarten has been adopted, or may hereafter be adopted, as part of the public primary schools" (Stat. 1893, pp. 249, 253, 254), thus recognizing that the proper governing body may adopt the kindergarten as an integral part of the primary schools.

Since the "kindergarten system" has for its object the purposes above briefly indicated, and as those purposes seem appropriate for pursuit in the primary schools, and as the law evidently contemplates that such system, when adopted, shall be regarded "as part of the public primary schools," we consider that the kindergarten classes mentioned in the resolution of the board of education became, when organized, classes in the primary schools of the district. The mere fact that such classes were instructed in separate buildings, and that the special study mentioned in the resolution was "solely taught" in those classes, does not render such course obnoxious to the restrictive clause of section 1666, Pol. Code, as supposed by counsel for appellant. It may well be that the branches, some or all of them, specified in the preceding section 1665, are not, and should not be, required in the grade to which the kindergarten classes properly belong, and, if so, are not compulsory under that section; besides, *non constat* but that the children in the kindergarten who have sufficient capacity may receive in other classes and other buildings instruction in such of the studies named in section 1665 as their minds are prepared to comprehend.

But it does not follow, because the provision made by the board for the kindergarten system incorporates such system into the primary schools of the district, that, therefore, the plaintiff must have a certificate authorizing her to teach the whole primary school course before she could be eligible to employment as a teacher in the kindergarten. Under section 1771, Pol. Code, the county board of education has authority to grant certificates, valid for six years, which entitle the holder to teach such special branches as may be required by city boards of education. In this instance the plaintiff held a certificate entitling her to teach kindergarten classes, and the city board has required instruction appropriate to such classes as a "special branch." We see no conflict between the portion of said section 1771 referred to and sections 6 and 7* of article 9 of the Constitution of the state. The certificate of fitness to teach any kindergarten class in the case before us is a certificate of fitness to teach a special branch of study in the primary schools; she was employed to teach that

branch, and none other, and could not have been lawfully required to give instruction in any other; and no provision of law is brought to our attention which requires the plaintiff to hold a certificate of qualification to teach any subject which she was not legally bound to teach if pupils should offer themselves for instruction therein. The fund in the hands of appellant, and against which the warrant in plaintiff's favor was drawn, is subject to the disposition of the board of education for the payment of the proper expenses, including teachers' salaries, of the grammar and primary schools of the city; and since as we hold the kindergarten is, in virtue of the order of the board, incorporated as a substantive part of the primary schools, the fund was lawfully drawn upon to pay the compensation due the plaintiff for teaching the kindergarten classes (see sections 61-64 of the city charter; Stats. 1873-74, p. 417), and it is immaterial that the kindergarten classes or system had no existence in those schools at the time the tax to raise the fund in question was levied.

The judgment should be affirmed.

We concur: **Haynes, C.; Belcher, C.**

Per Curiam:

For the reasons given in the foregoing opinion the judgment is affirmed.

Giovanni GIRAUDI, *Resp't.*,
v.

ELECTRIC IMPROVEMENT CO., OF SAN
JOSÉ, *Appt.*

(.....Cal.....)

1. **Placing electric light wires over the metallic roof of a hotel where persons may come in contact with them, without raising them high enough to prevent such contact, is sufficient proof of negligence in case of injury to a person by an electric shock from such wires.**
2. **Want of ordinary care of an employe in a hotel in going out on a metallic roof in a dark night with his employer to secure signs which seemed to be endangered during a heavy rain, and coming in contact with electric light wires which he knew were above the roof, but which he may not have known to be dangerous, is a question for the jury.**
3. **One who is ignorant of the danger that may result from contact with electric light wires over the roof of a building in which he is employed, is not required to exercise the same degree of care that would be required if he knew the danger.**
4. **Allowing a witness to give an opinion as to negligence is not ground for reversal, if the facts were fully shown, and the negligence fully proven by other evidence.**

NOTE.—For dangerous electric wires on roofs, see also *Clements v. Louisiana Electric Light Co. (La.)* 16 L. R. A. 43; *Illingsworth v. Boston Electric Light Co. (Mass.)* 25 L. R. A. 532; and *Hector v. Boston Electric Light Co. (Mass.)* 25 L. R. A. 554.

*Section 6 makes the public school system, grammar and primary, and high schools, evening schools, normal schools, and technical schools, and section 7 says: "The county superintendents and the county boards of education shall have the control of the examination of teachers and the granting of teachers' certificates within their respective jurisdictions."

5. A presumption that the public know enough of electricity to avoid the danger is not created by the mere fact that some persons use that agency.

(April 6, 1895.)

A PPEAL by defendant from a judgment of the Superior Court for Santa Clara County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. John E. Richards, for appellant:

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

Deering, Neg. § 1, p. 26; Beach, Contrib. Neg. p. 7 *et seq.*

Plaintiff knew that those electric wires were upon the roof. He knew that they crossed it from the street to the rear of the building near the point where he ascended. He knew that those wires carried the current of electricity which lighted the building below. He knew that the lights were burning at the time. He knew that the night was excessively dark and windy and rainy; that signs were being blown down and other exposed property disturbed or destroyed. He was not a stranger to the properties of electricity for he had seen it in daily use on these same premises for more than a year. Knowing all these facts, was his act in going upon the roof in the manner and at the time he did and either walking or stumbling against those wires the act of a prudent and reasonable man? We submit that it was not.

Baltimore & O. R. Co. v. Whitacre, 85 Ohio St. 627; 4 Am. & Eng. Encyclop. Law, p. 74, and cases cited in note 2; 4 Am. & Eng. Encyclop. Law, p. 22, and cases cited in note 1; 1 Shearm. & Redf. Neg. 4th ed. §§ 56, 112, note 4; Beach, Contrib. Neg. pp. 39, 40, and cases cited.

One may testify as to matters of science, as to correct methods of performing acts, but the deduction of negligence in the defendant from his evidence it is error to permit him to make.

Lawson, Expert Ev. pp. 507-515.

The public who receive the benefits of convenience and comfort from the supply of the commodity are presumed to know enough of the nature of the element to avoid the dangers which must arise out of its practical use.

1 Shearm. & Redf. Neg. § 12, and cases cited.

Messrs. D. W. Herrington and Charles Clark, for respondent:

Even if plaintiff knew the preposterous manner in which the defendant managed its business in locating the wires and leaving them without inspection, etc., it does not follow that a nonsuit should have been granted.

Mages v. North Pacific Coast R. Co. 78 Cal. 435; Thompson, Electricity, § 66.

Knowledge is a material factor in determining whether one is guilty or not of contributory negligence.

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Parrott v. Wells, 82 U. S. 15 Wall. 534, 21 L. ed. 210.

Temple, J., delivered the opinion of the court:

This action is for damages for injuries received through an electric shock caused by the negligence of defendant. Plaintiff was employed as dish washer in an hotel and restaurant at San José, kept by one Lamolle. The house was lighted by incandescent lights, furnished by defendant. The wires passed over the house from the southeast corner, where they descended from the Hensley House to the apex of the roof. At the southeast corner it was twelve feet above the roof. At the ridge of the roof the wires were eighteen inches high, and ran thence diagonally over the northern slope of the roof for sixty feet, at an average height of two feet, to a point on the north fire wall, where they descended on the outside of the wall to the transformer. Those wires were part of a circuit of 1,000 lights, and carried 1,000 volts, which was reduced at the transformer to 50. The wires were erected while plaintiff was employed at the Lamolle House. Plaintiff did not see the workmen place them over the roof, but saw where they came down the north wall. After the wires had been erected, plaintiff was on the roof for a few minutes, to assist in placing Lamolle's signs. One was at the southeast corner of the building, and one at the southwest corner. This was in the daytime, and was the only occasion on which plaintiff had been upon the roof before the accident. At that time the wires were dead, and plaintiff had no reason for taking note of them, and there is no evidence which tends to show that he did so. He got upon the roof then at the same point as upon the night of the accident, about three feet west of the place from which the wires passed down from the roof to the transformer. He reached the roof by step-ladders temporarily placed there for the purpose. When the wires were erected, Lamolle was told by the workmen of defendant that they were harmless, and he was not consulted as to their location, nor was he asked what use, if any, was made of the roof. The accident occurred in the night of February 23, 1891. It was dark, stormy, and there was a heavy fall of rain. The signs seemed to be endangered, and Lamolle went upon the roof to secure them, and requested plaintiff to accompany him. Lamolle reached the roof first, having, as he thinks, a lantern, though plaintiff testified that he did not. They desired to reach the southeast corner of the building, to do which they must necessarily go over the wires, or, passing to the west over the roof, pass under them at the southeast corner. Plaintiff, not knowing or forgetting the location of the wires, came at once in contact with them. The first contact was with his leg. By the shock he was thrown down, and when Lamolle ran to him, he found him grasping one wire with his hand. He was badly burned, both in his hand and leg. Plaintiff had judgment, and this appeal is from the judgment, and from an order refusing a new trial. The first question is, Is there evidence

which tends to show negligence on the part of defendant which contributed proximately to the injury? I think there is. Indeed, this point is not much insisted upon on this appeal. The question is, simply, Was there any evidence which it can be reasonably contended showed such neglect? If the question is open to debate, it must be left to the jury, even though there is no conflict in the evidence. The jury thought such negligence shown by a preponderance of evidence, and I think they correctly found. Defendant was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property. It would have been comparatively inexpensive to raise the wires so high above the roof that those having occasion to go there would not come in contact with them. Not to do so was sufficient proof of negligence to justify the verdict. If there was any excuse for not so locating the wires, it is on the claim that they were so covered that there was no danger in coming in contact with them. The accident itself proves that this was not sufficient, *res ipsa loquitur*. The point most insisted upon here is that plaintiff was guilty of contributory negligence; that he knew, or ought to have known, of the location of the wires, and should have taken care to avoid them. It is not a case where the doctrine of negligent ignorance can apply. Plaintiff owed defendant no duty, and no part of his employment required him to know, or gave him opportunity to know. Unless it can be held that he did in fact know, there was no evidence which even tended to show negligence on his part. He testified that he had never seen the wires before the accident, and did not know of their location. This probably means that he had no recollection of seeing them. There was no testimony as to where he went on the roof when he was there to assist in placing the signs, except that one was over the fire wall at the southeast corner, and the other at the southwest corner. He might have passed from one to the other without going near the wires. At all events he had no occasion to take note of them. He had no interest in the matter, and no reason to suppose he would ever be upon the roof again. It would be a hard measure to hold one responsible for knowing everything he might observe if he would only take notice, when he had no interest in taking heed.

Can we say then, as matter of law, and against his positive testimony, that he had notice and did know? Even had he observed the wires during his short visit to the roof, it would be a question for the jury to say whether it was the want of ordinary care for him not to have it in mind on that occasion. It is said that, if one was aware of a fact, which should have put him upon his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot it. This is true as a general proposition, but, like all other rules upon this subject, it must have a reasonable construction. To forget is not negligence, unless it shows the want of ordinary care, and it is a question for the jury. Illustra-

tions of this proposition are found in the cases of brakemen who are injured by obstructions over or near the track of the road. They have been allowed to recover, although it is shown that they knew of the obstruction, on the ground that they cannot be expected to retain at all times a complete outline of the track, and because, in the hurry of their work, they would not be likely to keep these things in mind; that is, to forget, under the circumstances, did not prove absence of ordinary care. See *Dorsey v. Phillips & C. Constr. Co.* 42 Wis. 583.

And, again, the wires over the roof were covered with insulating material, precisely as the wires in the house were. It is claimed that this was of the very best quality known, and that, if it had been perfect, it would ordinarily have rendered the wires harmless. If it was not in good condition, it was the fault of defendant, and plaintiff cannot be held to have had knowledge of its dilapidated condition. It is claimed that the fact that the wire was wet destroyed the insulation for the time. But we cannot presume that the effect of moisture is a fact generally known, and there was no evidence tending to show that plaintiff had such knowledge.

It is also suggested that plaintiff grasped the wire with such force that in its wet condition the insulation was destroyed. If so, this would not prove contributory negligence, but there is no proof of this except that, when he was found, he had hold of the wire. His testimony is that he first felt the shock in his leg, and was by such shock thrown down upon the wire. His case must here be judged by the testimony most favorable to him.

2. Plaintiff was allowed, over the objection of the defendant, to ask certain questions of an expert electrician as to what matters should be taken into consideration in locating electric wires carrying such currents as these in question, and whether it was proper or prudent management to put them so low over a metallic roof. The objection was that it was the province of the jury to determine such matters, and not a proper subject for expert testimony. The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one, or whether certain methods are prudent, but all hold that facts may be elicited from the witness from which the conclusion inevitably follows. To illustrate, in *Bemis v. Central Vermont R. Co.*, 58 Vt. 686, an expert was held not allowed to testify "that it was not prudent to use a certain hoisting apparatus with less than three men, on a stone of two tons weight." Yet the court said there might have been shown "the number of men required, danger in its use by a less number, its safety and adequacy when properly used," and added that then the jurors could as well decide for themselves. Of course, the point had been as effectively decided by the expert as though the first question had been answered. The difference is largely one as to the form of the question; and, while I do not mean to say that it is immaterial, or that such an error may never be cause for reversal, I do not think it should

be so held here. The answer of the witness gave the facts in full, and explained what methods would have been safe. All this information might have been obtained by proper questions; and then it was not very material here. The negligence of defendant was fully proven by other evidence. In fact, the defense chiefly relied upon the plea of contributory negligence. I think we may safely conclude that the defendant was not injured by the form of the question.

3. Appellant also claims error in refusing two instructions asked by him, and in giving one at the request of plaintiff.

Instruction 4, which was refused, is as follows: "With reference to the use of the agencies of nature, such as fire, steam, gas, or electricity, the court instructs you that persons employing such agencies, and introducing them into cities in the form of commodities for the public use, while held to a considerable degree of care in the service of these dangerous elements, are not required to use such extraordinary care as, while it would render the element absolutely harmless under all conditions, would also render its supply impracticable. The public, who receive the benefits of convenience and comfort from the supply of the commodity, are presumed to know enough of the nature of the element to avoid the dangers which must arise out of its practical use. The duties of the person supplying the community [commodity?] and of the public using it are reciprocal. Each may depend upon the exercise by the other of such ordinary knowledge of the character of the community [commodity?] and such common prudence in its presence as the circumstances of the time and place require." I think this instruction was properly refused. The mere fact that some persons use a dangerous agency raises no presumption that the public know enough of its nature to avoid the danger which must arise from its use; and the public, aside from the consumers using the commodity, owe no duty to those introducing it; but, on the other hand, it is the duty of those making a profit from the use of so dangerous an element as electricity to use the utmost care to prevent injury to any class of people composing the public which exists in any considerable numbers. They must protect those possessing less than ordinary knowledge of the character of the commodity. If ordinary knowledge means that of the person of average intelligence, the rule contended for would leave one half

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the community partially unprotected. It is true, when the question is as to the negligence of the defendant, he is entitled to be judged in view of the knowledge generally—that is, almost universally—possessed by the community. The instruction asked had reference only to the alleged contributory negligence of plaintiff. As to that it has been said: "As there are different classes in society, with widely different degrees of intelligence, the plaintiff was not required to exercise more care than is usual under similar circumstances among careful and prudent persons of the class to which he belongs." *Shearm. & Redf. Neg.* § 87. In *Mackay v. New York Cent. R. Co.*, 35 N. Y. 75, the court said: "You would never expect the same care and caution from the mass of ignorant laborers that is exercised by educated, grave philosophers. The mass of men would not expect it, and the law that requires it is absurd. He should be called upon for such care only as a man in his condition in life would ordinarily exert under the circumstances. Does not a juror know what that is as well as a judge? The ignorant and the unwary are entitled to the protection of the law, as well as the wise and educated. There is little justice in depriving a man of his life for not exercising more care than his capacity will allow him to exert." The same rule is applied to the case of children, lunatics, and the blind. Contributory negligence implies fault on the part of the person injured. Sometimes it is negligence to be ignorant. Such was not the case here.

The fifth instruction asked by defendant ought to have been entirely rejected. A portion was given. Of this the defendant cannot complain.

At the request of plaintiff, the court gave the following instruction: "What constitutes reasonable care must be judged by the circumstances of this case, of which you are the judge. If he is ignorant of the danger that might result from contact with these wires, a less degree of care was demanded of him than would have been required if he had been informed of such danger." This is also complained of by appellant. As applied to the facts of this case, I think it correct.

The judgment and order are affirmed.

We concur: *Beatty, Ch. J.; McFarland, J.; Harrison, J.; Garoutte, J.; Henshaw, J.; Van Fleet, J.*

MINNESOTA SUPREME COURT.

C. STEVENOT, *Respt.*,

v.

Mr. KOCH

and

EASTERN RAILWAY CO. of Minnesota,
Garnishee, *Appt.*

(.....Minn.....)

Property in the hands of a common carrier in transit to a place outside of the state**Headnote by MITCHELL, J.**

is not subject to garnishment, although it is yet within the state at the time of the service of the garnishee summons.

(May 10, 1885.)

APPEAL by the garnishee from a judgment of the Municipal Court of St. Paul holding it liable for the value of certain goods which were garnished while in its possession for transportation. *Reversed.*

The facts are stated in the opinion.

NOTE.—Liability of carriers to garnishment.

- I. *As to debts and ordinary bailments.*
 - a. *Application of ordinary garnishment laws.*
 - b. *Test of garnishability.*
- II. *As to property held for transportation.*
 - a. *While in actual transit.*
 - b. *Before and after actual transit.*

The question of the liability of the carrier to garnishment arises first with reference to debts due from it to the principal debtor and to property of the debtor in its hands for ordinary business purposes, and second with reference to property placed in its hands for the purpose of transportation. The general rule deducible from the weight of authority would seem to be that with relation to the carrier's proprietorship of its property and franchises, and with relation to its business transactions in which the ordinary relation of debtor and creditor exists, it acts in a private capacity and is subject to garnishment the same as any individual or corporation, but so far as it performs the functions of a common carrier its duties are public and it is entitled to exemption upon the same principle as that which exempts other public agencies.

General questions with relation to garnishment, however, are not deemed to be within the scope of this note, and cases in which carriers have been sought to be garnished, but which lay down rules equally applicable to any other party, have been omitted, the intent of the note being to treat such questions of garnishment only as are in some way affected by the fact that the intended garnishee is a carrier.

I. As to debts and ordinary bailments.**a. Application of ordinary garnishment laws.**

As a general rule carriers and corporations in general are held liable to garnishment with relation to debts and ordinary bailments under general statutes conferring the rights to garnish persons indebted to the principal debtor.

Thus the word "persons" used in statutes providing for garnishment in designating what shall be subject thereto includes railroad companies and other corporations. *Baltimore & O. R. Co. v. Galahue* (1855) 12 Gratt. 655, 65 Am. Dec. 254.

And that the term "persons" is sufficiently broad and comprehensive to apply to a carrier having any property, effects, or estate of another in its hands is assumed as a matter of course in *Michigan Cent. R. Co. v. Chicago & M. L. S. R. Co.* (1878) 1 Ill. App. 399; *Bates v. Chicago, M. & St. P. R. Co.* (1884) 60 Wis. 296, 50 Am. Rep. 369; *Adams v. Scott* (1870) 104 Mass. 164.

So in *Bates v. Chicago, M. & St. P. R. Co.*, *supra*, the doctrine is stated that as to debts due to the principal debtor railroads and other corporations are subject to garnishee process, the same as individuals.

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And in *Caldwell v. Stewart* (1870) 30 Iowa, 379, it was said that debts due by a municipal or political corporation are the only exceptions made to the operation of the statute respecting garnishment.

So Massachusetts Rev. Stat., chap. 109, § 6, providing that all corporations may be summoned as trustees, designs to place corporations on the same ground as individuals and does not include railroad companies incorporated under the laws of another state although in possession of leased roads within the state. *Gold v. Housatonic R. Co.* (1854) 1 Gray, 424.

Although many of the members and officers reside in the state and their books and records are kept within it. *Danforth v. Penny* (1842) 3 Met. 564.

The superintendent of a railroad, which was not a corporation however, but the sole property of the state subject to the power of the legislature at all times, was held not to be subject to garnishment, such officer being held to belong to that class of public agents such as the governor, treasurer, and the like which are not subject to that process. *Dobbins v. Orange & A. R. Co.* (1867) 37 Ga. 240.

And in *Rives v. Boulware* (1833) Dudley (Ga.) 153, it was held that a corporation not a railroad company was not subject to garnishment under Georgia Statutes of 1822 authorizing garnishment of any person or persons indebted to the defendant or who may have any money, effects, or property of the defendant in his, her, or their hands.

And in *Holland v. Leslie* (1837) 2 Harr. (Del.) 306, it was held that a corporation could not be summoned as a garnishee for the reason that as it could not make an oath the statute provided no means of compelling it to answer.

b. Test of garnishability.

The liability of a carrier to garnishment on account of debts owing to or property held belonging to another depends, as in ordinary cases, upon its direct and immediate accountability to the creditor or owner. *Baltimore & O. R. Co. v. Wheeler* (1862) 18 Md. 372.

Thus, moneys in the hands of an express company as bailee accruing to a railroad company from its earnings are subject to garnishment at suit of creditors of the railroad company. *Johnston v. Riddle* (1881) 70 Ala. 219.

And a railroad, though mortgaged to secure the payment of certain bonds, may be garnished with respect to its earnings, before foreclosure or possession taken by the trustee, where the mortgage provides that the railroad company shall be entitled to possession, and the use of the road and its rents and profits until default. *Mississippi Valley & W. R. Co. v. United States Exp. Co.* (1876) 81 Ill. 534.

And a railroad company having funds in the hands of its engineer under a contract with a contractor for construction providing that if the

Mr. C. Wellington, for appellant:

The possession which a common carrier as such has of goods in transit is not sufficient to make the carrier liable as garnishee.

Illinois Cent. R. Co. v. Cobb, 48 Ill. 402; *Bates v. Chicago, M. & St. P. R. Co.* 60 Wis. 296, 50 Am. Rep. 869; *Stanley v. Raymond*, 4 Cush. 314; *Cooley v. Minnesota Transfer R. Co.* 53 Minn. 827; *Western R. Co. v. Thornton*, 60 Ga. 300; *Michigan Cent. R. Co. v. Chicago & M. L. S. R. Co.* 1 Ill. App. 399.

Mr. Alva Hunt, for respondent:

Gen. Stat. 1878, § 164, is as follows: "The service of the summons upon the garnishee shall attach and bind all the property, money, or effects in his hands, or under his control,

belonging to the defendant, . . . to respond to final judgment in the action."

The statute does not make any distinction between common carriers and other companies or individuals, and none should be made.

Adams v. Scott, 104 Mass. 184; *Jewett v. Bacon*, 6 Mass. 60.

Mitchell, J., delivered the opinion of the court:

It appears that the property for which the plaintiff seeks to hold the garnishee liable was, at the time of the service of the summons, in the possession of the garnishee, merely as common carrier, for transportation from St. Paul, in this state, to West Superior, Wis., the place

contractor shall fail to furnish evidence within a stated time that all labor under the contract for a specified time had been paid for then the engineer may apply the amount due to the payment of such labor, is not subject to garnishment on account thereof at suit of a creditor of the contractor, where he has failed to furnish such evidence of payment. *Taylor v. Burlington & M. R. Co.* (1867) 5 Iowa, 114.

And a railroad company which employs a contractor to procure its right of way at a fixed price per mile, who condemns a tract of land in the name of the company, is the party liable to the land owner for compensation, and may be garnished by a judgment creditor of the land owner therefor, and where the amount is paid to the sheriff and the land owner appeals and the company is garnished by a creditor of the land owner, the contractor is bound to take notice of the garnishment, and his payment of an additional sum to the land owner in settlement of the appeal does not exonerate the company from liability as garnishee for the additional sum in excess of the award thus admitted to have been due to the land owner. *Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co.* (1883) 62 Iowa, 494.

So a corporation doing business in the state may be summoned as garnishee with respect to its own stock belonging to a stockholder on suit by a creditor of such stockholder. *Chesapeake & O. R. Co. v. Paine* (1877) 29 Gratt. 502.

And a garnishment of a ferry company under contract to deliver certain of its mortgage bonds to a trustee for the benefit of a debtor, before the delivery was made, was upheld in *Marble Falls Ferry Co. v. Spidler* (1864) (Tex.) 25 S. W. Rep. 965.

And in *Ware v. Gowen* (1876) 65 Me. 534, a railroad company was held chargeable as trustee at suit of a creditor of an employé to whom it was indebted the case turning on a question as to whether or not the indebtedness was due absolutely.

So in *Bigelow v. York & C. R. Co.* (1858) 37 Me. 320, the question whether a railroad company which has contracted to issue stock certificates to the debtor is chargeable as trustee was raised, but the case was decided on other grounds.

Garnishment cannot have the effect, however, of changing the nature of a contract between the garnishee and the defendant, or of preventing the garnishee from performing a contract with a third person. *Baltimore & O. R. Co. v. Wheeler* (1863) 15 Md. 372.

And when two connecting railroads have mutual dealings with each other and establish a system of through rates agreeing either expressly or by implication for a mutual course of dealing that each should receive and advance for the other, the relation of debtor and creditor between them, and the consequent right of a creditor of one to garnish the other depends upon the terms and conditions on which such transactions were conducted. *Ibid.* 28 L. R. A.

So one of two railroad companies possessing connecting lines between which running arrangements exist, such as are usually adopted by connecting lines, whereby each receives from the other carloads of freight and transports them to their destination returning the cars after discharging the freight, is not liable to garnishment at the suit of a creditor of the other by reason of cars thus received. *Michigan Cent. R. Co. v. Chicago & M. L. S. R. Co.* (1878) 1 Ill. App. 399.

And a railroad company bound by contract with other railroad companies, all of whose roads form a connecting line, to settle and pay accounts monthly with the company whose road adjoins its own, is not liable as trustee in foreign attachment of such adjoining company for a sum found due it, where it was not found due it as its own property but was to be paid it as the earnings and property of the other companies which were parties to the agreement and for which it was in turn liable to them. *Chapin v. Connecticut River R. Co.* (1860) 16 Gray, 69.

II. As to property held for transportation.

a. While in actual transit.

There is a conflict of authority as to whether property in the hands of a carrier in actual transit is subject to garnishment. The tendency, however, would seem to be toward holding it exempt, though in many of the cases the courts have placed their decisions denying the right to garnish upon other grounds, avoiding the direct question as to exemption from garnishment, though arguing in its favor.

Thus in *Illinois Cent. R. Co. v. Cobb* (1868) 48 Ill. 402, it was held that a railroad company cannot be held liable to judgment on the process of garnishment on the ground that it had property *in transitu* on its route consigned to the principal debtor at the time of the issue of the writ, at least where at the time of its issuance and service the property had left the county where it was originally situated.

But this holding is placed upon the ground that it is not the business or to the interest of the carrier to know to whom the various articles it carries belong, nor should it be required of it that conflicting claims to the property intrusted to it should be adjusted through controversies, the burden, annoyance, and expense of which it must bear, which ground would have supported the holding equally well without the qualification. *Ibid.*

So in *Michigan Cent. R. Co. v. Chicago & M. L. S. R. Co.* (1878) 1 Ill. App. 399, set forth *supra*, under heading, *Test of garnishability*, turning upon the question of the right to garnish a railroad company with respect to cars of a connecting carrier in its possession, it was argued that considerations of public policy prevent the construction of the Illinois statutes providing for summoning as garnishees "all persons" so as to include carriers having goods in their hands for transportation though

of consignment; that the car in which the property was formed a part of a regular train operated in transporting freight between the places named; that the train was already made up, and was standing on a siding in St. Paul, ready to start for Superior; that thereafter the property was transported to West Superior, and there delivered to the consignee. We do not deem important the fact that the train had not yet moved out of the St. Paul yard. The property was none the less in the possession of the garnishee, as common carrier, for transportation to the place of consignment. In contemplation of law, it was in transit. The courts have not infrequently been confronted with the question whether a common carrier can be held liable to judgment on the process

of garnishment merely on the ground that it may, at the time of the service of the process, have had property in transit on its route belonging to the defendant debtor. The objections, on grounds both of public policy and of injustice to the carrier, to holding the carrier liable under such circumstances, have been fully recognized by the courts, and have led them, notwithstanding the broad language of the statutes, to deny or limit the liability of the carrier under such circumstances. See *Bates v. Chicago, M. & St. P. R. Co.* 60 Wis. 296, 50 Am. Rep. 369; *Illinois Cent. R. Co. v. Cobb*, 48 Ill. 402. In passing on the question, the courts have not, as a rule, gone further than was necessary for the purpose of deciding the particular case under consideration, and hence

the term "all persons" is sufficiently broad and comprehensive for the purpose of charging any one having any property, effects, or estate of another in his hands, upon the ground that a common carrier exercises a public employment, and that nothing can excuse it from delivery at the place of destination except the act of God or the public enemy, and that therefore the same reasons which exempt public officers and agents should exempt carriers whenever the application of the statute would interfere with the performance of their public duties.

And in *Bates v. Chicago, M. & St. P. R. Co.* (1884) 60 Wis. 296, 50 Am. Rep. 369, the court laid down the positive rule quoting and adopting the reasons given in *Illinois Cent. R. Co. v. Cobb*, *supra*, that a common carrier cannot be held liable as a garnishee for personal chattels in its possession in actual transit when the process is served, and that public policy and the proper discharge of the duties imposed upon common carriers of personal chattels placed in their possession for carriage require their exemption from garnishment with respect thereto, in the absence of any positive legislative declaration subjecting them thereto even though the general language used in the statute authorizing garnishment is broad enough to include them.

But the court stated that this question was not absolutely necessary to the determination of the case, and that it was considered because of its great importance, the points given precedence in the opinion and upon which the case must have turned being that property in the hands of a carrier or other bailee outside of the state is not subject to garnishment within it. *Ibid.*

And that when garnishee process is served upon one agent of a railroad company while the property of the debtor with respect to which it was issued is in the actual possession of another agent at another place some distance away who delivers the property to the party entitled to receive it before the agent served can with reasonable diligence notify him to retain it, the company is not liable as garnishee. *Ibid.*

So in *Western R. Co. v. Thornton* (1878) 66 Ga. 300, it was held that a garnishment issued by the courts of one state to a railroad company which was a corporation of another state is not binding upon it as to a trunk of a passenger en route with the passenger in the latter state at the time of the service over the company's road running through both states as the trunk was not then within the reach of process of the courts of that state, the question whether the baggage of a passenger on a railway train was subject to garnishment having been raised but not decided.

And the rule is laid down in Iowa that garnishment process served within the state upon a resident common carrier will not reach property not actually within but in course of transportation by

the carrier to a point without the state. *Montrose Pickle Co. v. Dodson & H. Mfg. Co.* (1888) 2 L. R. A. 417, 76 Iowa, 172.

And in Kentucky that an attachment served upon a railroad company creates no lien upon property not within the county, where the order of attachment was in the hands of the officer. *Sutherland v. Second Nat. Bank of Peoria* (1882) 78 Ky. 260.

So in Pennsylvania the rule is that a carrier which receives goods from another carrier to be delivered to the consignee is not presumed to know that they are the property of the shipper so as to render an attachment served on it as garnishee without actual seizure of any goods effective as notice to retain them to answer the purposes of the attachment. *Bingham v. Lamping* (1856) 26 Pa. 340, 67 Am. Dec. 418.

In this case it was said that the utmost effect that can be given to the service of an attachment on a carrier as garnishee is to treat it as a notice to the garnishee to retain, in order to answer the purposes of the attachment, any goods of the defendant that may be in or may come into its hands, and the duty imposed upon it by such notice is that it shall not allow any goods which it knows, or which under the law it should know, to be the property of the defendant to pass out of its hands. *Ibid.*

And Pennsylvania Act of April 12, 1855, providing that goods in transit shall not be subject to attachment when beyond the limits of the commonwealth, does not sanction or authorize a service upon the carrier in one part of the state while the goods are in the hands of its agents and servants in another part, and it is not held bound for the goods by such service. Where the shipment is in distinct parcels an actual seizure must be made, though a seizure of a part would bind the whole when it came to hand. *Pennsylvania R. Co. v. Pennock* (1865) 51 Pa. 244.

But the court said that in attachments of debts and the like, or of property passing through the hands of the garnishee, no doubt accumulations after notice to the garnishee would be bound. Actual seizure is not required, for it is not in contemplation of law possible. *Ibid.*

And Massachusetts Rev. Stat., chap. 109, § 24, providing that when any person who is summoned as trustee is bound by contract to deliver any specific goods to the principal defendant at any certain time or place, he shall not be compelled by reason of the foreign attachment to deliver them at any other time or place, is applicable only to contracts for delivery within the state, and one who has a contract to deliver goods at a place without the state cannot be charged as trustee of the person to whom the delivery is to be made. *Clark v. Brewer* (1866) 6 Gray, 320.

So in Michigan a disclosure by the agent of a railroad company that as common carrier it had in its possession goods consigned to the principal de-

their decisions do not always lay down a definite rule of universal application; but we have found no case where a court has placed a literal and unlimited construction upon the broad language of statutes of garnishment, except *Adams v. Scott*, 104 Mass. 164. In *Cooley v. Minnesota Transfer R. Co.*, 58 Minn. 327, we held that a railway company, after the termination of the transportation of the property, and while holding it only as warehouseman, was liable to garnishment, but declined to consider whether goods in the possession of a common carrier, and while actually in transit, are subject to garnishment; and we do not find it necessary in this case to decide this broad question. It is a well-settled rule of construction that courts may, under certain circumstances,

adopt a restrictive construction of the general words of a statute. This has often been done in the case of statutes of the kind now under consideration. See *Stanleys v. Raymond*, 4 Cush. 814, in which it was held that a person might have the possession or control of the property of another, and yet not be subject to the trustee process.

One limitation which all courts agree in imposing upon the language of such statutes, so as to make an exception to their general words, is that the personal property which may be arrested in the hands of the garnishee must be within the state, so that it may be seized and sold to satisfy any judgment obtained against the principal debtor. Upon the question whether it must be within the state at the time

defendant in the garnishment suit, but that he did not know whether they belonged to such defendant and had no personal knowledge of his business or other consignments, was held to be insufficient to sustain the garnishment or to render the company liable as garnishee. *Walker v. Detroit, G. H. & M. R. Co.* (1882) 49 Mich. 446.

This ruling is placed upon the ground that unless protected by vouchers the carrier cannot assume to deal with consignments as in all cases actually and beneficially belonging to the consignee, and that consignments and bills of lading are frequently transferred or made to factors and agents, and that the carrier must recognize such transfers. *Ibid.*

So a carrier receiving goods upon contract to deliver them at a certain place is not required to keep them to answer an attachment at the suit of a creditor of the shipper previously served upon him. *Bingham v. Lamping* (1855) 26 Pa. 340, 37 Am. Dec. 418.

Nor does the garnishment of a railroad company on account of a trunk of a passenger being carried with the passenger as baggage which is ineffectual because served while the trunk is still in another state become effectual upon the subsequent arrival of the trunk within the state; especially where the agent served was located at a different place from that at which the trunk arrived, and it does not appear that he had any authority over it. *Western R. Co. v. Thornton* (1878) 60 Ga. 300.

And a garnishee summons served upon the master of a steamboat imposes no duty upon him to retain goods subsequently received by him for shipment out of the state, for production in court, where at the time of the service he was neither debtor nor bailee of the attachment defendant, though he received them before he answered and before the term of court at which he was required to answer. *Burrus v. Moore* (1879) 63 Ga. 405.

So in *Wells v. American Exp. Co.* (1882) 55 Wis. 28, 42 Am. Rep. 605, in which a package of money was consigned to two and garnished as the property of one of them, and the carrier was notified by both that it was the property of the other, it was said that the real owner could reclaim his property as against a carrier or bailee at any time before the carrier had delivered the property to the consignee, or answered as to his liability as garnishee, but the case was decided on other grounds.

On the other hand, it was held in a Massachusetts case that a railroad company having in its hands a package containing money belonging to the defendant in an action against a resident of another state, as a common carrier in course of transportation to him at his place of residence, is chargeable therefor as his trustee, under Mass. Gen. Stat., chap. 142, § 21, making provision for charging persons having goods, effects, or credits of the defend-

ant intrusted or deposited in their hands or possession. *Adams v. Scott* (1870) 104 Mass. 164.

This ruling is placed upon the ground that a judgment charging the carrier as trustee would be a sufficient excuse for a failure to deliver according to contract, the law substituting a delivery to its officers for a performance of its contract, and that the doctrine that a carrier is responsible for all losses except by the act of God or the public enemy has no application because the property is not lost but sequestered by law and applied to the defendant's use and benefit. *Ibid.*

Adams v. Scott, *supra*, distinguishes *Clark v. Brewer* (1856) 6 Gray, 320, upon the ground that in that case the garnishee had no goods or effects of the defendant in his hands, but had merely contracted to deliver goods to him which would not become his property until such delivery, and as the delivery was to be made outside the state the statute charging as trustee one who is bound by contract to deliver specified goods is not applicable.

And *Edwards v. White Line Transit Co.* (1890) 104 Mass. 159, 6 Am. Rep. 218, *infra*, is distinguished on the ground that in that case the property of the plaintiff, while in the hands of the common carrier *in transitu*, was attached upon a writ against a third person which was clearly illegal and the plaintiff thereby lost his property.

And *Bottom v. Clarke* (1851) 7 Cush. 497, is distinguished upon the ground that in that case the bailee was discharged because it did not appear that the locked trunk in its hands contained any goods, effects, or credits of the principal defendant which were attachable, while in the case at bar the sealed package was proved to contain money.

In *Edwards v. White Line Transit Co.*, *supra*, however, it was held that the seizure of goods in the hands of a common carrier by an officer under an attachment against a person not their owner does not constitute a defense to an action against the carrier for breach of its contract to deliver the goods.

But in *Kiff v. Old Colony & N. R. Co.* (1875) 117 Mass. 561, 19 Am. Rep. 420, it was held that the seizure of goods in the hands of a carrier for transportation is no defense to an action by the owner against the carrier for their loss, where they were not subject to attachment.

Though he would not be liable where the goods were subject to attachment and he had given proper notice to the consignor. *French v. Star Union Transp. Co.* (1883) 124 Mass. 288.

The three cases last above set forth, though more properly belonging to the subject of the liability of a carrier for goods seized under legal process, are here included as having some bearing upon the rule with reference to garnishment adopted by the Massachusetts court.

So in *Union Mut. L. Ins. Co. v. Holbrook* (1855) 4

of the service of the process, or whether it is enough if it is so at the time of the garnishee's disclosure, the decisions are not entirely agreed. But that question is not material here. The proposition is fundamental in the law of garnishment that the property is arrested, if at all, subject to all the rights of the garnishee. Our statute expressly provides that "the garnishee shall not be compelled to deliver any specific articles at any other time or place than as stipulated in the contract between him and the defendant." Gen. Stat. 1894, § 5325. Under this statute, we think it clear that the garnishee in this case was not required to forego the benefit of the contract to transport this property to West Superior, stop its transportation, and take it out of the car. It had a right to transport it, according to its contract with the defendant, to West Superior, and was only bound

to deliver it there. *If plaintiff desired to arrest it in this state, he should have resorted to attachment, and taken actual possession of the property. But, after the property had arrived at West Superior, it was not within the jurisdiction of the courts of this state, and could not be seized or sold on any process against the defendant; and certainly the garnishee could not be required to bring it back into this state for the purpose of subjecting it to the process of our courts. We therefore hold (and it is all we decide in this case) that property in the hands of a common carrier in transit to a place outside of the state is not subject to garnishment, although it is yet within the state at the time of the service of the garnishee summons.

Judgment reversed.

Gray, 235, it was held that a carrier who receives money from a debtor to be tendered to an agent of a creditor in payment of a debt not yet due, and, in case of his refusal to receive, to carry it to another place and there tender it to another agent of the same creditor in payment of the same debt, is liable as trustee of the debtor in a suit by the creditor upon another debt, after tendering the money to the first agent who refused it though he has had no opportunity to tender it to the second.

But the decision was placed upon the ground that the money was put into the hands of the carrier for other purposes than transportation, and that the commencement of the suit was in itself a refusal to receive it for the purposes for which it was to be tendered, the court expressly declining to decide whether if it had been put into the hands of the carrier for transportation only it could have been arrested in its transit, and the carrier charged as trustee. *Ibid.*

And in *Stiles v. Davis* (1861) 66 U. S. 1 Black, 101, 17 L. ed. 33, it was held that where goods are delivered to a common carrier to be conveyed to the place of destination, and while they are in the carrier's custody they are seized by the sheriff under an attachment against third parties, and the carrier is summoned as garnishee in the attachment suit, they are in the custody of the law and the carrier cannot, on demand of the shipper, take the goods from the custody of the sheriff and deliver them, and will not be held liable in trover for failure to do so.

But *Edwards v. White Line Transit Co.* (1890) 104 Mass. 159, 6 Am. Rep. 213, limits and distinguishes *Stiles v. Davis*, *supra*, the court saying that all that case decides is that the failure to deliver goods at another place than that of their destination upon a demand made there, with no denial of plaintiff's right, but merely for the reason that they were detained under legal process, would not be a conversion of the goods.

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b. Before and after actual transit.

Where the goods are awaiting shipment or where the transit is ended and they are awaiting delivery, the rule, though meagrely supported, would seem to be different.

Thus in *Illinois Cent. R. Co. v. Cobb* (1893) 48 Ill. 402, it was said that where goods are still in the depot of a railway company in the county in which attachment proceedings are instituted, there could perhaps be no objection to a garnishment of the company with respect to them, but the court refused to express any definite opinion on the question.

But in *Bates v. Chicago, M. & St. P. R. Co.* (1894) 60 Wis. 293, 50 Am. Rep. 369, the court expressly refused to determine whether goods in a depot of a railway company in the state before transit or after, and awaiting delivery after their arrival, would be subject to garnishee process.

In *Cooley v. Minnesota Transfer R. Co.* (1893) 53 Minn. 327, however, it was held that where a railroad company carries property to its destination and holds it as warehousemen and not as carrier it is subject to garnishment whether goods actually in transit would be so or not.

And that where property has been demanded by the consignee at the place of destination but not delivered on account of unadjusted claims for charges for transportation, and permitted to remain in the yards of the railroad, it is held as warehouseman and not as carrier, so as to permit a garnishment. *Cooley v. Minnesota Transfer R. Co. supra.*

A garnishment of a railroad company holding property after transportation as a warehouseman, charges it with the responsibility of retaining the property as in the custody of the law in order that it might be applied in satisfaction of the claim on which it issued if the claimant should succeed in maintaining it. *Ibid.*

F. H. B.

Moses MANSTON *et al.*

v.

Angus MCINTOSH, Auditor of Itasca
County.

(....Minn.....)

"By the use of the word "delegate" in sections 31, 33, and 34, chap. 4, Gen. Laws 1893, the legislature did not intend to prohibit political parties from holding mass conventions for the nomination of candidates for office, or intend to require the members of such conventions to be elected as delegates to such conventions at primaries or caucuses.

(Buck, J., *dissent*.)

(October 22, 1894.)

PETITION for a writ of mandamus to compel defendant to receive and file petitioner's certificate of nomination for certain offices.
Denied.

The facts sufficiently appear in the opinion.
Mr. John P. Rea for petitioners.

Messrs. Wilson & Van Derlip for respondent.

Canty, J., delivered the opinion of the court:

The petition of Manston and others states that they are residents and voters of Itasca county; that on September 1, 1894, a mass convention of the Republican voters of that county was held for the purpose of nominating candidates for county officers; that the convention met, and nominated such candidates; that Manston, being chairman of the Republican county committee, and believing that such mass meeting was illegal under our statute, called a delegate convention, which was held on the 8th of October, and also nominated candidates for county officers; that he and some of the other petitioners were nominated for county officers at this last convention, but were not so nominated at the first convention; that the county auditor refused to receive and file their certificates, made by the proper officers of the last convention, and refused to print the names of these candidates on the Australian ballot, but recognized only the certificates made by the officers of the first convention. An order to show cause was thereupon issued under section 48, chap. 4, Gen. Laws 1893, to the county auditor and other parties interested, who filed an answer alleging that the mass convention was held according to the regularly established usage of the party in that county; that it and all the political parties in that county have, ever since its organization, nominated county officers in mass conventions.

Sections 31, 33, 34, chap. 4, Gen. Laws 1893, reads as follows:

"Sec. 31. Any assembly or convention of delegates, held for the purpose of making nominations to public office, or electors to the number hereinafter specified, may nominate candidates for public office, to be filled by election within the state. Said nomination shall

*Headnote by CANTY, J.

NOTE.—The above decision seems to touch a new question under the Australian ballot law.
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be made by delivering to and leaving with the officer charged by this act with directing the printing of the ballots upon which the name is to be placed, within the time prescribed by this act, a certificate of nomination for each candidate."

"Sec. 33. The certificate of nomination of a candidate for office selected by any convention of delegates, as herein defined, shall be signed and certified by the presiding officer and secretary of said convention, who shall also take and prescribe an oath before some proper officer that the facts stated in the certificate are true, and the secretary shall immediately deliver such certificates of nomination to the officer charged with directing the printing of the ballots, upon which the name is to be placed, and in case he shall neglect to do so he shall be guilty of a misdemeanor.

"Sec. 34. An assembly or convention of delegates within the meaning of this act, is an organized assemblage of delegates representing a political party, which at the last general election before the holding of such convention or assembly polled at least one per cent of the entire vote cast in the state, or county or other division or district for which the nomination is made."

It is contended by the petitioners that under these sections the law does not recognize any convention but a delegate convention,—that is, a convention of delegates chosen at primaries or caucuses, and sent to the nominating convention,—and that the certificates of nomination made by a mass convention, where every voter represents himself and his self only, cannot, under the law, be recognized by the officer whose duty it is to prepare and print the Australian ballot; that a "delegate" is "a person sent and empowered to act for another; one deputed to represent another." We admit that, if we are to give the word "delegate" where used in these sections, its strict, literal, and technical meaning, the contention of the petitioners must prevail. But it seems to us that this would be giving the word a meaning never contemplated by the legislature, and would be wholly contrary to the spirit and intent of the election law. If there was a single section in this act, or even a single line, by which it was clearly intended to regulate the manner in which political parties should proceed in organizing conventions or making nominations, this interpretation would perhaps not be warranted; but there is a total absence of anything of the kind in this act, except what may be found in the use of the word "delegate" in these three sections. Taking into consideration the history of legislation in this state, we are of the opinion that the legislature did not intend, by this election law, to interfere with the manner of organizing political conventions, so long as they were regularly organized according to the usage of the party. As one instance in such history it may be stated that by sections 100-104, chap. 4, Gen. Laws 1887, the legislature prescribed certain regulations to prevent fraud and caucus packing at primary elections, but by section 128, chap. 4, Gen. Laws 1891, these sections were expressly repealed. Under all the circumstances, it seems to us that the legislature used the word "delegate" in the present law in a

more popular but less accurate sense, as meaning a regularly selected member of a regular party convention. It has long been the practice, in several of the thinly settled counties of this state, to hold mass conventions, and the legislature had no object in suppressing this practice, and did not intend to do so. It is not a new doctrine which interprets a statute according to its spirit and intent, though that be contrary to its strict technical letter. "The intention of the legislature should always be followed whenever it can be discovered, although the construction seems contrary to the letter of the statute. *Grimes v. Bryne*, 2 Minn. 89, 106 (Gil. 72), cited and approved in *Barker v. Kelderhouse*, 8 Minn. 207, 211 (Gil. 178). See also Sedgw. Stat. & Const. L. 2d ed. 255, and note a.

The petition should be denied.

So ordered.

Butch, J., dissenting (Filed October 31, 1894):

This is a contest between Republican candidates for county offices in Itasca county, one set being the nominees of a mass convention, and some of the others claiming to be candidates of a delegate convention. The petitioners allege that the mass convention was composed of a howling lawless mob, irrespective of party, and that the Republican party, at said mass convention, was overcome by persons other than Republicans, all of which is denied in the return to the order to show cause. The petitioners are residents and voters of Itasca county; and September 1, 1894, a mass convention of Republican voters in that county held a convention for the purpose of nominating various candidates for county offices, one of the petitioners, Manston, being chairman of the Republican county committee and one Arnold secretary, selected as such at a mass convention of Republican voters held about two years before. The mass convention held September 1, 1894, nominated candidates for the various county offices, and the county auditor received the certificates of the presiding officers, and intended putting them upon the official ballots as the legal nominees. Afterwards Manston, as chairman of the Republican county committee, and Arnold, as secretary, deeming the mass convention illegal, called a delegate convention of Republican voters of said county. It is alleged in the petition that Manston and Arnold supposed that a mass convention was a legal compliance with the law, but that immediately upon discovering their mistake, they called a delegate convention, as above referred to. The petition alleges "that immediately upon the discovery of said mistake being made, in the call and holding of said mass, non-delegated convention, as aforesaid, said chairman Manston and secretary, Arnold, in good faith, and pursuant to the orders and direction of said county committee, made due call and advertisement of a regular convention of an organized assemblage of delegates of the Republican party of said county to be held in said county October 8, 1894; and as said delegate convention said party of said county was duly, equitably, uniformly represented by delegations of delegates from the different political subdivisions of said

organized county of Itasca, and from the whole of said county of Itasca, accordingly, said delegates being selected by the regularly called caucus of the Republican voters of each election district." The contest is between the nominees of the different Republican conventions, as to which are the lawful nominees; the latter claiming to be the legal ones, and petitioned that, as such, their names be put upon the official ballots.

The opinion rendered by a majority of this court holds that the nominees of the mass convention were the legal nominees, notwithstanding that the candidates were subsequently nominated at the delegate convention. The reasoning by which this conclusion is reached is that, taking the various statutes of 1887, 1891, and 1893 into consideration, the words "mass convention" should be construed as equivalent to the words "delegate convention," especially in view of the fact that it was the established usage of the political parties of the county of Itasca to nominate county officers in mass convention. The following language is found in the majority opinion, viz.: "Taking into consideration the history of legislation in this state we are of the opinion that the legislature did not intend by this election law to interfere with the manner of organizing political conventions so long as they were regularly organized according to the usage of the party. . . . It has long been the practice in several of the thinly settled counties of this state to hold mass conventions, and the legislature had no object in suppressing this practice, and do not intend to do so." Just where the legislative authority exists for passing a general election law which authorizes the holding of a mass convention of the voters in a thinly settled county, and a delegate convention in a thickly settled county, I am not advised, either by counsel, the records of the case, or by the majority opinion; and such authority may be doubted, unless I concede, as some modern statesmen claim, that the legislative power is omnipotent, and its knowledge boundless. As I do not find in the law books or elsewhere any definition of just what constitutes a thinly settled county, so that mass conventions can there be held, and be legally designated "delegate conventions," I suppose that it is intended by the majority opinion to take judicial notice of what are and what are not thinly settled counties in the state, and that the county of Itasca is one of them. Whatever force or weakness there may be in this connection, it is respectfully suggested that the usage as to holding mass conventions for nominating candidates for office is not applicable to this case. I shall not deny the proposition that doubtful words in a general statute may be explained by reference to a long-continued general usage, but this interpretation or construction of statutes is subject to the well-known elementary law that no usage is good which conflicts with the well-established rules of law, nor can it subvert or control any plain statutory enactment, however long continued such usage may have existed. Even if long-continued usage could be invoked in this case at any time, it certainly ceased to be of avail, for by the Laws of 1887 it was specially provided that political primary elections shall be

held as therein provided, under severe penalties for a violation. Upon the passage of that law, all usage ceased to have any force, by virtue of this positive statutory enactment, and this was in force until April 20, 1891,—a period of four years. As there was no election in the year 1891, the only usage which could possibly be invoked as a basis for construing the statute in the manner found in the language of the majority opinion must be the usage of 1892. I do not think that holding one mass convention in 1892 would establish a usage which should give it a legal recognition as such. The Law of 1891, relative to election, and which repealed the Law of 1887, retained the sections in regard to delegate conventions; and they were retained in the Election Law of 1893. The sections of that law, as far as applicable, are as follows:

"Sec. 81. Any assembly or convention of delegates held for the purpose of making nominations to public office, or electors to the number hereinafter specified, may nominate candidates for public office to be filled by election within the state."

"Sec. 83. The certificate of nomination of a candidate for office shall be signed and certified by the presiding officer and secretary of said convention."

"Sec. 84. An assembly or convention of delegates within the meaning of this act is an organized assemblage of delegates representing a political party which at the last general election before the holding of such convention or assembly polled at least one per cent of the entire vote cast in the state or county or other division or district for which the nomination is made."

"Sec. 85. The certificate of nomination of a candidate selected otherwise than by a convention of delegates shall be signed by the electors resident within the district or political division from which the candidate is presented to a number equal to one per cent of the entire vote cast at the last preceding election in the state, county, or other political division or district from which the nomination is made."

This is the recognized and acknowledged law, and has been such ever since June 1, A. D. 1891. Do these sections need any party usage to enable a court to construe or interpret them? Have these sections any of the characteristics which demand interpretation from the judiciary of this state? I know that usage is sometimes "the stuff of which law is made;" but we need no light from the uncertainties of usage to guide our judicial pathway, especially where there are plain statutory provisions which enable us to see clearly the well understood meaning of words and phrases. "Where the language is transparent, there is no room for the office of construction. There should be no construction where there is nothing to construe." Anderson, Law Dict. p. 240. It certainly is not the rule to construe a law that is well understood. Construction or interpretation is only demanded where the law is uncertain, ambiguous, and difficult in its application. This is not.

It seems to me that it is a dangerous doctrine to hold that a local usage in the county of Itasca can be construed to control a general election law applicable to a whole state. There

might be a different usage in different counties in reference to the method of administering this election law, and, after a few years, the law itself would be so torn, battered, and left in shreds that it would be difficult to find its spirit, intent, or letter. A general law should not be construed by usage as applicable to one county, and not to another. The usage of wrongfully cutting pine timber in some thinly settled counties, which has existed for more than thirty years, may yet be claimed to have the force of law, unless we pause in this method of statutory construction. It is said in the majority opinion that "it is not a new doctrine which interprets a statute according to its spirit and intent, though that be contrary to its technical letter; that the intention of the legislature should always be followed whenever it can be discovered, although the construction seems contrary to the letter of the statute." This rule of construction has no application to this case, and the construction is an arbitrary enlargement of the meaning of the law itself. What is the spirit and letter of this law before us? Is it to provide a mass convention when it expressly provides for a delegate convention? Why hunt for the intent and spirit of the law when it has no hidden meaning? What are the words and phrases which justify this majority opinion in invoking this rule of construction? It is bending and twisting words from their well-understood meaning. It is not construction, but destruction. It subverts the meaning of the law. The letter, the spirit, and intent of the law agree. What is meant is written in the law. It provided for a delegate convention. It did not provide for a mass convention, and it is not idle declamation to say so. The language of the law is: "An assembly or convention of delegates within the meaning of this act is an organized assemblage of delegates." Do these words need any judicial construction, any infused spirit and intent, to let the people know their meaning? A "delegate" is one deputed, empowered, intrusted, sent to act or represent another. It is in the nature of a trust. Delegates are generally selected for their experience, skill, honesty, and discretion. He represents a body of the people, within the meaning of this statute. An individual in a mass convention represents nobody but himself. I confess to an utter inability to understand or comprehend how a mass convention is the same as a delegate convention, within the meaning of the law. Our statute provides a rule for construction where one is necessary (Gen. Stat. 1878, chap. 4, § 1), as follows: "Words and phrases shall be construed according to the common and approved usage of the language." The common and approved usage of the words "delegate convention" and "mass convention" are well understood even by those unlearned in the law.

Conceding that the nomination of the mass convention was orderly, yet its proceedings in nominating candidates was a palpable disregard of the requirements of the law. This is not a case where great public interests are to be protected, or human rights secured, by the construction given the law by this court, and which I fear may be hereafter claimed as a sort of precedent for negligence, and one which

in the coming years may return to annoy and perplex us very materially. If a "mass convention" can be construed to mean a "delegate convention," then lexicographers will have to add a new definition to their dictionaries. I greatly regret that my view of the law compels me to dissent, and, if there were any doubt in my mind upon the proper construction to be given to the law, I would concur in the majority opinion, at least by my silence. My opinion may be of but little consequence in this case, but I am not insensible to the weakening force which sometimes arises by reason of judgments being rendered by a divided court, as well as by the conflicting opinion of different courts; but as I wholly disapprove of the construction placed upon the law, and the reasoning by which it is sought to be maintained, I am compelled to make this dissent. I think that the prayer of the petition should have been granted.

N. A. THOMPSON, *Appt.*,

v.

W. M. DODGE, *Resp't.*

(.....Minn.....)

- *1. A highway is intended for public use, and a person driving a horse thereon has no rights superior to those of a person riding a bicycle.
- 2. A bicycle is a vehicle, and riding one in the usual manner as is now done upon the public highway, for convenience, recreation, pleasure, or business, is not unlawful.
- 3. A person cannot be made to pay damages for his acts unless they were done in such manner and at a time which show that he was acting in disregard of the rights of others.

(October 28, 1894.)

APPEAL by plaintiff from a judgment of the District Court for Dakota County in favor of defendant in an action brought to recover damages for injuries alleged to have been caused by defendant's negligence in riding a bicycle along a public highway. *Affirmed.*

The facts are stated in the opinion.

Mr. C. P. Carpenter for appellant.

Messrs. Hodgson & Schaller for respondent.

Buck, J., delivered the opinion of the court:

This action was commenced in justice's court to recover damages for injury to the plaintiff's carriage, which plaintiff alleges was caused by the carelessness and negligence of the defendant in riding and using a bicycle in the public highway, whereby plaintiff's horse was frightened, and became wholly unmanageable and shied, precipitating the plaintiff's horse and carriage off from the grade and road into a swamp, and damaging the carriage of plaintiff to the amount of \$15. The plaintiff recovered judgment for \$15 and costs, but, upon appeal to the district court of Dakota county, the judgment was reversed, upon the ground that, conceding all of the testimony introduced

*Headnotes by **BUCK, J.**

NOTE.—For regulation of bicycle riding, see *Twillie v. Perkins* (Md.) 19 L. R. A. 622, and *note* 28 L. R. A.

by the plaintiff to be true, the defendant was not negligent. The decision of the district court was right. It is true that upon a controverted question of negligence, where different deductions or reasonable inferences might be drawn by the jury from the conflicting evidence, the general rule is that the finding of the jury should not be disturbed. But upon the undisputed facts, or assuming the testimony of the plaintiff to be true, it does not show a cause of action against the defendant. A person riding a bicycle upon the public highway has the same rights in so doing as persons using other vehicles thereon. A highway is intended for public use, and a person riding or driving a horse has no rights superior to those of a person riding a bicycle. In the use of a public highway, there are certain rights of the road which must be observed by all persons, and a violation of those rights constitutes actionable negligence. A bicycle is a vehicle used now very extensively for convenience, recreation, pleasure, and business, and the riding of one upon the public highway in the ordinary manner as is now done is neither unlawful nor prohibited, and they cannot be banished because they were not ancient vehicles, and used in the Garden of Eden by Adam and Eve. Because the plaintiff chose to drive a horse hitched to a carriage does not give to him the right to dictate to others their mode of conveyance upon a public highway, where the rights of each are equal. The traveled grade where the parties met was from ten to twelve feet wide, giving ample room for the parties to have passed each other. Gen. Stat. 1878, chap. 14, § 1, provides that when persons meet each other on any bridge or road, traveling with carriages, wagons, sleds, sleighs, or other vehicles, each shall seasonably drive his carriage or other vehicle to the right of the middle of the traveled part of the road, so that the respective carriages may pass each other without interference. This law appears to have been complied with on the part of the defendant. If there was not room to pass, it was as much the duty of the plaintiff to stop as that of the defendant; especially in view of the fact that he testified that, when he discovered defendant riding towards him, he anticipated that his horse would be frightened.

In his complaint the grounds of negligence charged are that defendant did not stop riding towards plaintiff, and ascertain whether plaintiff's horse was likely to be frightened, and by riding upon the road grade before plaintiff had time to drive off the same. As the defendant had the legal right to be in the highway, and as there is no allegation in the complaint that the defendant knew, or had any reason to believe or anticipate, that plaintiff's horse would be frightened at defendant's bicycle, or the manner in which he was riding the same, it does not charge actionable negligence. It is not the duty of a party lawfully traveling upon a public highway upon a bicycle, when he sees a horse and carriage approaching to stop and inquire whether the horse is likely to be frightened, nor to anticipate that such horse will be frightened, especially in the absence of any apparent reason for so doing; and it appears from the evidence that defendant was within five to ten feet of plaintiff's horse when he noticed

nothing but the point thus made as applying to the condition last above quoted.

The standard policy was, under the act, prepared by the insurance commissioner, with the assistance of the attorney-general. Its use by insurance companies doing business in this state is made compulsory. The courts must, when called on, interpret it and its various provisions and conditions, and generally by the same rules as though the form of policy were voluntarily adopted by the parties. But in respect to the power of the parties to insert the provisions and conditions that are contained in the standard policy, and the binding effect of them, the act is conclusive; for it would be absurd to say that, while the same statute compels the use of a particular condition, the parties cannot or shall not bind themselves by it, but it may be nugatory. By requiring the condition to be inserted, the statute certainly enables the parties to make the condition. It follows that the conditions quoted are valid and binding. In respect of the power of the parties to bind themselves by such conditions, the act changes the rule in the *Lamberton Case*.

Order reversed.

Canty, J., dissenting:

I cannot agree to the foregoing opinion, for reasons that I will state. The questions involved in this decision are of very great importance to the people of this state, as well as to the insurance companies. By chapter 217, Gen. Laws 1889, the legislature under the guise of reform, enacted a most extraordinary law. It provides that the insurance commissioner, within sixty days after the passage of that act, shall prepare and file in his office "a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements, or conditions as may be indorsed thereon or added thereto and form a part of such contract or policy, and such form when so filed shall be known and designated as the Minnesota standard policy." It further provides that he shall call upon the attorney-general for such assistance as to him may seem necessary in the preparation of the policy. It further provides that all fire insurance contracts made after June 1, 1890, shall conform in all particulars as to provisions, agreements, and conditions to this printed form. It further provides that printed or written forms of description, "or any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk (which facts or conditions shall in no case be inconsistent with, or a waiver of any of the provisions or conditions of the standard policy herein provided for), may be written upon or attached or appended to any policy issued on property in this state." If these provisions mean anything, they mean that every condition in such standard form which will allow the insurance company to escape liability must be inserted in every insurance policy issued, and, when so inserted, it cannot be waived by any power on earth, but absolutely protects insurance companies in taking advantage of every technical violation for the purpose of evading payment of losses, and under no circumstances can the company waive or forgive any such technical violation. Within sixty days after the passage

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of this act the insurance commissioner did prepare and file the Minnesota standard policy, which contains at least thirty-five conditions, the violation of any one of which will forfeit the policy. Any one familiar with insurance law can readily understand that one such forfeiture clause, protected from the doctrine of waiver as heretofore applied by the courts, will render void more policies than a dozen such clauses to which such doctrine of waiver is applied; and, if this statute and standard policy is the law of this state, then not one insurance loss in ten which the insurer sees fit to refuse to pay can be collected. By the law of waiver, the party to a contract who would enforce an act of forfeiture committed by the other party must do so at once recognizing the contract as still in force after he learns of the forfeiture. If he does, he waives the forfeiture. This rule applies as well to forfeiture clauses in leases, deeds, and other contracts as it does to those in insurance policies. If this statute is constitutional, the decision of the majority is right. But it seems to me that the constitutionality of this statute is very questionable. Is it not an attempt to delegate legislative power to the insurance commissioner? If the legislature can thus delegate to an individual the power to prescribe what provisions shall, and what provisions shall not, be inserted in an insurance contract, why can they not in the same manner delegate the power to prescribe what provisions shall, and what provisions shall not, be inserted in a deed or a mortgage or a promissory note? Why can they not designate some one as the czar of the law of contracts, and delegate to him complete and absolute power to say what the law of any and all contracts shall be? It is true that the question of the constitutionality of this legislation has not been raised by either party to this appeal; but it seems to me that, on account of the great public importance of the question, this court should not dispose of the case in a way that, to a considerable extent, implies that it considers the legislation constitutional, but should, when the question is suggested, raise it of its own motion, and order a further argument of the case as to this question. If such a course is unprecedented, it seems to me that it is time such a precedent was established. For this reason I cannot agree with the opinion of the majority.

Collins, J.:

Because of its importance, I am of the opinion that it would be advisable to order a reargument of this case upon the question suggested by *Mr. Justice Canty*, although I do not wish to be understood as concurring in all that he has said. On the case as presented, I assent to the majority opinion.

A rehearing was subsequently had after which on May 15, 1895, *Canty, J.*, on behalf of the court delivered the following opinion:

This case was argued and decided in favor of appellant at the last term of this court. See 60 N. W. Rep. 1095. It having been then suggested that chapter 217, Gen. Laws 1889 (Gen. Stat. 1894, §§ 8200-8202), which provided for the preparation and adoption of the "Minnesota standard policy," was unconstitutional, for the reason that it attempted to delegate legislative

powers to the insurance commissioner, a motion for a reargument was made, on the ground of such unconstitutionality, the motion was granted, and the case has since been reargued. Since the granting of the motion for reargument, the supreme court of Pennsylvania has declared a somewhat similar statute unconstitutional, as being an attempted delegation of legislative power. See *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 26 L. R. A. 715. It is now conceded by appellant that, if the Minnesota statute was the same as that of Pennsylvania, it would be unconstitutional. But, while the statute of Pennsylvania attempted to give the insurance commissioner power to adopt, as the standard policy, any form of insurance contract he saw fit, it is claimed that the Minnesota statute required the insurance commissioner to adopt the New York standard policy, and gave him no discretion, as to the substance of the contract to be so adopted, and that, therefore, there was no such attempt to delegate legislative power to him. So far as it is necessary here to consider said chapter 217, it reads as follows:

"Section 1. The insurance commissioner shall prepare and file in his office on or before the first (1st) day of August, A. D. eighteen hundred and eighty-nine (1889), a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be indorsed thereon, or added thereto, and form a part of such contract or policy, and such form when so filed shall be known and designated as the Minnesota Standard Policy. Said insurance commissioner shall within sixty (60) days from the passage of this act prepare, approve, and adopt a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements, and conditions as may be indorsed thereon or added thereto and form a part of such contract or policy, and such form shall, as near as the same can be made applicable, conform to the type and form of the New York Standard Fire Insurance Policy, so called and known. Provided, however, that five (5) days' notice of cancellation by the company shall be given, and provided, that proof of loss shall be made within sixty (60) days after a fire.

"Sec. 2. The insurance commissioner may call upon the attorney-general for such assistance as to him may seem necessary in the preparation of the aforesaid standard insurance policy, and it is hereby made the duty of said attorney-general to perform such service."

"Sec. 4. On and after the first (1st) day of January A. D. eighteen hundred and ninety (1890), no fire insurance company, corporation or association, their officers or agents, shall make, issue, use or deliver for use any fire insurance policy or renewal of any fire policy on property in this state, other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions with the printed form of contract or policy so filed in the office of the insurance commissioner, as provided for in the first (1st) section of this act, and no other or different provision, agreement, condition, or clause shall in any manner be made a part of said contract or policy, or be indorsed thereon or delivered therewith, except as follows, to wit: . . ."

Then follow provisions which authorize the insertion in the insurance policy of matters of description, and other particulars and provisions peculiar to the particular insurance company or the particular risk, and not inconsistent with the provisions or conditions of the standard policy. It is contended, in substance, that all of this statute above quoted which provides for the preparation and adoption of a standard form is surplusage, except the part of section 1, chapter 217, Gen. Laws 1889 (Gen. Stat. 1894, § 8200), which provides that "such form shall, as near as the same can be made applicable, conform to the type and form of New York Standard Fire Insurance Policy so called and known." If this contention is correct, why were the provisions inserted, which immediately follow this, and require five days' notice of cancellation by the company, and provide for sixty days in which to make proof of loss? It is conceded by counsel for appellant that these identical provisions were in the New York standard form when this act was passed. If the legislature intended to require all of the provisions of that form to be adopted, why did they thus specify only those two?

Again, if the insurance commissioner had no discretion, and was to act merely as a copyist of the New York form, why was it deemed necessary to provide for him the assistance of the attorney-general, in his onerous duties of copying the same?

Again, why should the words "provisions, agreements and [or] conditions" occur so often in the statute where they are of no particular importance, and be left out in the very connection and very place where they would be all-important?

Again, the statute provides that "such form shall, as near as the same can be made applicable, conform to the type and form of the New York 'standard.'" It is insisted that this authorizes only such changes as striking out the words "New York," and inserting "Minnesota," and that for the purpose of permitting such changes the words, "as near as the same can be made applicable," were used. There are no such changes to be made. The words "New York" do not occur in the provisions of the New York standard. There is not a word in the provisions of the New York form which it is necessary to change in order to apply the form to Minnesota. Then the legislature must, at least, have intended to give the insurance commissioner power to exercise his judgment in determining which of the provisions of the New York form were applicable to Minnesota, and which were not, and this would be an unconstitutional delegation of power. Conceding, without deciding, that this would be a proper way to make the New York form a part of the Minnesota statute, if the legislature intended to adopt the New York form, they could have said so in a very few words. The words "type and form," above quoted, are written together in the same connection, and it is fair to presume that they both refer to matters of the same general kind; that is, to matters of form. Construing these words in connection with the other provisions of the statute, we are of the opinion that they are equivalent to "type and style," that the legislature intended to give the insurance commissioner power to

insert in the standard form such provisions as he saw fit, and that, while it might be materially different from the New York form in substance, it should conform to it, as far as practicable, in the size and character of the type, and in the arrangement of provisions. The object of this was obviously to prevent the use of type so small and obscure, and the arrangement of provisions so misleading, that an ordinary man would not read these provisions, and, if he did, could not understand them. Then the legislature attempted to clothe the insurance commissioner with power to enact a general law, prescribing what provisions and conditions should be inserted in a policy of insurance, and what should not. There was no reason why the legislature could not pass this act as well as the commissioner. There may be necessity for police regulation in the insurance business, for the protection of the insured and the insurer; and the regulation of many matters of detail, exceptional matters, and matters which cannot well be regulated by the general provisions of law, may perhaps be delegated to such a commissioner. But this is not such a matter. There is no necessity for changing from time to time, between legislative sessions, the provisions which should be put in such a standard form, so as to meet changing conditions (see *State v. Chicago, M. & St. P. R. Co.*, 38 Minn. 801), and no such power was given to the commissioner. He was to prepare and adopt a standard form, once for all, and, when so adopted, it was to remain irrevocable until

changed by subsequent legislation. A clearer instance of an attempt to delegate legislative power could hardly be suggested. As said in *State v. Young*, 29 Minn. 551: "It is a principle not questioned, that, except where authorized by the constitution, as in respect to municipalities, the legislature cannot delegate legislative power; cannot confer on any body or person the power to determine what shall be law. The legislature only must determine this." We are of the opinion that said chapter 217 is unconstitutional and void, and therefore the provision of said statute prohibiting the parties from waiving any of the provisions of the standard policy has no effect, and does not prevent a parol waiver of the condition in the policy declaring such policy "void if the insured now has, or shall hereafter make or procure, any other contract of insurance." This being so, the contract of insurance is merely the voluntary contract of the parties, not restricted by any such statute; and by delivering the policy here in question, knowing of the existence of other insurance on the property, the defendant waived this condition of its policy, and plaintiff is entitled to recover. *Brandup v. St. Paul Fire & Marine Ins. Co.* 27 Minn. 398; *First Nat. Bank of Deer's Lake v. American Cent. Ins. Co. of St. Louis* (Minn.) 60 N. W. Rep. 845; *Lamberton v. Connecticut F. Ins. Co.* 39 Minn. 129, 1 L. R. A. 222.

This disposes of all the questions in the case, and the order appealed from is affirmed.

ILLINOIS SUPREME COURT.

LAKE ERIE & WESTERN R. CO., *Appl.*,

v.

Eugene H. WHITHAM.

(155 Ill. 514.)

1. The fact that the name of a wife is placed after that of her husband in naming the party of the first part to a deed in which she appears as one of the parties conveying and quitclaiming all interest in the land, is not sufficient to restrict the conveyance by her to a mere waiver of dower.
2. The omission of the words "notary public" in the signature to a certificate of acknowledgment by a notary, the body of which shows that he was acting officially as a notary public, does not make the certificate invalid.
3. The presumption that a deed was delivered on the day of its date is not overcome by the fact that it was acknowledged at a later date and thereafter came into the personal possession of the grantee, where it was procured for him by an attorney in another county in which it was executed and acknowledged.
4. A complete description by metes and

NOTE.—The present case is the only one of which we have knowledge that decides the question of power to make a common-law dedication of land to a railroad company.

On the general subject of dedication, see *Church v. Portland* (Or.) 6 L. R. A. 239, and note; *Campbell v. Kansas* (Mo.) 10 L. R. A. 593.

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bounds of land between a certain block and the north line of a quarter section does not limit a conveyance to that land when followed by a sentence declaring that it is all the land that lies between the north line of such quarter section and two blocks named, only one of which is mentioned in the preceding description by metes and bounds.

5. Plaintiff's testimony that suit was not commenced until after a deed was delivered to him is prima facie sufficient to show the fact, although on cross-examination it appears that the events took place on the same day at different places.
6. For plaintiff in ejectment to trace his title to an alleged common source is prima facie sufficient under Rev. Stat., chap. 45, § 25, where he has stated on oath that defendant claims title from that source and this is not denied on oath.
7. A village plat showing a strip of land 100 feet wide on each side of a railroad track but which is not marked or noted on the plat as donated or granted to the railroad company in order to make a conveyance thereof under Rev. Stat., chap. 108, § 2, cannot be made to operate as such conveyance by the aid of proof of contemporaneous or subsequent acts of the parties tending to show dedication thereof as part of the right of way.
8. A railroad corporation cannot acquire title to or an easement in land by common-law dedication.

(April 2, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for Vermilion County in favor of plaintiff in an action brought to recover possession of certain real estate which defendant claimed as part of its right of way. *Affirmed.*

The facts are stated in the opinion.

Mr. H. M. Steely, for appellant:

Under the general issue in ejectment, the statute of limitations may be set up as a defense, or any other matter that tends to defeat plaintiff's action.

Stubblefield v. Borders, 92 Ill. 279; *Shelden v. Van Vleck*, 106 Ill. 45.

Plaintiff must recover upon the strength of his own title, and not upon the defects in or weakness of the title of defendant.

Hague v. Porter, 45 Ill. 318; *Marshall v. Barr*, 35 Ill. 106; *Stuart v. Dutton*, 39 Ill. 91; *Daniels v. Burso*, 40 Ill. 307; *Kirby v. Wabash, St. L. & P. R. Co.* 109 Ill. 417.

If there was a dedication to and acceptance by the original company, then the question as to whether or not the present company had title or right to possession cannot concern appellee, as that is a question to be adjusted between such former company and appellant.

Kirby v. Wabash, St. L. & P. R. Co., *supra*; *Sands v. Kagey*, 150 Ill. 109.

Where it is shown that the consideration has been paid or performed and possession taken with the express or implied consent of the former owners, defendant can successfully defend the action on these grounds. The consideration for the giving of this ground was the location of the station. This was done and possession taken of this land by the company to whom the offer was made.

Rock Island & P. R. Co. v. Dimick, 19 L. R. A. 105, 144 Ill. 641; *Chicago & E. I. R. Co. v. Hay*, 119 Ill. 503; *Sands v. Kagey*, *supra*; *Kilgour v. Gockley*, 83 Ill. 109; *Deere v. Cole*, 118 Ill. 165; *Staley v. Murphy*, 47 Ill. 241; *Stow v. Russell*, 86 Ill. 36; *Cobb v. Lavalley*, 89 Ill. 331, 81 Am. Rep. 91.

Appellant was in possession when appellee got his first deed. In such case he is not an innocent purchaser.

Sands v. Kagey, *supra*.

A dedication may be made by parol declarations, or acts and declarations without writing, no particular form being required to establish its validity, it being purely a question of intention.

Maywood Co. v. Maywood, 118 Ill. 61; *Godfrey v. Alton*, 12 Ill. 30, 52 Am. Dec. 476; *Warren v. Jacksonville*, 15 Ill. 236, 58 Am. Dec. 610; *Alford v. Ashley*, 17 Ill. 369; *Davidson v. Reed*, 111 Ill. 167, 53 Am. Rep. 613.

Dedications can be established in any conceivable way by which the intention of the dedication can be evinced, as by user and other matter *in pais*, or estoppel, and no lapse of time is necessary to perfect it.

Smith v. Flora, 64 Ill. 98; *Rees v. Chicago*, 83 Ill. 322; *Waugh v. Leech*, 28 Ill. 488; *Peyton v. Shaw*, 15 Ill. App. 192; *Whitfield v. Horrocks*, Id. 315; *Newell, Ejectment*, § 67, p. 688, *note 1*.

If a dedication appears to be beneficial and necessary for the purpose for which it is used, acceptance is presumed from slight circum-

stances, and such acceptance is indicated by actual use for the purpose indicated.

Mann v. Elgin, 24 Ill. App. 419; *Maywood Co. v. Maywood*, 118 Ill. 70; *Buchanan v. Curtis*, 25 Wis. 99, 3 Am. Rep. 23; *Smith v. Flora*, *supra*.

Railroad companies are public corporations, and their roads are declared by the Constitution (art. 11, § 12) to be public highways. Under the statutes of this state they are capable of taking lands for railroad purposes by dedication.

Rev. Stat. 1893, chap. 109, § 8; *Morgan v. Chicago & A. R. Co.* 96 U. S. 716, 24 L. ed. 743, *notes*.

A dedication once made cannot be recalled. *Ruch v. Rock Island*, 5 Biss. 95; *Adams v. Saratoga R. Co.* 11 Barb. 414; *Newell, Ejectment*, § 70, p. 688.

Lots were sold abutting on this strip, and it was used both by the public and the railroad company for a great many years, without claim by the owners. Such acts *in pais* amount to a dedication.

Smith v. Flora, *supra*.

A dedication may be made to a body incapable of taking by grant, and when accepted it becomes irrevocable.

Smith v. Heath, 102 Ill. 142; *Smith v. Flora*, *supra*.

Possession was taken of this strip by the railroad company at the time of making and recording the plat, and the bar of the twenty year statute of limitation was complete when this suit was commenced.

James v. Indianapolis & St. L. R. Co. 61 Ill. 554; *Faloon v. Smshauser*, 130 Ill. 656; *Schneider v. Botsch*, 90 Ill. 577; *Weber v. Anderson*, 78 Ill. 439.

On petition for rehearing.

It matters not that the agreement was by parol, possession and performance on one side took it out of the statute of frauds.

Bragg v. Olson, 128 Ill. 544; *Morrison v. Herrick*, 130 Ill. 641.

Such facts constitute a complete defense to an action of ejectment by the former owners or their grantees, and injunction will not lie.

Stow v. Russell, 86 Ill. 36; *Staley v. Murphy*, 47 Ill. 241; *Kilgour v. Gockley*, 83 Ill. 109; *Cobb v. Lavalley*, 89 Ill. 331, 81 Am. Rep. 91; *St. Louis, A. & T. H. R. Co. v. Karnes*, 101 Ill. 403; *Turpin v. Baltimore, O. & C. R. Co.* 105 Ill. 11; *Kirby v. Wabash, St. L. & P. R. Co.* 109 Ill. 418; *Chicago & E. I. R. Co. v. Hay*, 119 Ill. 503; *Sands v. Kagey*, 150 Ill. 109.

Messrs. Salmons & Draper and C. A. Allen, for appellee:

When a plaintiff proves possession in a remote grantor, to whose title he has succeeded by mesne conveyances, the prima facie case made can be overcome only by proving a paramount title, either in the defendant or in a stranger.

Anderson v. McCormick, 129 Ill. 816.

Proof of prior possession under claim of ownership is prima facie proof of seisin, and authorizes a recovery unless defendant shall show a better title.

Benefield v. Albert, 182 Ill. 670.

If a purchaser of land takes possession under his deed, the premises being vacant at the time, the deed will be sufficient to protect him against a mere trespasser without title.

Anderson v. Gray, 184 Ill. 556.

Defendant cannot show title in itself, since it has seen fit to introduce only the plea of not guilty.

Starr & C. Stat. §§ 21, 22, p. 986; *Dickerson v. Hendryx*, 88 Ill. 66.

If the land was dedicated by plat, then the plat ought to show such dedication, and ought to conform to the statute.

Princeville v. Auten, 77 Ill. 825.

An intention to dedicate is essential to a dedication.

Eckhart v. Irons, 128 Ill. 568.

The fact of dedication upon a conflict of testimony itself for the jury and their findings will not usually be disturbed.

Daniels v. People, 21 Ill. 439.

The doctrine of estoppel *in pais* is available only in equity and not in an action of ejectment.

Mills v. Graves, 88 Ill. 456, 87 Am. Dec. 814; *Blake v. Fash*, 44 Ill. 302; *Baltimore & O. & C. R. Co. v. Illinois Cent. R. Co.* 187 Ill. 9; *Winslow v. Cooper*, 104 Ill. 235.

Bayley, J., delivered the opinion of the court:

This was a suit in ejectment brought by Eugene H. Whithan against the Lake Erie & Western Railroad Company to recover a strip of land 40 or 50 feet in width, and 965 feet long, lying between the north line of blocks 13 and 14 in the village of Rankin, Vermilion county, and the north line of the S. E. $\frac{1}{4}$ of section 11, township 22 N., of range 14 W., being a part of the land claimed by the defendant as its right of way. The suit was brought November 29, 1892; the declaration consisting of one count, which describes the premises and alleges that the plaintiff is the owner thereof in fee simple. The defendant pleaded "Not guilty," and at the trial, which was had at the May term, 1894, of the circuit court, a verdict was rendered finding the defendant guilty, and finding that the title to the premises established by the plaintiff was in fee simple. Upon this verdict the court, after denying the defendant's motion for a new trial, gave judgment in favor of the plaintiff, and the defendant now brings the record to this court by appeal.

It appears from the evidence that the village of Rankin was laid out and platted about November 14, 1872, and that the plat, with the accompanying certificates, was filed for record in the office of the recorder of Vermilion county November 28, 1872. The railroad in question, of which the defendant is now the owner, is located near the north line of the land in controversy, and seems to have been built and in operation before the plat of the village of Rankin was filed for record; it having been built by a railroad company of which the defendant is, or claims to be, the successor. At the point in question the railroad runs east and west, and is crossed by Main street,—a street running north and south,—near the center of the village. At the time the village was platted, William A. Rankin and David Rankin,

for whom the village was named, owned the W. $\frac{1}{4}$ of section 12, on which that part of the village east of Main street was platted, while George Guthrie owned the N. E. $\frac{1}{4}$ of section 11, or all that part of the plat lying west of Main street and north of the railroad, and the heirs of Stanton S. Johnston, deceased, owned the S. E. $\frac{1}{4}$ of section 11, being that part of the land included in the plat lying west of Main street and south of the railroad. The evidence tends to show that at the time the village of Rankin was platted there was great rivalry between Rankin and a small place about a mile and a half further west, known as "Pellsville," as to which should secure the railroad station, and that the owners of the land embraced in Rankin were disposed to offer very considerable inducements to the railroad company for the purpose of securing the station for their own village. William A. Rankin seems to have been employed by the Johnston heirs in platting their part of the village, and the evidence tends to show that they agreed to give him each alternate two lots throughout the plat, if he would secure the station; that Rankin, acting for the Johnston heirs, had the surveying done, some of the heirs being present, and one or more of them assisting in making the survey. The evidence further tends to show that the proprietors of the several tracts of land to be included in the plat instructed the surveyor to leave sufficient ground on each side of the railroad track to make, with the right of way already acquired by the railroad company, a strip 100 feet in width, and that, in pursuance of such instructions, he surveyed and laid out the grounds, and made the plat so as to leave 100 feet on each side of the railroad through the entire village; and there is evidence tending to show that it was the intention of the parties that the ground so left should be railroad ground, and should be occupied and used for railroad purposes. The strips of land thus left not being "marked or noted on the plat as donated or granted" to the railroad company, it is not, and cannot well be, claimed that the plat operated as a conveyance thereof to the railroad company, under the provisions of section 3 of chapter 109 of the Revised Statutes; but it is contended on behalf of the company that the plat, when considered in connection with the evidence of the contemporaneous and subsequent acts and conduct of the parties, tends to establish a common-law dedication of the land to the company, for its use as a part of its right of way. This contention, which raises one of the principal questions presented by the record, will be more fully noticed hereafter. The plaintiff, to establish title in himself to the lands in question, offered in evidence certain proceedings in chancery between the heirs of Stanton S. Johnston, deceased, for partition, in which it was alleged in the bill, and found by the decree, that Stanton S. Johnston, in his lifetime, was seized of an equitable estate in these lands, by virtue of a contract for the sale thereof to him by the Illinois Central Railroad Company, and that after his death certain deeds were executed, by which the legal title was conveyed to his heirs. Evidence was also given, not only that his heirs were thus claiming title in fee to the land, but that before the village of Rankin was laid out

and platted they were in possession of it. The plaintiff then offered in evidence quitclaim deeds to himself from each of the heirs of Johnston, purporting to convey to him all their right, title, and interest in the land. Several specific objections to these deeds were raised, all of which were overruled, and the deeds were read in evidence. The decisions of the court overruling these objections are now assigned for error.

Harriet M. Hutchison is one of the heirs of Johnston, and one of the deeds offered in evidence purports to be executed by Joseph M. Hutchinson and Harriet M., formerly Harriet M. Johnston, his wife, party of the first part, to the plaintiff, party of the second part, and in which the party of the first part, for a certain consideration therein mentioned, conveys and quitclaims to the party of the second part all interest in the land in question. It is objected that, because the name of the wife is placed after that of her husband, it will be intended that she joined with her husband merely for the purpose of waiving her dower, and not for the purpose of conveying her estate. It is sufficient to say that, even if such intentment could arise under other circumstances, it is completely negatived here by the very terms of the instrument, since she appears in the deed as one of the parties conveying and quitclaiming all interest in the land. To hold otherwise would do violence to the express language of the deed.

Again, it is objected that the certificate of acknowledgment is insufficient because the officer before whom the acknowledgment was taken, though describing himself in the body of the certificate as a notary public, omitted to write the name of his office under his official signature. As he professes, in the body of his certificate, to be a notary public, and to be acting officially, we are of the opinion that the omission of the words "Notary Public" after his signature cannot have the effect of rendering his certificate invalid. His official character, and the fact that he was acting officially, we think, sufficiently appear. The objections to this deed were properly overruled.

A deed from William A. Rankin and Mary D. Rankin his wife, bearing date November 23, 1892, was objected to on the ground that the certificate of acknowledgment bears date December 2, 1892,—the latter date being after the suit was commenced. The presumption is that the deed was delivered on the day of its date, and the fact that the certificate of acknowledgment bears a later date is not sufficient to rebut such presumption. *Deisinger v. McConnell*, 41 Ill. 227; *Jayne v. Gregg*, 42 Ill. 413; *Blake v. Faah*, 44 Ill. 802; *Hardin v. Crate*, 78 Ill. 538. There is evidence tending to show that the deed was executed and acknowledged in a different county from that in which the plaintiff resided, and that its execution was procured for him by his attorney in that county; and, while he testifies that it did not come into his personal possession until after it was acknowledged, there is no evidence outside of that furnished by the dates appearing upon the instrument itself, tending to show the date of its delivery to his attorney. To rebut the presumption of its delivery on the day of its date, it was necessary, under these circum-

stances, to produce some evidence as to the time of its delivery to the plaintiff's attorney, and, there being none, the presumption cannot be said to be rebutted.

It is next claimed that the deed from Jane M. Johnston, William O. Johnston, Scott Johnston, and Martha E. Johnston to Benjamin R. Cole conveyed the interest of the grantors in only a part of the land in controversy, and consequently that the plaintiff has failed to show that he has become vested with their title to the residue. This deed purports to convey and quitclaim all the interest of the grantors "in the following described real estate." Then follow two descriptions, the first of which describes by metes and bounds the land lying between block 14 and the north line of the quarter section. The other description, which in the deed appears in a separate sentence, is as follows: "Being all that part of above-described quarter section lying between the north line of said quarter section and blocks thirteen and fourteen in the village of Rankin." Here are two descriptions, each complete in itself, one embracing only that portion of the quarter section lying north of block 14, and the other that portion lying north of both blocks. It seems plain that, under these circumstances, effect must be given to the larger, as well as to the more restricted, description. Such interpretation does no violence to either, but gives full force to both. Were there any necessary incongruity between the two, the more restricted description might perhaps be rejected, so long as the conclusion fairly arises from the entire instrument that the grantors intended to convey their interest in the whole tract; but, there being no such incongruity between them, nothing need be rejected, and all parts of the description may be retained and given force.

It is also claimed that the deed from Cole and wife to the plaintiff is not shown to have been delivered before the commencement of the suit. That deed bears date November 23, 1892, and the certificate of acknowledgment is dated November 29, 1892. The suit was brought on the date last named, and the plaintiff testifies that the deed was received by him directly from Cole, and that he received it the day it was acknowledged, but that it came to his hands before the suit was commenced. His testimony upon this point is sought to be weakened on his cross-examination by eliciting from him the fact that he, on the day the deed was received, was in Rankin, while the suit was commenced at Danville, and, therefore he could not have known the exact time of the issuing of summons in the suit. He, however, persists in saying that according to his understanding the suit was not commenced at Danville until after the deed was delivered to him at Rankin; and, there being no evidence to the contrary, we think his testimony, while not very satisfactory, is sufficient to show, *prima facie*, that the deed came to the plaintiff's hands before the summons in the suit was issued.

It is contended in the next place that the verdict and judgment for the plaintiff are unsupported by the evidence, because the plaintiff failed to deduce his title from the United States, or any other original source of title.

It is claimed, on the other hand, that a *prima facie* title is shown, by deducing title from the Johnston heirs, who are shown to have been in possession of the land, claiming title in fee. The plaintiff also sought to bring his case within the provisions of section 25 of chapter 45 of the Revised Statutes. Upon the trial he stated on oath that he claimed title from the Johnston heirs, and that, as he understood it, the defendant claimed title from the same source. This, we think, was sufficient to require the defendant, or its agent or attorney, to deny on oath that it claimed title through such source, or that it claimed title through some other source, in order to compel the plaintiff to deduce title from any other than such common source. No such denial was made on oath by or on behalf of the defendant, and we think, therefore, it was sufficient, *prima facie*, for him to trace his title to such common source.

The principal contention on the part of the defendant, however, seems to be that the Johnston heirs, at the time the village of Rankin was laid out and platted, intended to dedicate, and in fact dedicated, the premises in question to the railroad company of which the defendant is the successor, to become a part of its right of way, to be used for railroad purposes. It seems to be conceded that the strip of land in question was not "marked or noted on the plat as donated or granted" to the railroad company; and it is not, and cannot well be, claimed that the plat operated as a conveyance thereof to the railroad company under the provisions of section 3 of chapter 109 of the Revised Statutes. But it is insisted that the plat, when considered in connection with the evidence of the contemporaneous and subsequent acts and conduct of the parties, tends to show a common-law dedication of the land to the company. The evidence bearing upon the question of a common-law dedication is conflicting, some of the witnesses, especially some of the Johnston heirs themselves, testifying positively that there was no intention on the part of the heirs to make such dedication; but, as the question is presented here, we need consider only the evidence introduced on the part of the defendant to show such dedication. The county surveyor who made the survey and plat was examined as a witness, and his testimony, so far as it relates to the strip taken from the land belonging to the Johnston heirs, being the premises in controversy in this suit, is as follows: "I was county surveyor at the time the village of Rankin was platted and laid out. I made the survey and plat. I recollect the circumstances of there being a strip of land left north of blocks 13 and 14 in that plat. There was a strip one hundred feet wide left along each side of the center of the road, as it was then running. In making that plat, I made a plat of the whole town. That strip was left at the time, as I understood it, for the railroad company. I think some of the Johnston heirs were assisting in making the plat. I think William O. Johnston carried chain for me. That strip has been used for railroad grounds ever since, so far as I know. I have been back there since that time, every year or two, at different times. Mr. Rankin was overseeing and looking after the platting

of the ground. He employed me, and paid me for doing the whole work. He was with me during the platting. I suppose he was acting for the Johnston heirs, in the platting of the ground. He was there all the time, and the Johnston heirs, or some of them, were there all the time, while I was acting. They told me to leave 100 feet on each side of the track; that they were willing to give almost any amount of land to the railroad to get the station there. And I did so, and that was made and signed by the different parties, and recorded. Why, certainly, it was left for railroad ground, that was the purpose of it. I do not remember any particular conversation with the Johnston heirs, it being twenty-two years ago. They were all mighty anxious to get the town there, and they were fighting the town a mile distant. There was a great rivalry at that station, and the station a mile or a mile and a half west of it, for the town. They were each fighting to get the station. There was great rivalry. I do not know what inducements they had offered, but they were willing to give most anything to the railroad to locate the station there. They were willing to give this ground, and anything else." Again, on cross-examination, he said: "I don't know that anything was said by the owners as to what use that land was to be put to. I know that it was not left for the owners to use themselves. I know it was called railroad ground. I understood by that that it was for the exclusive use of the railroad."

The evidence shows that shortly after the plat was recorded the railroad company entered into possession of the strip of land in controversy, and built a side track, and also erected stock pens upon it, and that it and its successors have continued to occupy and use it from that time up to the commencement of this suit,—a period of between nineteen and twenty years,—claiming it as railroad property. It also appears that from the time the plat was recorded the Johnston heirs made no claim to the strip of land, until a short time before the commencement of this suit, when, for a nominal consideration they quitclaimed their interest to the plaintiff. Upon this evidence the defendant's counsel asked the court to give the jury various instructions upon the hypothesis of a common-law dedication, but the court refused to give any instruction of that character, as asked, but modified them so as to limit their scope to a dedication by plat; thereby, in effect, refusing to instruct the jury that the defendant was capable of acquiring lands by a common-law dedication. Thus, the following instruction, being asked, was modified by inserting therein the words in italics, and given as thus modified: "The court instructs the jury that a railroad corporation is a public corporation, and is an ever-existing grantee, capable of taking lands by conveyance or by dedication *by plat* by the owner for railroad purposes." The following instruction also was asked on behalf of the defendant: "The court instructs the jury that the word 'dedication,' used in these instructions, means an appropriation or devotion or setting apart by the former owners of the land in question for railroad purposes. A dedication of land may be made by deed or writing, or it may be

by acts or parol declarations of the owners, or both, without writing; and no particular form is required to establish its validity, it being purely a question of intention. A dedication may also be made by survey and plat alone, without any declaration, either oral or on the plat, when it was evident from the face of the plat that it was intended to set apart certain ground for the use of the public, or for the use of a railroad company." This instruction the court refused to give as asked, but modified it as follows, and gave it to the jury so modified: "The court instructs the jury that the word 'dedication' used in these instructions, means an appropriation or devotion or setting apart by the former owners of the land in question for railroad purposes by a plat. A dedication may be made by survey and plat alone, without any declaration, either oral or on the plat, when it is noted on the face of the plat that it was intended to set apart certain grounds for the use of the public, or for the use of a certain corporation." Other instructions involving similar principles were modified in a similar manner. The rule which the trial court intended to lay down, manifestly, was that while a railroad company may take lands by dedication, where the dedication is by plat executed in the form prescribed by the statute, it is incapable of taking lands by dedication in any other way, and especially that it cannot become the beneficiary of a common-law dedication. That there was evidence tending to show a common-law dedication to the railroad company, if such dedication is legally possible, cannot be doubted; and the question presented is whether the court decided correctly in holding that no such dedication can be effectual, as vesting a railroad company with the title or right of possession of the land attempted to be so dedicated to its use. It is doubtless true that any person who is the owner of land may, by virtue of his absolute dominion over it, donate or dedicate it to whomever he pleases. He may give it to the public, to a body corporate capable of holding it, or to a natural person, for such purposes, either public or private, as the donor may see fit to appoint. But to render such gift effectual the owner must grant or convey to the donee the land, or such interest therein as he wishes to donate, either by deed, or by some equivalent mode of conveyance known to the law. Except in what are known as "common-law dedications," parol gifts of land or of easements therein are ineffectual; it being elementary law that the title to the lands cannot be transmitted *inter vivos* except by deed, or its equivalent, and that easements or other incorporeal hereditaments cannot be created by parol, but only by grant, or by prescription, whereby a conclusive presumption of a previous grant is raised. The provisions of chapter 100 of the Revised Statutes, entitled "Plats" furnish no exception to this rule. They merely create a new mode of conveyance. By force of those provisions the owner of land, by platting it, and marking or noting on the plat that portions of the land are donated or granted to the public, to a corporation, to a religious society, or to a natural person, in legal effect, conveys the portion of the land so marked or noted to the designated donee or grantee, for the uses and purposes therein

indicated. By this statute the purposes for which an owner of land may dedicate or grant it away to others are not enlarged, restricted, or modified, but a new mode is provided, by which his intention to grant or convey his land may be carried into effect. But, by the rules applicable to what are known as "common-law dedications," lands or easements therein may be dedicated to the public, so as to become effectually vested, without the aid of any conveyance. It may be done in writing, by parol, by acts *in pais*, or even by acquiescence in the use of the easement by the public. All that is necessary is that the intention to dedicate be properly and clearly manifested, and that there be an acceptance by or on behalf of the public. When that is done the right or easement becomes instantly vested in the public. But a dedication of this character, to be effectual, must be to the public. Washb. Easements, 205. At the common-law they are confined to the purpose of highways, but in this country the doctrine has a wider application, and its limits have been judicially defined as extending to public squares, common lots, burying grounds, school lots, and lots for school purposes, and pious and charitable uses generally, and in many cases where the use was either expressly, or from the necessity of the case limited to a small portion of the public. 5 Am. & Eng. Encyclop. Law, 416, and authorities cited in notes. But we are referred to no decision, and we think none can be found, where a dedication of this character, made for any other purpose than one strictly public, has been sustained. Railroad companies, though engaged in the public employment of common carriers, are essentially private corporations; and, while the lands composing their rights of way are acquired for a public purpose, the ownership of such lands, when acquired, is private. In no proper sense can such corporations be regarded as constituting the public or a portion of the public to which common-law dedications of land can be made. Donations or gifts of land can undoubtedly be made to them where the donor sees fit to effectuate his gift by some one of the ordinary modes of conveyance, and the donation can also be made by plat, where the donor sees fit to mark or note on his plat that the land which he wishes to give to such corporation is donated or granted to it. But we find no authority in the law for holding that a railroad corporation may acquire title to or an easement in land by common-law dedication. Neither the researches of counsel nor our own have brought to light a single case sustaining such dedication, and we think none can be found. Counsel seems to argue that because, under the statute, gifts or grants can be made to railroad companies and other corporations by plat, it should be held that common-law dedications may be made in like cases. This by no means follows. As we have already said, the statute makes the plat a mode of conveyance; thus enabling the donor of lands to accomplish by its means what, independently of the statute, he might have done by any other appropriate conveyance. But it in no way enlarges, either expressly or by implication, the class of cases where an easement may be created in favor of the public by common-

law dedication. Moreover, the reasoning sought to be employed would prove too much. The statute makes the plat a conveyance, not only to the public and to the corporations, but also to natural persons; and the same principles of analogy which would extend the doctrine of common-law dedications to railroad companies would make it apply as well to natural persons,—a result for which, we think, no one will contend. The case of *Morgan v. Chicago & A. R. Co.*, 96 U. S. 716, 24 L. ed. 748, upon which much reliance seems to be placed, will be found, on examination, to have been a case of the dedication or conveyance of certain lands to the railroad company by plat; and the question of a common law dedication, and whether such dedication could be made to a railroad company, was not involved. That case, therefore, cannot be regarded as an authority upon the questions presented here. It should also be noticed that the suit was in equity,—a forum where the doctrine of equitable estoppel has full play, and where there is always a strong indisposition to enforce stale claims, although they may not be barred by limitation,—while this suit is in ejectment, where legal titles only are regarded. The case of *Smith v. Flora*, 64 Ill. 98, to which we are referred, involved a question of dedication of strips of land on each side of the right of way of the railroad company to the municipal corporation, and no question of a common law dedication to a railroad company was raised or decided. We fail to find in the record any substantial error, and the judgment of the circuit court will accordingly be affirmed.

Judgment affirmed.

Rehearing denied.

Jessie MEACHAM *et al.*, *Appts.*,

v.

Prudence BUNTING.

(156 Ill. 586.)

1. **A naked trust in land conveyed to a man for the use and benefit of his wife is not executed by the statute of uses while the marriage exists, but the legal title remains in the trustee.**
2. **A tenancy by the curtesy initiate is created in the trustee, where land purchased by a husband is conveyed to him for the use and benefit of his wife, with nothing to indicate a purpose to exclude him from a right by the curtesy.**
3. **A divorce obtained by a husband from his wife does not defeat his tenancy by the curtesy initiate, where the statute has made no provision for such a case, but has declared that a divorce obtained for his fault and misconduct shall defeat a husband's right as tenant by the curtesy.**

NOTE.—As to adverse possession to affect rights of remaindermen and owners of future estates, see note to *Gindrat v. Western Railway of Alabama* (Ala.) 19 L. R. A. 839.

As to effect of divorce upon dower, see *Adams v. Storey* (Ill.) 11 L. R. A. 790, and note, and also as to effect when divorce was obtained in another state) *Van Cleef v. Burns* (N. Y.) 15 L. R. A. 542. 28 L. R. A.

4. **Possession of land by a grantee as trustee for the use and benefit of his wife so long as it continues to be held under the deed is not adverse to her, even after he has obtained a divorce from her.**

5. **Possession of land by a tenant for life cannot be adverse to the remainderman or reversioner.**

(June 15, 1896.)

A PPEAL by defendants from a judgment of the Circuit Court for Stephenson County in favor of plaintiff in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. M. Stoskopf and H. C. Hyde for appellants.

Messrs. H. C. Burchard and J. F. Lyon & Son, for appellee:

The deed gave Urban D. Meacham an estate for his life as tenant by the curtesy initiate.

Curtsey attaches to equitable as well as to legal estate, unless expressly cut off by the language used.

Hill, Trustees, 405; *Richardson v. Stodder*, 100 Mass. 528; *Davis v. Mason*, 26 U. S. 1 Pet. 503, 7 L. ed. 239; 2 Pom. Eq. § 990; Tyler, *Coverture*, § 286.

The intention to exclude the husband must appear distinctly from the terms of the limitation, and a simple gift or settlement "in trust for the use" will not have this effect.

Hill, Trustees, 405; 1 Sharswood & B. Lead. Cas. Real Prop. 271 *et seq.*; *Cushing v. Blake*, 30 N. J. Eq. 689; *Steadman v. Pulling*, 3 Atk. 423; Tyler, *Coverture*, § 286.

By the Sindlinger deed U. D. Meacham acquired an estate for his life as tenant by the curtesy initiate; he became vested with an estate for his own life in the property because prior thereto a child had been born alive, the fruit of the marriage with appellee.

The right of joint possession for their joint lives in the right of the wife became a right of sole possession by Urban D. Meacham for his own life in his own right.

Ross v. Sanderson, 38 Ill. 247; *Shortall v. Hinckley*, 81 Ill. 219; *McNeer v. McNeer*, 19 L. R. A. 256, 142 Ill. 888.

This estate and possessory right of U. D. Meacham as tenant by curtesy initiate continued until his death.

Jackson v. Jackson, 144 Ill. 274.

There should and would be no forfeiture of the husband's estate by curtesy unless the divorce was for the husband's fault or misconduct.

Wait v. Wait, 4 N. Y. 95; *Olarks v. Lott*, 11 Ill. 105; *Ross v. Sanderson*, *supra*; *Howey v. Goings*, 13 Ill. 95, 54 Am. Dec. 427.

The possession of Urban D. Meacham must be deemed to have been taken under the deed from Sindlinger under which he was rightfully entitled to possession, since no different source of title is shown.

Mettler v. Miller, 129 Ill. 681.

Urban D. Meacham having an estate by curtesy for his life therein, his possession could not be adverse to the remainderman or reversioner.

Ibid.; 1 Am. & Eng. Encyclop. Law, p.

287; Hill, Trustees, 8d Am. ed. 360, note 1; *O'Halloran v. Fitzgerald*, 71 Ill. 58.

And possession could not be adverse to appellee until the trust was openly disavowed or denied, and such disavowal or denial fully and unequivocally brought home to the knowledge of the appellee.

Reynolds v. Sumner, 1 L. R. A. 327, 126 Ill. 58; *Newell, Ejectment*, § 68, p. 759; *Timmons v. Kidwell*, 188 Ill. 13; *Rigg v. Cook*, 9 Ill. 351, 46 Am. Dec. 462; *Grand Tower Min., Mfg. & Transp. Co. v. Gill*, 111 Ill. 541; *Zeller v. Eckert*, 45 U. S. 4 How. 289, 11 L. ed. 979; *Graydon v. Hurd*, 6 U. S. App. 611, 55 Fed. Rep. 724; *Mitchell v. Murphy*, 43 Fed. Rep. 425.

Wilkin, J., delivered the opinion of the court:

Urban D. Meacham and Prudence Geddis were married in 1836. They removed from Wisconsin to Freeport, this state, in 1852, and there lived as husband and wife until 1862. One son, born of this marriage in 1836, is still living. On the 29th of November, 1856, the husband purchased of one Sindlinger lots 6 and 7 in block 5 in Wright's & Purinton's addition to the city of Freeport, the deed conveying the same to him, "in trust for the use and benefit of Prudence M. Meacham," then his wife. Both went into possession of the property in 1857, and occupied it as a home until 1862, and the "husband continued in possession until his death in January, 1892. In 1864 he obtained a decree of divorce in the circuit court of Ogle county from his wife, and by a second marriage became the father of a daughter Jessie, and a son James. The mother of these children resided with the father on the premises until her death, and the children continued to live with him until he died. By a general devise in his last will, their father gave these children the title he then held if any to the lots. The former wife also remarried, her present name being Prudence Bunting. In 1893 she brought this action of ejectment in the court below, claiming said property as owner in fee, and making Jessie and James Meacham with others defendants. Issue being joined, and a trial by jury, the court directed a verdict for the plaintiff, and entered judgment accordingly. The defendants appeal.

By the pleadings the issue whether plaintiff's right of action was barred by the twenty years' statute of limitations is properly raised, and is the controlling question in the case. The parties agree that, by the terms of the deed from Sindlinger to Urban D. Meacham, the latter became the naked trustee of his wife Prudence, and that the legal title to the property conveyed would therefore, under the general rule, vest in her, by force of the statute of uses. It is also conceded that inasmuch as she was not *sui juris* under the law in force at the time the deed was executed, the title did not immediately vest in her, but was left in her husband for her use. But counsel for appellants say, the statute took effect, and she became seised of the estate, in her own right upon the dissolution of the marriage in 1864, and from that time the possession of the husband was adverse; and therefore the statute then ran against her. On behalf of appellee it is con-

tended that even if the legal title did vest in her at the date of the decree of divorce still by reason of his marriage, and the prior birth of issue, her husband took an estate in the property upon the execution and delivery of the deed from Sindlinger as tenant by the curtesy initiate, and hence this right of action did not accrue until his death. Opposing counsel insist that it is held the title does not in such cases vest in the *cestui que trust* immediately, for the purpose of excluding all marital rights of the husband, and therefore Urban D. Meacham never became tenant by the curtesy; and even if he did, the decree of divorce destroyed that, as well as all other marital rights in him.

Appellees' counsel also deny that Urban D. Meacham's possession was at any time adverse to her. First, Did Urban D. Meacham have a life estate in the premises prior to the divorce?

If the statute of uses had operated at the time of the conveyance to vest the estate in the *cestui que trust* (the wife), there being issue then born, the husband would have become tenant by the curtesy initiate, precisely as though the deed from Sindlinger had been directly to her. But being a married woman the statute of uses did not execute the trust, and the legal title remained in her husband, the trustee for her use. *Dean v. Long*, 122 Ill. 447, citing *Perry on Trusts*, § 810. This author says: "If an estate be given to trustees upon a trust for a married woman for her sole and separate use . . . the legal estate will vest in the trustees and the statute will not execute it in the *cestui que trust*. In all these cases the court will give this construction to the gift if possible; for if the statute should execute the estate in the married woman, certain rights would arise to the husband which might defeat the intention of the donor. These are not the only words necessary to prevent the estate from vesting. Any words that show any intent to create an estate or a trust, for the sole and separate use of a married woman, will have the same effect." Other authorities are to the same effect, and it seems to be the settled rule that, where the trust is expressly "for the separate use" or "for the sole use and benefit" of a married woman, courts will not allow the statute to execute it in her, because the effect might be to let in marital rights of her husband, and thereby deprive her of the sole and separate use contrary to the intention of the party creating the trust. Nevertheless it is understood that a husband's right to an estate by the curtesy may attach to an equitable, as well as a legal, estate held by his wife during coverture, and there can be no doubt that he may have such right in real estate conveyed to another for her use. Whether she holds the property by a direct conveyance, or as the *cestui que trust* therein, if it appears that the grantor intended to exclude the husband from the curtesy, courts will give effect to that intention. *Pool v. Blakie*, 53 Ill. 495; *Monros v. Van Meter*, 100 Ill. 347. But the husband can be deprived of his marital rights only when the intention to do so clearly appears. *Carler v. Dale*, 3 Lea, 710, 31 Am. Rep. 660; *Cushing v. Blake*, 30 N. J. Eq. 689; *Hill, Trustees*, 405; *Steadman v. Falling*, 3 Ark. 423.

There is nothing in the language of the deed

in question to indicate a purpose on the part of the grantor to convey the property for the sole and separate use of Prudence Meacham. In fact the fair inference is that Sindlinger, the grantor, had no purpose whatever in conveying the lots in trust, except to carry out the wish of Mr. Meacham who purchased them. That he, the husband, intended by the words, "in trust for the use and benefit of Prudence Meacham," to exclude himself from all right in the property by the curtesy, cannot be presumed, and his conduct after the divorce was wholly inconsistent with any such intention. We think the authorities fully sustain the position that he, at the date of the Sindlinger deed, became tenant by the curtesy initiate in the premises. Was that estate destroyed by the decree of divorce? While the evidence does not show the grounds upon which it was obtained, it does appear that it was upon the application of the husband, and must therefore have been rendered not for his fault, but that of the defendant his wife. While many cases hold, "a divorce *a vinculo* destroys the husband's right to curtesy," they speak of such a divorce as at common law, which rendered the marriage void *ab initio*. Although the only divorce known to our law is, "a *vinculo*," it may under the statute be granted for causes arising after the marriage, and the decree does not avoid it from the beginning. The marriage is legal until dissolved, and we think rights acquired during its legal existence cannot be destroyed by its dissolution, unless the statute so expressly provides. This view is sustained by the case of *Wait v. Wait*, 4 N. Y. 95. The New York statute said: "In case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." The court of appeals held, where a divorce was granted for any other cause than the misconduct of the wife she was entitled to dower, and said:

"A divorce at common law avoided the marriage *ab initio*. It was equivalent to a sentence of nullity under our statute. It placed the parties in the same relation to each other as though there had been no marriage. . . . Until our statute, there was no such thing as divorce which recognized and admitted the validity of the marriage, and avoided it, for causes happening afterwards. Such a divorce is, alone, the creature of the statute. The principles applicable to a common law divorce cannot be made applicable to a divorce which admits the validity of the marriage and the rights and obligations resulting from it. The effect of such a divorce must be determined entirely by the provisions of law under whose authority it is granted. The common-law divorce avoided the marriage and all rights and obligations resulting from it. The statutory divorce is limited in its operation, and only affects the rights and obligations of the parties to the extent declared by statute. The marriage being valid the rights it conferred and obligations it imposed continue, where the legislature has failed to interfere. In determining the question before us, therefore, we are to ascertain the will of the legislature, the intent and effect of the statute under which the divorce in question was granted. When a divorce is under

the statute, the operation of the decree is wholly prospective. . . . If it was the intention of the legislature that, in case of a divorce under the statute, the wife should in no event be entitled to dower, why not make the provision general, instead of depriving the wife of dower only in case of her being convicted of adultery? *Expressio unius exclusio alterius*."

When the decree in question was obtained our statute provided: "If any woman shall be divorced from her husband for the fault or misconduct of such husband, except where the marriage was void from the beginning, she shall not thereby lose her dower, nor the benefit of such jointure; but if such divorce be for her fault or misconduct she shall forfeit the same; and when a divorce is obtained for the fault and misconduct of the husband, he shall lose his right to be tenant by the curtesy in the wife's lands, and also any estate granted therein by the laws of this state." Rev. Stat. 1845, chap. 34, § 12, title, *Dower*. Certainly it did not take away the husband's right to be tenant by the curtesy in his divorced wife's lands, but clearly shows an intention by the legislature to secure him in that right, if the divorce was obtained for causes other than his fault or misconduct. As said in *Wait v. Wait*, *supra*, if the legislature intended that in case of divorce under the statute the husband should in no event be entitled to tenancy by the curtesy, why not make the provision general instead of only in case of the divorce being obtained for his fault.

The husband's tenancy by the curtesy initiate was not defeated by the decree of divorce in his favor, but terminated only upon his death, and therefore the appellee's right of action did not accrue until he died in 1898. The possession of land by a tenant for life cannot be adverse to the remainderman or reversioner. *Mettler v. Miller*, 129 Ill. 630, and cases cited.

We are also of opinion that without reference to his tenancy by the curtesy the possession of Urban D. Meacham was at no time adverse to appellee, within the meaning of the statute of limitations. He entered under the Sindlinger deed, and *prima facie* continued to hold possession under it. If the defendants below, claiming under him, denied that fact, the burthen was upon them to prove it, and this they wholly failed to do. Adverse possession, sufficient to defeat the legal title, must be hostile in its inception, and continue uninterruptedly for twenty years. It must be acquired and retained under claim of title inconsistent with that of the true owner. *Turney v. Chamberlain*, 15 Ill. 271. See also *Morse v. Seibold*, 147 Ill. 318, and cases cited.

He entered as trustee under the Sindlinger deed, and he could only afterwards claim to hold adversely to that title by surrendering the possession, and retaking it. *O'Halloran v. Fitzgerald*, 71 Ill. 58; *Reynolds v. Sumner*, 126 Ill. 58, 1 L. R. A. 327. The entry was with appellee's consent, and therefore not adverse. *Timmons v. Kidwell*, 133 Ill. 13. The possession was consistent with the title of the real owner, and "nothing but a clear, unequivocal, and notorious disclaimer and disavowal of the title of such owner would render the possession, however long continued

adverse." *Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 462; followed by *Grand Tower Min., Mfg. & Transp. Co. v. Gill*, 111 Ill. 541. No other verdict than that which the jury

was instructed to return could have been properly rendered in this case.

The judgment of the Circuit Court will be affirmed.

NORTH DAKOTA SUPREME COURT.

Re Gertrude WEBER.

Gertrude WEBER, *Resp't.*,

v.

C. L. MAYER *et al.*, *Appts.*

(.....N. Dak.....)

*1. Under the statutes of this state regulating the entry of judgments in district

*Headnotes by WALLIN, J.

NOTE.—What entry or record is necessary to complete a judgment or order.

I. Necessity of entry or record generally.

- a. In actions at law.
- b. In actions in equity.

II. How made and what constitutes.

- a. The making up of the record.
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I. Necessity of entry or record generally.

The general rule would seem to be that for most purposes some entry or record of a judgment or order is necessary to its completion. Some of the cases, however, have adopted the contrary rule, at least for some purposes. But the difference of opinion usually, though not quite exclusively, grows out of differences in statutory provisions with reference to judgments and orders.

Besides those herein cited, there is also a line of cases all assuming the necessity of an entry or record to give effect to a judgment or order, all of which, however, turn upon questions as to the time of entry or as to the sufficiency of the judgment entered, and have therefore been omitted from this note.

a. In actions at law.

A decision in the federal courts is not regarded as technically a judgment until in some form it has been entered of record. *Gunn v. Plant* (1876), 94 U. S. 664, 24 L. ed. 304.

And a judgment cannot be regarded as final until 26 L. R. A.

courts, a final judgment does not become such, and has no force or effect, until entered by the clerk in the judgment book.

2. An order of the district court dismissing an action for jurisdictional reasons, as well as in other cases, will authorize the clerk of the district court to enter judgment, but such an order does not itself constitute a judgment, nor is it a final determination of any question. An order of dismissal, whether entered in the minutes of the court or recorded in a book labeled "Order Book" or written out, signed by

entered in a court in which execution can issue. Thus a judgment of the New York court of appeals affirming a judgment of the supreme court directing its entry therein becomes final only upon such entry. *Green v. Van Buskirk* (1865), 70 U. S. 3 Wall. 448, 18 L. ed. 245.

But a judgment otherwise duly entered is not invalidated by the fact that the verdict upon which it was rendered had not been recorded upon the minutes, the omission being an irregularity only. *Gunn v. Plant* (1876) 94 U. S. 664, 24 L. ed. 304.

So the practice of the United States district court for the southern district of New York is to enter an order upon a decision of the court and not to regard the decision itself as an order, and when no order is entered upon a decision granting a new trial on condition that the defendant pay costs, he cannot be held in default in not paying them. *Boker v. Bronson* (1861) 5 Blatchf. 5.

So under the Maine system of practice orders and decrees become operative only from the time they are entered of record. They then become the definite judgment of the court forming a part of the record. And an order directing that a decree be drawn in due form before it is extended is not a final decree or a complete record of the judgment of the court. *Gilpatrick v. Glidden* (1889) 32 Me. 201.

As to entry of judgment on orders for judgment for the purpose of appeal, see *infra* under heading, *Orders for judgment*.

So, a judgment is not final under the Louisiana statutes until signed by the judge and the law contemplates the reording of a final judgment. *Sprigg v. Wells* (1826) 5 Mart. N. S. 104.

And it is essential to the validity of a judgment under the provisions of the Iowa code that it should be entered upon the record book in which a statement of the proceedings of the court is to be kept; and a statement of a judgment in such book leaving the amount of the damages blank renders it a judgment for the costs only, although the judgment docket showed a judgment for both damages and costs. *Case v. Plato* (1890) 54 Iowa, 64.

But while a decree after being signed and before it is enrolled is not regarded as the judgment of the court, it has the effect of a direction to the clerk as to the form and substance of the judgment to be entered by him. *Traer v. Whitman* (1881) 56 Iowa, 443.

Decrees, judgments, and orders are required by the Kentucky statutes to be drawn up and recorded by the clerk on the evening of each day, and if found to be correct they are to be signed by the presiding judge or justice of the court and when so prepared, signed, and recorded they constitute a part of the records of the court and are

the judge, and filed, is still an order, and does not constitute a final determination or final judgment.

3. No appeal will lie from an order of the district court dismissing an action originating in that court or an appeal from a justice's court for jurisdictional reasons. Such an order is not appealable under the first subdivision of section 24, chapter 120, Laws 1891. The order is authority for the entry of a judgment; hence it does not "prevent the entry of a judgment from which an appeal might be taken."
4. Until judgment is entered upon the order, the action is not determined, but is pending in the district court.
5. Where an action, originating in the district court or brought there by ap-

peal, is dismissed for want of jurisdiction in the district court to determine the same, section 5194, Comp. Laws, expressly authorizes a judgment to be entered for costs. The section reads: "When an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs must be adjudged against the party attempting to institute or bring up the action." The right to enter judgment for costs under this section depends upon the validity of the dismissal, and this court on appeal from such a judgment will review the dismissal upon the merits, as well as any question touching costs which properly arises upon the judgment record.

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permanent and conclusive. *Raymond v. Smith* (1858) 1 Met. (Ky.) 65, 71 Am. Dec. 458.

And a writing found among the papers purporting to be a decree but which was not entered of record as a part of the proceedings or noted or referred to as a decree or order of the court in the minute book kept by the clerk, and which contains no memorandum or indorsement indicating that it had ever been filed as a part of the record, is wholly ineffectual for any purpose. *Ibid.*

And in Alabama a decision of the court in the final settlement of an estate signed by the judge of the orphans' court and filed among the papers of the cause is not the judgment of the court until entered of record though indorsed as a decree in the proceeding. *Hall v. Hudson* (1852) 20 Ala. 234.

But a stipulation submitting a cause providing that the decision shall be made in a designated number of weeks and entered up as of the present term is satisfied where the judge reduced his decision and judgment to writing within the agreed time so that it could be entered of record at a future day, and the judgment is valid though not filed and entered of record until the next term after the expiration of the judge's official term. *Hamill v. Gibson* (1878) 61 Ala. 261.

So in New York judgment must be entered in order to authorize the clerk to make up the judgment roll, the judgment being the only record evidence that judgment has been perfected. *Soheneeady & S. Pl. Road Co. v. Thatcher* (1851) 6 How. Pr. 220.

But *ex parte* orders granted at chambers to enlarge the time to answer and the like, granted in pursuance of N. Y. Code, § 386, need not be entered with the clerk to be effectual. *Savage v. Relyea* (1848) 3 How. Pr. 276.

As to the entry of *ex parte* orders for the purpose of appeal, see, *infra*, under heading, *Orders made out of court*.

So, under the system of practice superseded by the code a judgment was perfect after four days from the time of entering a rule for judgment, though the record was not filed. *Bauman v. New York Cent. R. Co.* (1854) 10 How. Pr. 218; *Grant v. Root* (1824) 3 Cow. 854.

In Colorado a judgment is complete when properly declared though the mechanical act of recording it has not been performed by the clerk. *Sleber v. Frink* (1893) 7 Colo. 148.

The rule that a judgment pronounced in open court takes effect from the time it is so rendered though the act of entering it in the record is omitted does not apply to judgments by confession which take effect from the time they are actually entered in the record as provided by statute. *Schuster v. Rader* (1889) 13 Colo. 320.

So in Indiana the failure of the clerk to enter a formal minute of the action of the court in striking the names of deceased plaintiffs from a complaint will not defeat a meritorious claim of the survivor. 28 L. R. A.

Brunson v. Henry (1894) (Ind.) 89 N. E. Rep. 259.

And in a North Carolina case, *Davis v. Shaver* (1886) 61 N. C. 18, 91 Am. Dec. 92, it was said that "a judgment is not what may be entered, but it is what is considered and delivered by the court, the entry is a memorial of what the judgment was."

In California, while under the code a judgment is not final for the purpose of an appeal until it is entered (see *infra*, heading, *For purpose of appeal*), the general rule is that the validity and effect of a judgment does not depend upon the performance of the clerical duty by the clerk of making up the judgment roll and preserving the papers. *Lick v. Stockdale* (1861) 18 Cal. 223.

And a judgment which is ordered, drawn up, signed, and filed with the clerk before the adjournment of a term of court, is a judgment of the court of that term though the ministerial duty of entering the judgment in the judgment book is performed by the clerk afterwards during vacation. *Casement v. Ringgold* (1895) 23 Cal. 335.

And the validity and effect of an order dispensing with an undertaking on appeal by a municipal officer does not depend upon its entry by the clerk in the minutes but upon the fact that the order had been made. *Von Schmidt v. Widder* (1893) 90 Cal. 511.

The provision of the California statute that the clerk must enter judgment immediately after entering a default is directory only and his failure to do so does not invalidate a judgment subsequently entered upon such default, and the defendant cannot invoke such failure for the purpose of annulling a judgment to which he has no other defense. *Edwards v. Hellings* (1894) 108 Cal. 204.

And an order of the court under the provision of the California constitution providing that within thirty days after judgment has been pronounced in a cause by a department, an order may be made that it be heard and decided in bank, is not dependent for its validity and effect upon the entry thereof by the clerk. These depend upon the constitutional authority of the court and any mode of authentication which the court may adopt is sufficient. *Niles v. Edwards* (1892) 95 Cal. 47.

So one sentenced to imprisonment is not entitled to discharge on habeas corpus because formal judgment was not entered upon the judgment docket for more than twenty days thereafter where an entry was immediately made in the minute or memorandum book kept by the clerk of the court showing the offense and the sentence. *Ex parte Raye* (1883) 68 Cal. 491.

b. In actions in equity.

In equity no proceeding is regarded as a matter of record until it is enrolled. *Crowell v. Byrne* (1812) 9 Johns. 287.

And where the proper officer draws up the form of a decree of enrollment from the decretal order

A PPEAL by defendants from a judgment of the District Court for Richland County annulling upon certiorari certain proceedings taken in accordance with a judgment rendered by the defendant Mayer, a justice of the peace, in favor of plaintiff in an action by the Travelers Insurance Company against Gertrude Weber to recover possession of certain real estate. *Affirmed.*

The main controversy in the certiorari proceedings was as to whether or not an appeal which had been taken from the justice's judgment had been so effectually dismissed by the appellate court that the matter was again within the jurisdiction of the justice so as to enable him to authorize proceedings for the enforce-

ment of his judgment. The district court had on January 10, 1891, rendered the following order:

"This cause coming on to be heard on the order to show cause why the appeal allowed therein by the said justice to the district court in and for said county should not be dismissed.

"After hearing arguments of the counsel for the respective parties in support of and in opposition to such dismissal, and it appearing therefrom and from the affidavit of P. J. McCumber, made in support of such dismissal, and from the papers and records in said action, that judgment for the restitution and possession of the premises described in the complaint in said action was entered therein in favor of

reciting all the pleadings, etc., and a fair copy is made upon parchment and signed by the chancellor. It is then and not till then an enrolled and final decree. *Burch v. Scott* (1829) 1 Gill & J. 393, 1 Bland, Ch. 112.

A mere order for a decree is not a final decree. *Gilpatrick v. Gildden* (1889) 82 Me. 201.

But a final decree properly and formally drawn and adopted by the court and placed on file and judgment thereon is equivalent in some of the states to the enrollment under the English practice. *Ibid.*

And the entry of a final judgment or decree is equivalent to the signing and enrolling of a decree thereunder. *Clapp v. Thaxter* (1856) 7 Gray, 885.

A decree in equity takes effect, however, from the time it is published by the court and the delay of the clerk in entering it in the judgment book will not affect its validity. *Lynch v. Rome Gas Light Co.* (1884) 42 Barb. 501; *Butler v. Lee* (1886) 33 How. Pr. 261, 8 Keyes, 70.

It is not necessary even to enroll it, except where it is required to be enrolled as a preliminary to some further action authorized by statute after enrollment. *Butler v. Lee, supra.*

But proceedings had though inadvertently upon a decree or order not entered in the registrar's book are irregular and voidable, and an attachment founded on such decree will be set aside though it had not been entered through the mistake of the officer and not through any neglect of the party. *Tolson v. Jervis* (1845) 8 Beav. 304, 14 L. J. Ch. N. S. 373. See also *infra*, heading, *For purpose of enforcement.*

So decrees of the supreme court in Michigan are made complete by entry on the journal; no separate signing or enrollment is needed. *Ryerson v. Eldred* (1869) 18 Mich. 490.

And under Massachusetts practice an entry upon the docket in a suit in equity, of "Bill dismissed," is of itself a final decree; and a more formal order, though convenient and proper for the regular completion of the record, is not essential. *Snell v. Dwight* (1876) 121 Mass. 349.

A decree in equity which is transmitted to and received by the clerk of the county in which the suit is pending takes full effect and becomes a matter of record on the day it is formally drawn out and filed by him whether it be in term time or vacation. *Thompson v. Goulding* (1862) 5 Allen, 81.

II. How made and what constitutes.

Under this head it is intended to treat generally the question of sufficiency of the act by which the judgment or order is made a part of the record, only. The question of the method of entry to make a determination final for particular purposes is considered *infra* under the several headings with relation to such purposes, and the question of the contents of the entry or record is omitted as involving the sufficiency of the judgment.

ment or order itself rather than the mere formal entry thereof.

a. The making up of the record.

An entry of the decision of the court made in its minutes by the clerk at the end of the trial is a rendition of judgment where findings are waived, but it does not constitute the judgment itself. *Crim v. Kessing* (1891) 89 Cal. 478.

And the record of a verdict found, containing an order for the entry of judgment thereon, is not a judgment. *Smith v. Steel* (1884) 81 Mo. 455.

So an entry on the record that judgment is rendered for the plaintiff for a designated sum and costs, is not a judgment but a mere statement of the clerk that judgment was rendered. *Wheeler v. Scott* (1854) 3 Wis. 302.

Filing the decision of the general term affirming a judgment on condition that plaintiff stipulates to deduct therefrom a specified amount together with the required stipulation does not constitute the entry of a judgment, the memorandum handed down by the general term not being a judgment but merely an authority to enter one. *Knapp v. Roche* (1880) 82 N. Y. 366.

And an order overruling a demurrer to an answer and sustaining a demurrer to a complaint based upon a contingency is not a final judgment but a mere authority for the entry of judgment in the future, which cannot be converted into a final judgment by the voluntary act of the clerk of the court in copying it into the judgment docket without the direction of the court and without proof of the happening of the contingency. *Bode v. New England Investment Co.* (1890) 1 N. Dak. 121, 6 Dak. 499.

But the fact that docket entries were not made in the court-room, but in the clerk's office by a deputy to whom that duty was assigned, does not invalidate the act. *Johns v. Frickey* (1873) 39 Md. 258.

But the practice of clerks to take minutes and docket entries of the court's proceedings and subsequently to enter them at length in technical language should not be extended to permit the entry of the single word "judgment" in court, and then out of court fixing the liability of the plaintiff or defendant from mere recollection as to how the judgment should be entered at length. *Montgomery v. Murphy* (1882) 19 Md. 576, 81 Am. Dec. 652.

The fact that the entry of a judgment was made at the request of a person not a party is immaterial, as it is the duty of the clerk after the rendition of a judgment to enter it. *Re Cook's Estate* (1883) 1 L. R. A. 567, 77 Cal. 220.

And a decision made by a judge in a cause submitted to him to be determined in vacation, deposited by him with the papers in the express office directed to the clerk of the proper county on the day before the judge's term of office expired is then complete and is not affected by the fact that

said plaintiff and against said defendant on the 15th day of December, 1890, and that no statement of the case has been made in said action; and no appeal taken on questions of law alone, and that no answer was made by the defendant in said action; but that the same was tried on the complaint and evidence of plaintiff, and that no issue was joined in the trial of said action, and that notice of appeal on questions of both law and fact was made in said action, and an appeal allowed in said action by said justice, and it further appearing that the appeal is without authority of law.

"Now, therefore, it is ordered that the said appeal be and the same is hereby dismissed, and the clerk of said district court is hereby ordered

to return to said justice all papers and records sent him in said action by said justice."

That order was delivered to the clerk of the court and by him duly filed in the action, but it was not by him entered in the judgment book but was entered and recorded at length in the book known as the order book and was not entered in the judgment index or judgment docket.

Further facts appear in the opinion.

Messrs. McCumber & Bogart, for appellants:

The instrument of January 10 operated to dismiss the appeal.

Travelers Ins. Co. v. Weber, 2 N. Dak. 239.

It has always been the practice in Califor-

it was not received and filed by the clerk until after the expiration of such term. *Babcock v. Wolf* (1886) 70 Iowa, 878.

And an action will not be dismissed under Cal. Code Civ. Proc., § 581, subsec. 6, providing for dismissal where the party entitled to judgment neglects to demand and have the same entered where he paid the clerk his fees for making the entry and requested him to make it, which he promised but neglected to do. *Gardner v. Tatum* (1888) 77 Cal. 453.

b. Signature of the judgment of record.

The omission of the clerk to sign the judgment roll upon entering up a judgment by default is a mere clerical error and does not affect the validity of the judgment as it involves a mere matter of practice and regularity. *Van Alstyne v. Cook* (1882) 25 N. Y. 489; *Lythgoe v. Lythgoe* (1894) 75 Hun, 147.

In *Manning v. Guyon* (1848) 1 Code Rep. 43, however, the court set aside a judgment the record of which the clerk had failed to sign at the time of entry, holding that the indorsement of "filed" giving the date was not a sufficient signature. This ruling was placed upon the ground that the terms of the statute expressly required the signature, but the statute was not set forth and unless the question arose under a different statute from that considered in the preceding New York cases it must be deemed to have been overruled by them.

In *Morris v. Patchin* (1882) 24 N. Y. 384, 82 Am. Dec. 811, however, it is held that the record of a judgment of another state which does not purport to have been signed by any judge of the court or other officer is not admissible in evidence where the statutes of the state expressly require the judgment record to be thus signed.

But a judgment roll is not void because not signed by the clerk of the court, when such signature is not expressly required by the statutes. *Goelet v. Spofford* (1873) 55 N. Y. 647.

So in Indiana it was held that when the statute requires judgments to be entered and signed a paper purporting to be a judgment of a justice of the peace which is not signed by him is not admissible in evidence. *Ringle v. Weston* (1864) 23 Ind. 588.

Iowa Rev. Stat., §§ 2664, 2665, providing for the signing of the record of the court by the judge thereof, however, is held to be directory merely, a failure to comply not affecting the validity of the judgment entered in such records. *Childs v. Mo-Chesney* (1886) 20 Iowa, 481, 89 Am. Dec. 545; *Hamilton v. Barton* (1866) 20 Iowa, 505.

The force and effect of an order dismissing an appeal made during the term is not affected by the failure of the judge to sign the record thereof. *O'Hare v. Leonard* (1865) 19 Iowa, 515.

And a decree signed by the judge in vacation and entered of record by the clerk constitutes a valid 28 L. R. A.

judgment though the record is not signed by the judge. *Traer v. Whitman* (1881) 56 Iowa, 443.

So the Wisconsin statute in force in 1838 requiring the judge to sign the record of a judgment rendered by him was held to be directory, so that the record would be admissible in evidence and the judgment valid though not signed by the judge, in *Eastman v. Harteau* (1860) 12 Wis. 267.

And the same is held of the Minnesota statutes, so that a decree of the district court would not be defective because of the absence of the signature of the judge, in *Secombe v. Steele* (1857) 61 U. S. 20 How. 94, 15 L. ed. 833.

And in *Dean v. Stone* (1894) (Okla.) 35 Pac. Rep. 578, it was held that a transcript of a judgment of another state, duly authenticated by the proper officers, is admissible in evidence though it does not show that the judgment was signed by the presiding judge as required by law.

And the same was held as to the admissibility of a certified copy of an unsigned journal entry of a judgment of another state, in *Ritche v. Carpenter* (1891) 2 Wash. 512.

So, the judge's signature to journal entries of an order adjudging a bail bond forfeited is not necessary to their validity or effect as evidence of the forfeiture. *Ainsworth v. Territory* (1897) 8 Wash. Terr. 270.

And when the judge fails to sign the record of a judgment at the term at which it was rendered he may deny a motion at a subsequent term to have the case redocketed for another trial because of such failure, and then sign it. *Bietman v. Hopkins* (1887) 109 Ind. 477.

So the failure of the clerk to sign a judgment does not entitle a third party to assert its invalidity on that ground. *Artisan's Bank v. Treadwell* (1861) 84 Barb. 558.

Or prevent it from being a bar to another action for the same cause. *Lythgoe v. Lythgoe* (1894) 75 Hun, 147.

In *State v. Robbins* (1888), (Me.) 6 New Eng. Rep. 170, however, it was held that an extended record of a case made by a deceased clerk is inadmissible as evidence if not signed.

And a judgment of a justice of the peace in a criminal action in Michigan is not valid unless the justice officially signs the entry thereof upon his docket. *Howard v. People* (1854) 8 Mich. 207.

And a judgment is not final under the Louisiana statutes until signed by the judge. *Spring v. Wells* (1826) 5 Mart. N. S. 104.

So in chancery practice in England a decree was not pleadable in bar of another action unless signed and enrolled. *Anonymous* (1754) 8 Atk. 809; *Kinsey v. Kinsey* (1754) 2 Ves. Sr. 577.

But it may be asserted by way of answer. *Davoue v. Fanning* (1819) 4 Johns. Ch. 190, 1 L. ed. 813.

And an enrolled decree must be signed by the chancellor and vice-chancellor and by the registrar

nia, whose code of procedure we adopted, to dismiss appeals simply by an order of the court wherever the dismissal is granted on jurisdictional grounds.

People v. Elkins, 40 Cal. 642; *Zoller v. McDonald*, 23 Cal. 136; *Belt v. Davis*, 1 Cal. 135; *Hayne*, New Trial & Appeal, § 184, p. 551.

The instrument is in effect a judgment.

A judgment is the final determination of the rights of the parties in an action.

Comp. Laws, § 5024.

Every direction of a court or judge made or entered in writing and not included in a judgment is denominated an order.

Comp. Laws, § 5223.

An order is the determination of the court

upon some matter arising in the action not disposing of the merits.

Loring v. Illsley, 1 Cal. 27; 1 Black, Judgm. § 1.

It is a judgment if it disposes of that case, ends the litigation between the parties in that court.

1 Black, Judgm. §§ 21, 26, 27; *Belt v. Davis*, 1 Cal. 134; *Hobbs v. Beckwith*, 6 Ohio St. 252.

An order of the county court dismissing an appeal from a judgment of a justice of the peace, in an action of forcible entry and detainer, is in effect a final judgment and may be appealed from.

Hayne, New Trial & Appeal, § 184, p. 551; *Zoller v. McDonald*, *supra*; *Dowling v. Polack*,

or clerk before it can be filed so as to authorize the issue of execution thereon. *Bank of Rochester v. Emerson* (1843) 10 Paige, 359, 4 L. ed. 1011.

A justice of the peace does not delegate his judicial power by having a judgment written out and signed by another in his presence and under his supervision. *Reeves v. Davis* (1879) 80 N. C. 209.

c. Entry in wrong book.

The entry of a judgment or order in a wrong book seems not to affect its validity or conclusiveness so long as the book used is a part of the court's records.

Separate books are not required to be kept for the entry of judgments in legal and equitable actions under statutory requirements that judgments shall be entered in a "judgment book." *Whitney v. Townsend* (1876) 67 N. Y. 40.

And the entry of a judgment of foreclosure in the decree book instead of the judgment book is a mere irregularity which will be disregarded where the clerk keeps two books for the entry of judgments, one called the "judgment book" and the other the "decree book." *Thompson v. Blackford* (1872) 19 Minn. 17.

And an entry of a judgment in a book kept by the clerk of the district court both for the registry of actions and the entry of judgments is valid though the statute provides that he shall keep a book for the registry of actions and also a book for the entry of judgments. *Jorgensen v. Griffin* (1899) 14 Minn. 464.

The entry of a judgment by the clerk of the court in a book kept by him labeled "minute book" instead of in the one labeled "judgment by the court" does not invalidate the judgment or prevent an appeal thereupon. *Wolf v. Great Falls Water-Power & Town-Site Co.* (1894) (Mont.) 83 Pac. Rep. 115.

And the entry of a judgment in a book known as "Journal of proceedings" instead of in the "judgment book" is sufficient to set in motion the time within which an appeal may be taken. *Work v. Northern Pac. R. Co.* (1891) 11 Mont. 513.

Iowa Code, section 197, requiring all proceedings, judgments, and decrees to be entered in the record book is directory, and a decree which is not recorded therein, but in a book entitled "Decrees of the foreclosure of mortgages," is not thereby invalidated. *Carr v. Bosworth* (1887) 72 Iowa, 530.

And the entry of a judgment in the permanent judgment record, instead of the original or trial docket of the term, is not illegal or so irregular as to require it to be stricken out, because not first entered in the original trial docket. *Bond v. Citizens Nat. Bank of Indianapolis* (1896) 65 Md. 496.

The judge's calendar, however, is not a part of the court records under the Iowa statutes, and an entry therein will not constitute a judgment. *Traer v. Whitman* (1881) 56 Iowa, 443.

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III. For the purpose of terminating the power of the court to change.

A judgment does not become a part of the record of a case and effective as such until it is filed with the clerk. Until then it is a mere purpose in the breast of the judge which he might change at his pleasure. *Broder v. Conklin* (1898) 98 Cal. 300; *Condee v. Barton* (1882) 62 Cal. 1.

Thus an entry of dismissal of an action in the clerk's register upon which no judgment is entered does not deprive the court of control over the cause, both the entry in the register and an entry of judgment being required to constitute a dismissal. *Page v. Alameda County Super. Ct.* (1888) 76 Cal. 372; *Page v. Page* (1888) 77 Cal. 83.

And an order in a foreclosure action substituting his successors in interest in place of the plaintiff, which is not entered, does not deprive the court of jurisdiction to have a subsequent order entered *nunc pro tunc* making the substitution. *Crim v. Kessing* (1891) 89 Cal. 473.

And a motion to rectify or change the minutes of a decree may be sustained under the Massachusetts practice at any time before the decree is recorded. *Gibson v. Crehore* (1827) 5 Pick. 145.

And a special judge who failed to sign the record of a judgment at the term at which it was rendered may deny a motion at a subsequent term to have the cause redocketed for another trial because of such failure and then sign it, as by Ind. Rev. Stat. 1881, § 415, it is intended to clothe special judges with authority to act in cases in which they are called upon to preside until judgment is rendered, entered up, and signed. *Bietman v. Hopkins* (1887) 109 Ind. 177.

So a case is not finally disposed of until a decree has been formally adopted by the court and placed on file in readiness to be spread upon the record. Previous to that time the court at *not prius* has power to accept, reject, or recommit the reports of masters and referees in equity causes. *Pitman v. Thornton* (1875) 65 Me. 95.

And an order or decree in equity does not preclude the correction of errors sought before the entry and recording of the final decree thereon. *Park v. Johnson* (1893) 7 Allen, 378.

And where a decree has not been enrolled the case may be reheard on petition. *Coleman v. Franklyn* (1868) 28 Ga. 366.

A decree by default which has not been enrolled may be opened on petition showing an adequate excuse even though third persons have purchased in reliance upon it. *Benedict v. Auditor General* (1893) (Mich.) 62 N. W. Rep. 364.

In England the chancellor after hearing pronounces the substance of his decree orally, minutes of which are taken down by the registrar who afterwards draws them out in the form of a decretal order, but this has the force of an interlocutory order only and until enrollment the chancellor

18 Cal. 625; *Leese v. Sherwood*, 21 Cal. 164; *Belt v. Davis*, *supra*.

Entry and docketing was not necessary to make it effective between the parties.

1 Black, Judgm. § 106; *Los Angeles County Bank v. Raynor*, 61 Cal. 145; *Freeman*, Judgm. § 88; *Matthews v. Houghton*, 11 Me. 377; *Fish v. Emerson*, 44 N. Y. 376; *Fontaine v. Hudson*, 98 Mo. 62; *Casement v. Ringgold*, 28 Cal. 335; *McMillan v. Richards*, 19 Cal. 467; *Hutchinson v. Bours*, 13 Cal. 52; *Hesse v. Mann*, 40 Wis. 560; *Bridges v. Thomas*, 50 Ga. 378; *Craig v. Alcorn*, 46 Iowa, 560.

Without a statute requiring a record no formal record need be made up.

Emery v. Whitwell, 6 Mich. 474; *Thompson v. Bickford*, 19 Minn. 17; *Jorgensen v. Griffin*, 14 Minn. 484.

lor may rehear, alter, or reverse it. *Buroh v. Scott* (1829) 1 Gill & J. 298, 1 Bland, Ch. 112.

But the entry of a final judgment or decree is equivalent in some of the states to the signing and enrolling of a decree under the practice of the courts of chancery of England. *Clapp v. Thaxter* (1856) 7 Gray, 385.

And after a decree has been entered and become a matter of record there can be no rehearing on petition or motion to correct alleged errors, the only remedy being by bill of review. *Thompson v. Goulding* (1863) 5 Allen, 81; *Clapp v. Thaxter*, *supra*; *Gilpatrick v. Glidden* (1889) 82 Me. 201.

And it becomes a matter of record when it is received by the proper clerk and formally drawn out and filed by him. *Thompson v. Goulding*, *supra*.

So in Mississippi a decree in chancery which has been signed and placed upon the records of the court is considered as enrolled, and after the expiration of the term at which it was made it is final and conclusive so that the court will have no power to set it aside or open it at a subsequent term though it opened but five days after the adjournment of the preceding one. *Sagory v. Bayless* (1849) 13 Smedes & M. 183.

In North Carolina, however, an entry upon the trial docket of the word "judgment" made in open court in accordance with its regular rules and practice is an entry of a regular judgment which cannot be vacated at a subsequent term of court. *Davis v. Shaver* (1866) 61 N. C. 18, 91 Am. Dec. 32; *Sharpe v. Rintels* (1866) 61 N. C. 84.

And in Georgia the entry of a judgment before the end of the term at which the cause was decided will not defeat the right conferred by law to move in arrest of judgment at any time before the adjournment. *Hartridge v. Wesson* (1848) 4 Ga. 101.

So the entry of a judgment did not, under New York Code, § 255, providing for the entry of judgment which should be final after the expiration of four days unless there be an order reserving the case or staying proceedings, prevent a motion to set aside the verdict where an order staying proceedings was obtained within four days after the rendition thereof. *Droz v. Lahey* (1850) 2 Sandf. 681.

And the enrollment of an order subsequent to a decree which recites it is not *per se* an enrollment of the decree though it will prevent a rehearing of the decree where it cannot be varied without being inconsistent with the order. *McDermott v. Kealey* (1842) 1 Phill. Ch. 297, 7 Jur. 163, 13 L. J. Ch. N. S. 237.

So in *Fairbanks v. Amoskeag Nat. Bank* (1867) 22 Fed. Rep. 572, turning upon a point foreign to the subject of this note, it was said that if a decree has been entered as such it is not subject to alteration except on a rehearing or on motion.

And in *Allen v. Swan* (1883) 5 N. Y. Civ. Proc. Rep. 58, it was held that after a judgment has been rendered L. R. A.

Messrs. W. E. Purcell and L. B. Everdell, for respondent:

Compiled Laws, section 5194, expressly gives the prevailing party in dismissal of appeal for want of jurisdiction, costs. These costs can only be enforced by judgment, and hence upon such dismissal the prevailing party is entitled to judgment of dismissal and costs. So the order, instead of preventing a judgment, should be followed by a judgment.

Blair v. Cummings, 39 Cal. 669.

Under the code the distinction between the rendition and the entry of judgment is done away, and there is no judgment until it is entered. Until then no appeal lies.

Comp. Laws, § 5216; *Rockwood v. Davenport*, 37 Minn. 533; *Home for Care of Inebriates v. Kaplan*, 84 Cal. 488; *Brady v. Burke*, 90 Cal. 1.

dered and entered by a justice of the peace, an offer by the successful party to reduce it is ineffectual, and an entry of such offer by the justice in his docket has no effect upon the judgment rendered.

IV. As between the parties.

A judgment remains a judgment and is unaffected as between the parties though not recorded pursuant to statutory provisions making it the duty of the clerk to record, but attaching no consequences to a failure to do so. *Bridges v. Thomas* (1873) 30 Ga. 378.

And an entry on the docket of the superior court in an action in which an appeal had been taken to the supreme court, "judgment as per transcript filed from the supreme court" is sufficient and effects a termination of the suit. *Bond v. Wool* (1898) 113 N. C. 20.

And a minute on the papers made by the judge in a bankruptcy proceeding declaring certain penalties claimed to have been incurred by breach of the custom revenue laws to be a debt subject to proof containing in itself the substance of the order subsequently entered may be deemed a judgment or order on a subsequent motion to dismiss proceedings for a remission of such penalties which will estop the parties to deny that there was such a judgment. *Re Barnes* (1878) 10 Ben. 79.

So a decree of divorce which was signed by the judge and filed with the clerk is binding upon the parties and their privies and operative from its rendition though not entered, the failure of the clerk to perform a ministerial duty not abridging the rights of the parties interested. *Re Newman's Estate* (1888) 75 Cal. 213; *Re Cook's Estate* (1888) 1 L. R. A. 567, 77 Cal. 220; *Re Cook's Estate* (1890) 83 Cal. 415.

And the entry thereof by the clerk is not essential to the validity of a remarriage by the party in whose favor it was rendered. *Re Cook's Estate*, and *Re Cook's Estate*, *supra*.

Re Cook's Estate (1889) 1 L. R. A. 567, 77 Cal. 220, limits and distinguishes *MacNevin v. MacNevin* (1883) 63 Cal. 186, the court saying that all that can be considered as decided in that case is that as an appeal from a judgment could not be taken until after its entry, therefore, for the purposes of an appeal, no order could be considered as an order made after final judgment which had not been made after the entry of the judgment, and distinguishes *Condee v. Barton* (1882) 62 Cal. 1, on the ground that as the entry of the judgment was expressly held in abeyance to await further consideration, it can hardly be said that the court rendered any judgment at all.

One of the parties against whom a judgment is rendered which is filed for record and recorded as provided in Minn. Gen. Laws 1887, chap. 61, § 1.

In fact under the code there is no judgment until entry.

Black, Judgm. § 110; *Case v. Plato*, 54 Iowa, 64; *Hunter v. Cleveland Co-operative Stov. Co.*, 81 Minn. 508; *Rockwood v. Davenport*, *supra*.

Wallin, J., delivered the opinion of the court:

From the record transmitted to this court it appears that on the 15th day of December, 1890, in an action then pending in justice court in Richland county, presided over by said C. L. Mayer, wherein the Travelers' Insurance Company was plaintiff and Gertrude Weber was defendant, for the unlawful detention of certain lots and an hotel thereon, situated in the city of Wahpeton, in said county, a judg-

ment was entered in favor of the plaintiff, whereby it was adjudged that the plaintiff was entitled to the possession of said lots and premises, and that said defendant unlawfully detained the same. The judgment was rendered upon complaint of the plaintiff, and evidence in support thereof, and there was no evidence and no answer on the part of the defendant. On the day the judgment was rendered, the defendant, Gertrude Weber, appealed from said judgment to the district court of said county upon questions of law and fact, and a new trial was demanded in the district court. No statement of the case was settled or filed in said justice court. On the 10th day of January, 1891, upon the application of the plaintiff in said action, the district court, after hearing counsel, made its order in writing,

against whom it has been duly indexed and entered in the reception book, cannot take advantage of a failure to index and enter it against another party. *Whitacre v. Martin* (1892) 51 Minn. 421.

As to the effect of entry or nonentry with reference to questions as to the vesting of title as between the parties, see *infra*, heading, *For the purpose of vesting title*.

V. For the purpose of appeal.

a. In courts of chancery.

The rule adopted by courts of chancery was that an appeal from a decree or order would not be entertained unless it had been enrolled. *Broadhurst v. Tunncliff* (1842) 9 Clark & F. 71; *Andrews v. Walton* (1842) 8 Clark & F. 457, 5 Jur. N. S. 519.

And if it is stale time to enroll it will not be granted unless the merits are with the appellant. *Broadhurst v. Tunncliff*, *supra*.

And the time to appeal from a decree or sentence began to run from the enrolling thereof. *De Burgh v. Clarke* (1837) 4 Clark & F. 562.

In *Ex parte Hookey* (1862) 4 DeG. F. & J. 456, however, it was held that the time at which an order was made was that at which it was pronounced and dated and not that at which it was drawn up, and the time within which to appeal began to run from that date.

b. In federal courts.

The chancery rule was practically adopted by the federal court it being held that the rights of the parties with respect to an appeal from a final decree are determined by the date of the actual entry or of the signing and filing thereof. *Providence Rubber Co. v. Goodyear* (1897) 78 U. S. 6 Wall. 163, 18 L. ed. 702.

And that it is the record of the judicial decision or order of the court found in the record book of the courts proceedings which constitutes the evidence of the judgment, and the time within which a writ of error must be brought begins to run from the date of the filing or entry thereof. *Polleys v. Black River Imp. Co.* (1884) 113 U. S. 81, 23 L. ed. 938.

So a docket entry in a suit for infringement of a patent containing only the words "Opinion—decree for complainants" does not constitute a decree for an injunction required to give jurisdiction to the circuit court of appeals, and cannot be aided for that purpose by reference to the opinion. *Herrick v. Cutcheon* (1893) 8 U. S. App. 260, 55 Fed. Rep. 6.

c. Under state statutes.

Different rules exist in the different states due largely if not entirely to the different language of and rules of interpretation applied to statutes authorizing appeals.

Thus under California Code Civ. Proc., § 906, providing for appeals from final judgments, an appeal perfected before entry of the judgment appealed

from does not bring up the case or affect it. *Home for Care of Inebriates v. Kaplan* (1890) 84 Cal. 496.

Such an appeal is premature and will be dismissed. *Coon v. Grand Lodge United Order of Honor* (1888) 76 Cal. 354; *Onderdonk v. San Francisco City & County* (1893) 75 Cal. 534; *Schroeder v. Schmidt* (1898) 71 Cal. 399; *People v. Center* (1895) 66 Cal. 551; *Thomas v. Anderson* (1890) 55 Cal. 43.

A judgment which has not been entered is not a final judgment from which an appeal may be taken. *Kimple v. Conway* (1886) 60 Cal. 71; *Tyrrell v. Baldwin* (1897) 73 Cal. 128; *Schroeder v. Schmidt*, *supra*.

So an appeal from a final judgment under Cal. Code Civ. Proc., § 906, providing that such appeal must be taken within one year after the entry of judgment, cannot be taken before the entry of the judgment though it has been ordered by the court. *McLaughlin v. Doherty* (1890) 54 Cal. 512; *Thomas v. Anderson*, *supra*.

A judgment being entered so as to be appealable only when it is actually entered in the judgment book. *McLaughlin v. Doherty*, *supra*.

And an appeal from an order settling the accounts of an administrator under a statute providing that it must be taken within sixty days after the order, decree, or judgment is entered is premature and subject to dismissal when taken before it is entered in the minute book of the court. *Re Rose* (1897) 72 Cal. 577.

And the time within which an appeal could be taken began to run at the time such entry was made. *Thomas v. Anderson*, *supra*.

But entering a judgment without first entering the default of one of the defendants though an irregularity, is not one that can be taken advantage of on appeal by the other defendant. *Malone v. Boech* (1894) 104 Cal. 660.

Under the California practice act existing previous to the enactment of the code of civil procedure, however, authorizing appeals within a designated time after the rendition of judgment, a judgment was deemed rendered so as to be appealable when it was ordered by the court. *McLaughlin v. Doherty*, *supra*.

And the time within which an appeal could be taken commenced to run when the judgment was announced by the court and entered upon the minutes by the clerk. *Thomas v. Anderson* (1890) 55 Cal. 43; *McCourtney v. Fortune* (1871) 42 Cal. 387; *Genella v. Relyea* (1897) 82 Cal. 159; *Peek v. Curtis* (1886) 31 Cal. 207; *Gray v. Palmer* (1895) 28 Cal. 416.

And not at the time it was entered in the judgment book by the clerk. *Peek v. Curtis* and *Genella v. Relyea*, *supra*.

And its entry was not necessary to set the statute running. *McCourtney v. Fortune*, *supra*.

The entry being a mere ministerial duty of the clerk. *Genella v. Relyea*, *supra*.

which order concluded as follows: "It further appearing that said appeal is without authority of law, now, therefore, it is ordered that the said appeal be and the same is dismissed, and the clerk of said district court is hereby ordered to return to said justice all papers and records sent him in said action by said justice." The order was filed with the papers in said action, but was not entered in the judgment book nor in the judgment docket, but said order was recorded at length in a book kept in the office of the clerk of the district court known as the "Order Book." No attempt has ever been made to appeal from such order. The fifth subdivision of section 24, chapter 120, Laws 1891, specifies as among those orders from

which an appeal may be taken to this court: "From orders made by the district court vacating or refusing to set aside orders made at chambers, where, by the provisions of this act, an appeal might have been taken in the case the order so made at chambers had been granted or denied by the district court in the first instance." The defendant proceeded on the theory that the order of dismissal was not appealable because made at chambers, but that it would have been appealable if made by the court, and under the foregoing provisions he moved in the district court to set aside the order of dismissal. This motion was denied, and from the order denying the motion to set aside an appeal was taken to this court. That appeal

The making of an order for judgment and its entry by the clerk in the minutes of the court and the preparation of a judgment thereon, which is signed by the judge and filed with the clerk constituted the rendition of a final judgment within the meaning of the California Practice Act, § 836, and the time within which to appeal began to run from that time. *Gray v. Palmer*, *supra*.

And the failure of the clerk to enter a judgment in the judgment book at the time it was rendered did not extend the time within which an appeal might be taken. *Ibid*.

So a change of time within which an appeal from a judgment may be taken by making it run from the entry of judgment instead of the rendition thereof will not warrant the court in considering the question whether the decision is supported by the evidence under Cal. Code Civ. Proc., § 939, providing that in order to review the evidence the appeal must be taken within sixty days after rendition of judgment, when the appeal was taken more than sixty days from the rendition of the judgment but less than sixty days from its entry. *Sohurts v. Romer* (1899) 81 Cal. 244.

An appeal from an order sustaining a demurrer to an indictment entered in the minutes of the court is good, as the penal code makes no provision for an entry of judgment on demurrer other than the entry of the order upon the minutes, the order thus entered being in effect a judgment. *People v. Jordan* (1884) 65 Cal. 644.

So in Missouri in which reviews and appeals are taken from final judgments and orders, a writ of error will be dismissed where the record fails to show any judgment entered in the court below. *Price v. Brown* (1876) 68 Mo. 347; *Ex parte Spencer* (1875) 61 Mo. 375; *Silvey v. Sumner* (1873) 61 Mo. 799.

And an appeal will be dismissed where no judgment was actually entered in the court below though the record shows that a verdict was returned in the usual form and that the court ordered judgment accordingly. *Dale v. Copple* (1873) 58 Mo. 821.

Nor does a judgment become a finality so as to set the time running within which an appeal may be taken until the overruling of a motion for a new trial, under Mo. Rev. Stat., 1899, § 4510, providing that in divorce cases no final judgment shall be reversed, amended, or modified unless the writ of error shall have been issued within sixty days after the judgment was rendered though the judgment had been previously formally entered. *State v. Smith* (1891) 104 Mo. 419.

So, the entry of a judgment on the record is essential to its completeness and efficacy and to make it appealable under the North Carolina code, it is not sufficient that the court has formed its judgment as to what the judgment should be; this is only the purpose of the court and to make it a judgment it must be entered of record. *Logan v. Harris* (1884) 90 N. C. 7.

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And in Alabama it was held that an entry that "upon consideration it is the opinion of the court that complainant is entitled to make a defense" not followed by words decreeing relief, or that the party is entitled to relief, is not such a final decree as will support an appeal. *Thompson v. Maddux* (1895) 18 So. Rep. 885.

So under the Texas statute authorizing an appeal from "judgment of conviction rendered," a defendant in a criminal cause cannot appeal therein until a judgment of conviction is entered against him. *Mayfield v. State* (1874) 40 Tex. 229, overruling previous cases holding the contrary rule.

And until final judgment entered in the court below the appellate court has no jurisdiction of the case whatever and the only order it can make is to dismiss the case from the docket. *Murray v. State* (1871) 35 Tex. 472; *Dooly v. State* (1879) 33 Tex. 712; *Calvin v. State* (1859) 23 Tex. 577; *Burrell v. State* (1856) 16 Tex. 147; *Nathan v. State* (1866) 28 Tex. 323.

And an entry made on overruling a motion for a new trial or in arrest of judgment, "judgment accordingly taxing all costs against the defendants," is not a judgment from which an appeal may be taken. *Roberts v. State* (1877) 3 Tex. App. 47.

But a party convicted may appeal from a judgment overruling his motion for a new trial under Paschal's Tex. Dig., art. 3151, though no judgment has been entered upon the verdict of conviction. *Hoppe v. State* (1899) 32 Tex. 383.

And under Paschal's Texas Crim. Code, article 3151, providing for the entry of judgment at the succeeding term if it has not been entered, the appellate court may proceed to dispose of the case on appeal though no judgment has been entered in the court below. *Nelson v. State* (1899) 32 Tex. 71.

In Nevada, however, the contrary rule has been adopted that a judgment when pronounced by the court is final so that an appeal will lie under Nevada Civil Practice Act, § 830, authorizing an appeal from a final judgment although it has not been entered and recorded by the clerk as required by law. *Keboe v. Blethen* (1876) 10 Nev. 445; *California State Teleg. Co. v. Patterson* (1895) 1 Nev. 150.

The right of appeal does not depend upon the entry or perfection of the judgment of the lower court but upon its rendition. *California State Teleg. Co. v. Patterson*, *supra*.

So in New York previous to the enactment of the code of civil procedure it was held that the time to appeal under N. Y. Code, §§ 245, 331, authorizing appeals within two years after judgment, began to run at the making of the final order or judgment and not from the docketing of the roll. *Bank of Geneva v. Hotchkiss* (1851) 1 Code Rep. N. S. 153, 5 How. Pr. 478.

And that the New York statute of limitations requiring a writ of error to be brought within two years after the rendering of the judgment or final determination of the court began to run at the

was dismissed. See *Travelers Ins. Co. v. Weber*, 2 N. Dak. 239. The court did not decide in that case whether or not the order of dismissal was an appealable order, but held that such order was, under our system, a court order when made, and hence no motion to set it aside was proper. If not appealable, the order refusing to set it aside was not appealable, and, if appealable, the appeal must be taken direct from the original order, and not from an order refusing to set it aside. When the remittitur in the case cited was filed in the district court, that court entered a judgment for costs against the appellant, including the costs in both courts. Certified copies of the dismissal and of the order of this court and of the judgment

of the district court, entered upon the order of this court, were filed in the justice court, and thereupon the justice issued execution upon the original judgment in his docket, and placed the same in the hands of the proper officer for service. While the officer was proceeding under the execution, and upon application therefor, the district court issued a writ of certiorari to the justice, requiring him to certify and return to said court all his proceedings in said case. The justice made return, and, after argument, the court entered an order stating, in effect, that, at the time of the issuance of the execution by the justice, he, the said justice, was entirely without jurisdiction, because no judgment dismissing the appeal from the jus-

time of the entry of the rule for judgment and not at the time of the filing of the record. *Fleet v. Youngs* (1888) 11 Wend. 522.

And that entry of a rule for judgment upon the report of referees or the filing of the judgment of record thereon is not necessary to limit the time for bringing error for the denial of a motion to set aside the report, the time limited in such case dating from the time when the motion was actually decided. *Lee v. Tillotson* (1842) 4 Hill, 37.

So in *Clason v. Shotwell* (1814) 12 Johns. 81, it was said that "the constitutional right of the party to appeal does not depend upon any English definition of a record. It depends upon the fact that his cause has been determined against him."

But under the New York code of civil procedure permitting appeals within a designated time after notice of the entry of the determination appealed from, a judgment must be entered and perfected before an appeal therefrom will lie. *Bentley v. Jones* (1880) 3 Code Rep. 37.

And an appeal will not lie from an order until it has been entered. *Smith v. Dodd*, (1854) 3 E. D. Smith, 215; *Nicholson v. Dunham* (1849) 1 Code Rep. 119; *Plato v. Kelly* (1863) 16 Abb. Pr. 193.

And until the motion papers are filed with the clerk of the court. *Smith v. Dodd*, *supra*.

And an appeal from a judgment brings up questions of law only when the order denying a motion for a new trial in the action on the ground that the verdict was contrary to the law and the evidence was not entered. *Chaimson v. Henshing* (1895) 88 N. Y. Supp. 271.

And an order must be entered before notice of its entry is given for the purpose of limiting the time within which to appeal therefrom in order to be effectual for that purpose, as no appeal can be taken until after such entry. *Re New York Cent. & H. R. R. Co.* (1875) 60 N. Y. 112.

And a decision of a surrogate upon which no order has been entered will not sustain an appeal, and an appeal taken therefor previous to such entry will be dismissed. *Re Callahan's Estate* (1892) 66 Hun, 118.

And notice of a judgment cannot be given so as to limit the time to appeal where the judgment roll has not been made up and filed though the form had been drawn up and settled and signed with the judge's initials and the clerk had been directed in writing to enter it. *Sherman v. Postley* (1895) 45 Barb. 345.

Notice required by statute to be given of an order required to be entered cannot be given until the order has been entered. *Galt v. Finch* (1862) 24 How. Pr. 193.

The opinion of the court given in deciding a motion avails nothing until given effect by some judgment or award and until that is done no appeal can be taken. *Snyder v. Beyer* (1854) 3 E. D. Smith, 236.

Nor is a judgment upon a verdict perfected and 36 L. R. A.

one from which an appeal will lie until it is entered in the judgment book with the amount of costs recoverable inserted therein. *Lentihon v. New York* (1851) 3 Sandf. 721.

And the entry of a judgment in which the amount of costs is kept open will not form a basis for a notice of judgment which will limit the time for appeal. *Sherman v. Wells* (1857) 14 How. Pr. 522.

And an appeal from a judgment reversing an order of a surrogate with costs cannot be taken until the amount of costs is ascertained and the roll filed. *McMahon v. Harrison* (1851) 5 How. Pr. 360.

So an order adjudging a defendant in contempt in not paying over money as directed by a previous order and imposing a fine therefor must be filed or entered with the clerk before an appeal can be taken from it. *Marshall v. Francisco* (1864) 10 How. Pr. 147.

And a judgment entered upon the direction of the court upon the trial of an issue of fact cannot be reviewed under the New York code of civil procedure unless a decision is signed and filed determining the issues of fact and law. *Benjamin v. Allen* (1885) 7 N. Y. Civ. Proc. Rep. 202.

The filing of a judgment roll after but upon the same day an appeal from the judgment is perfected, however, does not affect the regularity of the appeal, as fractions of a day are not regarded except for the purpose of preventing injustice. *Blydenburgh v. Cotheal* (1850) 4 N. Y. 418.

And an order of the general term on appeal in a contest in surrogate's court as to priority of right to administration does not require the entry of a judgment thereon before an appeal to the court of appeals pursuant to N. Y. Code Civ. Proc., § 2565, requiring that on appeal from a decree or order of a surrogate court the judgment or an order made thereon must be entered, as it is a special proceeding which can result only in an order and an appeal from the order is proper. *Libbey v. Mason* (1890) 2 L. R. A. 795, 112 N. Y. 525.

So in Wisconsin, where the statute (Wis. Laws 1860, chap. 264, § 12), like that of New York, provides for appeals within a designated time after notice of entry of judgment, it is held that there is no judgment to appeal from and the time to appeal does not begin to run until it is actually entered and the costs taxed and inserted therein. *Milwaukee County Suprs. v. Pabet* (1885) 64 Wis. 244.

And that costs must have been adjusted and inserted in a judgment in order to render notice of entry thereof effective to set the time running within which a bill of exceptions must be served. *Bonesteel v. Bonesteel* (1872) 30 Wis. 151.

Nor is a docket entry in an action of replevin, showing that a trial was had and that judgment was rendered against the defendant for the property claimed, without any finding of the value of the property or that the plaintiff is entitled to pos-

tice had ever been entered in the district court, and directing that the execution, and all the proceedings thereunder, be set aside and annulled. From a judgment entered on this order this appeal was taken.

We notice first that the propriety of the remedy pursued in this case has not been questioned; hence, we must not be understood as holding that certiorari is or is not the proper remedy in cases of this character. The case has been submitted to us on the theory that certiorari was the appropriate remedy, and we decide it accordingly. If the position of the learned trial court that no judgment of dismissal had been entered in that court be correct, and if a formal judgment of dismissal be necessary, then an affirmance must follow.

session or assessment of damages and no order that the officer deliver the property to the plaintiff, a judgment which can be either affirmed or reversed on certiorari. *Beemis v. Wylie* (1865) 19 Wis. 313.

Under the Minnesota statute (Gen. Stat. 1878, chap. 86, § 6), providing that an appeal may be taken within six months after the entry of judgment, the time within which an appeal may be taken begins to run from the time the judgment or order appealed from was perfected by being entered of record and not from the time of making the decision. *Humphrey v. Havens* (1864) 9 Minn. 313, overruling the contrary holding in *Furlong v. Griffin* (1859) 3 Minn. 207; *Haines v. Paxton* (1861) 5 Minn. 442; *Hostetter v. Alexander* (1876) 22 Minn. 559.

And the filing of the record and entry of judgment is necessary to set the time running within which an appeal may be taken and an appeal taken before that is done is premature. *Exley v. Berryhill* (1896) 36 Minn. 117.

In Nebraska, though the statute provides for appeals within a designated time after the rendition of judgment, a decree is required to be entered of record in order to set to running the time within which an appeal may be taken, so that it may be within the power of the appellant to comply with the statute by filing in the appellate court a certified transcript of the proceedings of the court below, the decree not being regarded as rendered until it is made matter of record. *Bickel v. Dutcher* (1892) 35 Neb. 751.

Bickel v. Dutcher, *supra*, overrules *Horn v. Miller* (1896) 20 Neb. 96, holding that the time within which an appeal may be perfected begins to run at the date of the rendition of a judgment or decree and not of the entry thereof on the journal by the clerk.

An appeal will not be dismissed under South Dakota Comp. Laws, §§ 5095, 5101, 5102, giving the right to appeal "from any judgment" because taken before the costs and disbursements are taxed and inserted in the entry of the judgment appealed from. *Williams v. Wait* (1891) 2 S. Dak. 210.

So under the Michigan statute limiting the right to a review to two years from the judgment or other final determination of the case, the time within which a writ of error may be brought for the review of a judgment runs from the time of its rendition and is not affected by the subsequent settlement of exceptions. *Teller v. Willis* (1864) 12 Mich. 384.

And in Maryland the preparation of a bill of exceptions on appeal is in no way dependent upon the entry of judgment and should not be delayed to await such entry. *Bond v. Citizens Nat. Bank of Indianapolis* (1886) 65 Md. 498.

An appeal is not prevented by the entry of the judgment in the "minute book" instead of the book of "judgments by the court." *Wolf v. Great* 28 L. R. A.

Otherwise we must reverse the judgment. It is contended by respondent's counsel that the document which we have called the order of dismissal, meaning the dismissal of the appeal from justice court, which was entered on January 10, 1891, is not a judgment, and further contended that, under our statutes, there can be no judgment until the proper entry is made in the judgment book. If it be conceded, and we think it must be, that a technical judgment is required to dismiss an appeal from a justice court, then respondent is right. A mere order of determination made by the district court does not constitute a final judgment under our statutes. Before any judgment can have any force as such, it must, in our opinion, be entered in the judgment book.

Falls Water-Power & Town-Site Co. (1894) (Mont.) 33 Pac. Rep. 115.

And the entry in the "Journal of proceedings" instead of in the "judgment book" is sufficient to set in motion the time within which to appeal. *Work v. Northern Pac. R. Co.* (1891) 11 Mont. 513. See also *in tra*, heading, *Entry in wrong book*.

A probate decree entered in a will contest, the recitals in which do not show that it was entered by consent and agreed to be final and conclusive, is not a consent decree which will constitute a waiver of all errors and prevent an appeal, although it was submitted and consented to by appellee's counsel who procured its entry on the minutes of the orphans' court where he did it for the purpose of speeding the process of appeal. *Olmstead v. Webb* (1894) 22 Wash. L. Rep. 801, affirmed in 23 Wash. L. Rep. 169.

d. Orders for judgment.

A rule or order for judgment entered upon the record is not a judgment upon which error will lie where no judgment has been entered thereon. *Dean v. Williams* (1849) 1 Chand. (Wis.) 22, 3 Pinney, 91; *Joint School Dist. No. 7 of Brighton v. Kernen* (1887) 68 Wis. 246; *Murray v. Scribner* (1897) 70 Wis. 228; *Abkle v. McLean* (1891) 2 Idaho, 812; *Durant v. Comegys, Id.* 809; *Chesterson v. Munson* (1879) 26 Minn. 303; *Preston v. Hearst* (1888) 54 Cal. 505; *Thomas v. Anderson* (1890) 55 Cal. 43.

There is no legal determination of a cause and nothing to appeal from though the decision is announced where no decree is actually drawn up or filed. *Newbould v. Stewart* (1866) 15 Mich. 155.

Until judgment is entered the trial court retains complete jurisdiction of the case of which it cannot be deprived by an unauthorized appeal. *Brady v. Burke* (1891) 90 Cal. 1.

And an order for judgment upon which no judgment is entered is not a final judgment so as to render an order subsequently made appealable as an order made after final judgment. *Macnevin v. Macnevin* (1893) 63 Cal. 186.

So an appeal or writ of error cannot be taken from a mere opinion of the court upon which no judgment or order has been entered. *Harper v. Roberts* (1853) 22 Pa. 194; *Thompson v. Howe* (1874) 21 Minn. 1.

And a judgment *not* may or may not ripen into a judgment under the Mississippi practice, and until it does so ripen no appeal from it will lie. *Bush v. State* (1899) (Miss.) 6 So. Rep. 647.

Nor will an appeal lie from the court's findings of fact and law filed on a trial by the court without a jury; it must be taken from the judgment entered upon them. *Von Glahn v. Sommer* (1896) 11 Minn. 203.

And filing findings and an order for judgment does not furnish a basis for an appeal under

This question involves the examination of the statutes of this state regulating the rendition and entry of judgments in the district courts. Section 5024, Comp. Laws, reads: "A judgment is the final determination of the rights of the parties in the action." Section 5095 reads: "Judgment, upon an issue of law or fact, or upon confession, or upon failure to answer, may be entered by the clerk upon the order of the court or the judge thereof." Section 5101 reads: "The clerk shall keep among the records of the court a book for the entry of the judgments, to be called the 'Judgment Book.'" Section 5102 reads: "The judgment shall be entered in the judgment book, and shall specify clearly the relief granted or other determination of the action." Section 5103 provides for

making up the judgment roll, and directs that the roll shall be made up by the clerk after the entry of the judgment. This is apparent also from the requirement that the roll shall embrace a "copy of the judgment." Under section 5104 a judgment will become a lien upon real property only when docketed in another book, known as the "Judgment Docket." Section 5102, *supra*, is a copy of section 273 of chapter 66 of the General Statutes of Minnesota of 1878, and the section of the Compiled Laws regulating the making and filing of a judgment roll by the clerk of the district court is also copied substantially from section 275, chapter 66, of the General Statutes of Minnesota for 1878.

The point involved in the case at bar has

Cal. Code Civ. Proc., § 839, providing for appeals from final judgments within one year from the entry thereof, and an appeal thus taken does not divest the trial court of jurisdiction to subsequently enter the judgment. *Brady v. Burke, supra*.

And an appeal will not lie from an order confirming the report of a referee. *Bourgeois v. Schrage* (1887) 60 Wis. 316.

Or from a verdict without judgment. *Evanston v. Dowden* (1894) 55 Ill. App. 217.

And an order of the general term directing the entry of a judgment upon a verdict in a case heard on exceptions at the general term in the first instance is not appealable to the court of appeals. Judgment must be first entered as ordered, and the appeal taken from the judgment. *Delaware, L. & W. R. Co. v. Burkard* (1888) 109 N. Y. 648; *Becker v. Koch* (1887) 104 N. Y. 394, 58 Am. Rep. 517.

Neither is an order for judgment against a garnishee upon which judgment has not been entered appealable. *Croft v. Miller* (1879) 26 Minn. 317.

So an order of the general term affirming a judgment furnishes no basis for an appeal to the court of appeals; judgment must be entered upon the order and the appeal taken from the judgment. *Bielling v. Brooklyn* (1890) 120 N. Y. 98; *Kilmer v. Bradley* (1890) 80 N. Y. 630.

And the same rule applies to an order affirming a judgment and denying a motion for a new trial. *Derleth v. DeGraff* (1887) 104 N. Y. 661.

And an order of reversal cannot be appealed from as an order, and is not a judgment and appealable as such until judgment is actually entered and perfected thereon by the clerk in the judgment book. *Rust v. Hauselt* (1887) 69 N. Y. 435; *Mehl v. Vonderwulbeke* (1871) 46 N. Y. 539; *Vernon v. Palmer* (1883) 67 How. Pr. 18.

Nor will an appeal lie from an order of dismissal duly entered but upon which no judgment had been entered. *Lamb v. McCanna* (1889) 14 Minn. 513; *Rogers v. Holyoke, Id.* 514; *Searles v. Thompson* (1871) 13 Minn. 316.

And an appeal taken by the defendant in a criminal cause after a conviction and the overruling of a motion for a new trial will be dismissed where the record does not show that any final judgment had been rendered and entered in the court below. *Young v. State* (1876) 1 Tex. App. 64.

An appeal cannot be taken from a judgment overruling a motion for new trial or in arrest of judgment, the entry of judgment thereon being an indispensable requisite to an appeal. *Roberts v. State* (1877) 3 Tex. App. 47.

An order sustaining or overruling a demurrer is a mere order for judgment, and before an appeal can be taken therefrom judgment must be entered on it. *Garner v. Harmony Mills* (1879) 13 Jones & S. 148, 6 Abb. N. C. 213; *Ferris v. Aspinwall* (1871) 10 Abb. Pr. N. S. 137; *Campbell v. New* 38 L. R. A.

York Cotton Exchange (1881) 15 Jones & S. 558; *Cameron v. Equitable L. Assur. Soc. of United States* (1879) 13 Jones & S. 628; *Bruce v. Pinckney* (1853) 3 How. Pr. 397; *Parsons v. Hayes* (1884) 13 Jones & S. 29; *Cambridge Valley Nat. Bank v. Lynch* (1879) 19 Alb. L. J. 360; *Olsen v. Newton* (1891) 3 Wash. 429; *Moraga v. Emerio* (1884) 4 Cal. 309; *Cummings v. Heard* (1868) 2 Minn. 24.

As to the necessity of entering an order sustaining or overruling a demurrer to make it a bar to another action, see *infra*, under heading 2b *constitutes a bar to another action*.

The order furnishes no basis for an appeal. Judgment must be first entered thereon, and the appeal taken from the judgment. *Lacustrine Fertilizer Co. v. Lake Guano & Shell Fertilizer Co.* (1879) 15 Hun, 494; *Miller v. Sheldon* (1878) 15 Hun, 220; *Lee v. Timken* (1894) 81 Hun, 81; *Sheffield v. Murray* (1894) 80 Hun, 555; *Bruce v. Pinckney, supra*; *Adams v. Fox* (1883) 27 N. Y. 640; *Cambridge Valley Nat. Bank v. Lynch* (1879) 76 N. Y. 514; *Parsons v. Hayes, supra*.

The same rule applies to an order for judgment on demurrer with leave to amend. *Lewis v. Acker* (1853) 8 How. Pr. 414.

And no appeal will lie from a judgment upon a demurrer under N. Y. Code, § 343, authorizing an appeal from a judgment entered upon the direction of a single judge, until the judgment is entered and perfected. *Bentley v. Jones* (1850) 4 How. Pr. 335.

In *Nolton v. Western R. Corp.* (1864) 10 How. Pr. 97, however, it was held that under section 349 of the old New York Code a decision sustaining or overruling a demurrer might be appealed from before judgment was entered thereon whether the demurrer went to the whole or only to a part of the pleading.

And the same rule was held in *Reynolds v. Freeman* (1852) 4 Sandf. 702.

A judgment must be entered in the judgment book before it is complete and an entry by the clerk upon the minutes of the court of a motion for a new trial and its allowance upon which no judgment has been entered furnishes no basis for an appeal. *Hodgins v. Heaney* (1870) 15 Minn. 185.

Thus the entry made by the clerk by direction of the judge upon the return of a verdict, of a judgment to be rendered thereon is a direction to enter judgment, but it is not the judgment and is not subject to appeal. *Lentillon v. New York* (1861) 3 Sandf. 721.

And a docket memorandum of the presiding judge intended and operating as a direction to the clerk as to what judgment should be entered is not a judgment from which an appeal will lie. *Morgan v. Flexner* (1894) (Ala.) 16 So. Rep. 716.

And a memorandum for a decree made by a judge upon his calendar is not a final judgment or

been considered and passed upon by the supreme court of Minnesota in several cases, and the holding of that court has always been, in effect, that the entry of the judgment is essential to its existence as a final adjudication. That court, in *Rockwood v. Davenport*, 37 Minn. 533, reviewing the former decisions, and quoting from the statute, which says: "The judgment shall be entered in the judgment book, and specify clearly the relief granted, or other determination of the action,"—then proceeded: "By section 276 the clerk is required, immediately after entering the judgment," to attach and file, as the judgment roll, certain papers, among them a copy of the judgment. Section 277 provides for docketing the judgment 'on filing the judgment roll.' These facts follow in

regular sequence: First, the entry of the judgment; second, the making up and filing of the judgment roll; third, the docketing. To support either a judgment roll or docketing there must be a judgment entered. As this court stated in *Williams v. McGrade*, 13 Minn. 46 (Gil. 39), 'if a copy of the judgment constitutes a part of the judgment roll, the original must exist.' There can be no judgment capable of being docketed or enforced in any manner until it is entered in the judgment book. Until that is done, it does not matter that a party is entitled to judgment, either by default of defendant or upon a decision or direction of the court. It has frequently been decided that an order or direction for judgment by a court or by a referee is not a judgment so that

decree from which an appeal will lie and does not authorize a review of the case prior to the formal entry thereof upon the journal of the trial court. *Ward v. Urmson* (1894) 40 Neb. 695.

So the oral announcement of a judgment of affirmance and its entry in the minutes of the clerk is not such a judgment as will authorize action under it; a formal judgment embracing the decision of the court must be entered by the clerk in order to set the time running within which an appeal may be taken. *Bowman v. Tallman* (1864) 28 How. Pr. 482.

And the filing of his findings of fact by a judge and an entry by the clerk in his minute book that the court gives judgment for the defendant constitutes the making of an order for judgment but is not the entry of a judgment from which an appeal can be taken. *Thomas v. Anderson* (1890) 55 Cal. 43.

And where no further proceedings were had in the state court than the rendition of a verdict and the overruling of a motion for a new trial, no judgment having been entered on the verdict, there is no final judgment from which a writ of error can be taken to the Supreme Court of the United States. *National L. Ins. Co. of United States v. Scheffer* (1881) 26 L. ed. 1110.

A memorandum "demurrer overruled" entered upon the court docket is not a decree which will support an assignment of error but a mere direction to the registrar from which a decree might be developed by formal incorporation in the minutes of the court. *Park v. Lide* (1889) 90 Ala. 246.

And a determination in an action in the form of a conclusion of law coupled with the mandate, "let judgment be entered accordingly," is not an appealable order when no judgment has been entered upon it; it is a mere order for judgment and not a judgment. *Ryan v. Kranz* (1878) 25 Minn. 362.

So an entry on the minutes of the court stating that on motion of defendant's counsel the court ordered the cause dismissed at plaintiff's costs taxed at a designated amount, is not a final judgment from which an appeal may be taken but simply an order directing the entry of judgment. *Durant v. Comegys* (1891) 2 Idaho. 809.

And an indorsement on motion papers used on motion to arrest judgment of the words "motion granted," signed by the judge, is not a final judgment from which an appeal can be taken but a mere order for the entry of an order staying judgment on the verdict. *Sedgwick v. Dawkins* (1880) 17 Fla. 811.

Nor is an entry in the record of the district court on motion to dismiss an appeal from probate court, "motion to dismiss appeal granted," a judgment or an appealable order. It is a mere order for judgment upon which judgment should be rendered as an appeal taken from the judgment. *Murphy v. King* (1886) 6 Mont. 30.

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Neither is an entry on the record at the foot of a verdict, stating that a judgment is rendered, without setting out what the judgment was, a final determination of the court from which an appeal may be taken. *Bell v. Otis* (1893) (Ala.) 13 So. Rep. 48.

And the same rule applies to an entry on the minutes of the clerk showing the denial of a motion for a new trial and another showing the trial and submission of the case and stating that the court gives judgment for the defendant. *Thomas v. Anderson* (1890) 55 Cal. 43.

As to orders for decrees in equity, see *supra*, under heading, *In actions in equity*.

c. Orders made out of court.

An order made out of court must be entered in the county clerk's office before it furnishes a basis for an appeal. *Pool v. Safford* (1877) 10 Hun. 697; *Whitaker v. Desfosses* (1861) 7 Bosw. 678.

Although a direction to enter it signed by the judge is indorsed upon it. *Whitaker v. Desfosses, supra*.

An the rule is the same where the order is made upon notice. *Gallt v. Finch* (1862) 24 How. Pr. 193. And the appeal will be dismissed where it was not so entered. *Murray v. Hathaway* (1889) 28 N. Y. S. R. 53.

But *ex parte* orders to enlarge the time to answer under N. Y. Code, § 366, need not be entered with the clerk to be effectual. *Savage v. Relyea* (1848) 3 How. Pr. 276.

VI. For the purpose of being effective as a lien.

This subject is intended to be confined to the question of the sufficiency of the entry or record of a judgment to make it effectual as a lien and not extended to include the docketing thereof which is usually something distinct from the entry and recording required to be subsequently performed to render effective that which is given by the judgment and record.

Thus the judgment roll must be made and filed before a judgment can be legally docketed, the docketing of a judgment previous to such filing of the judgment roll creating no lien upon the lands of the judgment debtor. *Townshend v. Wesen* (1856) 4 Duer. 342.

The record of a judgment must show the names of the plaintiff and defendant in order to operate as a lien under a statute providing that it shall operate as such when recorded and indexed. *Anthony v. Taylor* (1887) 68 Tex. 403.

And a judgment must be entered of record in such a manner as to give notice of its existence in order to make it a lien which will affect the rights of third persons dealing with the judgment debtor. *Eastham v. Sallis* (1884) 60 Tex. 576.

Thus a judgment against partners which was indexed in the name of the firm only is not effective

an appeal can be taken from it. That, to constitute a judgment, it must be entered in the judgment book as the statute directs, has always been held by this court. *Brown v. Hathaway*, 10 Minn. 303 (Gil. 238); *Washburn v. Sharpe*, 15 Minn. 63 (Gil. 43); *Williams v. McGrade*, 18 Minn. 46 (Gil. 39); *Hodgins v. Heaney*, 15 Minn. 185 (Gil. 142); *Thompson v. Bickford*, 19 Minn. 17 (Gil. 1); *Hunter v. Cleveland Co-operative Stores Co.* 81 Minn. 505." The reasoning of the learned court in the case from which we have made extracts above, based as it is upon statutes identical in their language with those in this state, seems to our minds both sound and conclusive upon the question under discussion. We are aware that California and some of the other states, under sys-

tems somewhat resembling our own, have emphasized the distinction between the "rendition" and the "entry" of a judgment; but we are convinced that it will serve to simplify and make certain an important feature of practice to hold, as was said in one of the cases cited, "there can be no judgment capable of being docketed or enforced in any manner until it is entered in the judgment book." What was said by this court in *Gould v. Duluth & D. Elevator Co.*, 8 N. Dak. 96, is in entire harmony with the decisions cited. In that case we said: "In this state, where an order for the entry of a judgment is given, it is the duty of the clerk under section 5095, *supra*, to enter final judgment in the judgment book, and then place a copy of said judgment in the roll

as a lien upon lands belonging to one of the partners and subsequently conveyed by him to an innocent third person. *Old Dominion Granite Co. v. Clarke* (1877) 28 Gratt. 617. For index as part of records of title, see *notes* to *Dewey v. Sugg* (N. C.) 14 L. R. A. 888.

And any lien which may have attached to land under a judgment rendered in a circuit or district court of the United States in a county in Kansas other than that in which the land is situated, is lost, where the judgment creditor fails to file a copy of the journal entry in the office of the clerk of the district court of the county in which the land is situated as required in case of judgments by state courts for more than four months after the passage of the Act of Congress of August 1, 1888, providing that whenever the laws of a state as to the registering, recording, etc., of judgments or decrees extend to judgments and decrees of the United States, compliance therewith is essential to the existence of liens as to such judgments. *First Nat. Bank of Washington v. Clark* (1896) (Kan.) 40 Pac. Rep. 270.

But a judgment which is filed with the clerk and recorded and entered in the abstract book is not rendered invalid or deprived of its character as a lien by the omission of the clerk to sign, date, and test it and mark it filed. *Clark v. Melton* (1888) 19 S. C. 498.

And the omission of the clerk to date and sign the formula prescribed by law at the time of the entry of a judgment does not invalidate it or affect the lien thereof even as to third persons subsequently purchasing from the judgment debtor. *Hardin v. Melton* (1887) 23 S. C. 38.

An entry in the record of a cause reciting the trial and verdict and "therefore it is considered and adjudged by the court that the plaintiff in this action have judgment, etc.," is not a mere order for judgment, but a judgment, which may be docketed and will sustain subsequent proceedings. *Potter v. Eaton* (1870) 26 Wis. 382.

Under the Louisiana practice the recording of a judgment gives a judicial mortgage but until judgment is signed it is not a judgment so that the registry of an unsigned judgment cannot cooperate. *Marshall v. Hooker* (1875) 27 La. Ann. 454.

But the registry of a judgment upon which a judicial mortgage is claimed upon the same day that it became complete and final by being signed by the judge is sufficient. *Spring v. Wells* (1890) 5 Mart. N. S. 104.

Filing the transcript of a judgment of foreclosure of a mechanic's lien with the auditor as required by the Washington statutes as to money judgments is not essential to perfect the lien upon the lands affected thereby, and such judgment is effective as a lien thereon as against a purchaser with notice though not thus filed. *Frank v. Jenkins* (1896) (Wash.) 40 Pac. Rep. 220.
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VII. For the purpose of enforcement.

a. By execution.

The general rule, subject to some exceptions, is that the entry of the judgment is a condition precedent to the issue of execution.

Thus a docket should be sustained by a judgment roll under the New York practice, and where a judgment is docketed upon the decision or order for judgment without any judgment roll having been made up or filed an execution issued on such docket will be set aside unless the defect be cured by filing a proper judgment roll within a reasonable time. *Blashfield v. Smith* (1882) 27 Hun. 114.

And there can be no judgment capable of being docketed or enforced in any manner, under the Minnesota statutes, till it is entered in the judgment book, and a docketing without such entry is of no avail though the judgment roll has been made up and filed. *Rockwood v. Davenport* (1887) 37 Minn. 538.

To constitute a valid judgment, the record of it must contain sufficient certainty and precision to enable the clerk to issue execution by inspection of the entry without reference to other entries. *Boyken v. State* (1882) 3 Yerg. 426; *Steamer Mollie Hamilton v. Paschal* (1872) 9 Heisk. 208.

An entry "ordered judgment in this action, etc.," is not a judgment upon which an execution can issue. *Lincoln v. Cross* (1860) 11 Wis. 92.

And an entry in the minutes of the court showing the declaration of a default by the court and a statement that by reason thereof a plaintiff ought to recover damages and an order to the clerk to assess them, which was done, and directing the issue of execution for the costs, is not a final judgment. *Eastham v. Sallis* (1884) 60 Tex. 576.

So an enrolled decree must be signed by the chancellor or vice-chancellor and by the register or clerk before it can be filed so as to authorize the issue of an execution thereon. *Bank of Rochester v. Emerson* (1848) 10 Paige, 360, 4 L. ed. 1011.

When the decree is enrolled the proceedings become a matter of record and execution can issue upon it. *Gilpatrick v. Glidden* (1880) 82 Me. 201.

And an entry on the minutes of the clerk in a proceeding for forcible entry and detainer, "Verdict for plaintiff, let writ issue," is not a judgment and an execution issued thereon is void, and a failure to enter judgment invalidates a writ of possession issued therein and renders it insufficient to protect possession taken under it. *Stark v. Billings* (1875) 15 Fla. 318.

So a confession of judgment which was filed and a judgment indorsed thereon, but which was not entered in the judgment book, is not sufficient to support an execution. *King v. French* (1872) 3 Sawy. 441.

The filing of the papers authorizing the entry of a judgment by confession is not sufficient as an

(Comp. Laws, §§ 5101, 5103); and the coming in of a verdict and order for judgment entered in the minutes, or subsequently written out, signed by the judge, and filed, will give the clerk authority to enter judgment pursuant to the order. Where the action is tried by the court, the findings should indicate clearly the character of the judgment to be entered, and such findings, without further direction from the court or judge, will authorize the entry of judgment. In no case should a judge be called upon to sign a judgment." This language indicates clearly that, in the opinion of this court, it is not the order of the district court or judge, which, under section 5095, Comp. Laws, must precede the entry of judgment, that constitutes the judgment. We

think that under existing statutes the final determinations of district courts never assume the authoritative form of a final judgment until the previous adjudication is recorded at length in an official record, called a "Judgment Book." Comp. Laws, §§ 5101, 5102. See also *Bowman v. Tallman*, 28 How. Pr. 483, and *Knapp v. Roche*, 83 N. Y. 866.

In the view taken by this court a judgment was necessary to accomplish a dismissal of the appeal from justice court. A motion was regularly made to dismiss the appeal. Argument was had on the motion, and the court signed a writing which recited: "Now, therefore, it is ordered that the said appeal be and the same is hereby dismissed." Section 5323, Comp. Laws, reads: "Every direction of a

entry thereof, the judgment must be in fact entered by the clerk, and an execution issued thereon before such entry is illegal and subject to collateral attack. *Ling v. King* (1879) 91 Ill. 571.

It is not material, however, whether the record of judgments entered by confession in open court was actually written up or not at the time executions are issued thereon where the judgments were a part of the proceedings of the court in term time. *Welgley v. Matson* (1888) 125 Ill. 64.

And in Minnesota the omission of the entry of a confessed judgment in the judgment book does not invalidate a docketing of the judgment or an execution issued upon it where the judgment was indorsed upon the statement filed, as under Gen. Stat. 1878, chap. 82, § 2, each is an original step. *Wells v. Gieseke* (1881) 27 Minn. 478.

As to confession on warrants of attorney in general, see *note* to *Teel v. Yost* (N. Y.) 18 L. R. A. 708.

In Missouri, however, the rule is that the right to an execution follows *eo instanti* upon the rendition of a judgment, and that the rendition of the judgment is the judicial act upon which the execution rests and its entry upon the record is a mere ministerial act evidencing the judicial act but not essential to its validity or giving it any additional force or efficacy, and that it is sufficient if the record evidence is in existence when proof of the judgment becomes necessary. *Fontaine v. Hudson* (1887) 96 Mo. 62.

And the entry and docketing of a judgment are not necessary under the California practice to its enforcement by the issuance of an execution thereon; they are merely ministerial acts required to confer the right to appeal and for the purpose of creating a lien, but do not affect the right to execution. *Los Angeles County Bank v. Raynor* (1882) 41 Cal. 145.

An execution may issue immediately upon the entry of judgment though the judgment roll has not been made up and filed. *Sharp v. Lumley* (1868) 34 Cal. 614.

But in *Gray v. Palmer* (1866) 28 Cal. 416, it was said that, under section 209 of the Practice Act, providing that execution may issue on a judgment within five years after its entry, judgment must be entered before it can issue.

An entry by a justice of the peace in his docket stating the amount of damages given by the verdict of the jury and the amount of costs is effectual as an entry of judgment and sufficient to sustain an execution issued thereon. *Overall v. Pero* (1869) 7 Mich. 315. See also *infra*, heading, *Judgments of justices of the peace*.

b. By action.

Proper entry of a judgment is also necessary to a right of action upon it or growing out of it.

Thus a memorandum of the clerk of a court states 28 L. R. A.

ing the amount of damages assessed by the jury, with the words "then judgment for" the sum so assessed, does not constitute a judgment upon which an action may be maintained. *Hinson v. Wall* (1852) 20 Ala. 296.

And a statement on the record signed by the clerk of the court showing the parties, amount, and date of an award of judgment, is a mere memorandum from which a final judgment could be drawn up, and will not sustain an action against a sheriff for a false return of a *fi. fa.*, a judgment being necessary to a recovery which will not be presumed to have been entered in the absence of disclosure in the record. *Tombeckbee Bank v. Godbold* (1880) 3 Stew. (Ala.) 240, 20 Am. Dec. 80.

So, when there is no proof of a record once existing and lost, entries in the handwriting of a justice upon a writ and declaration returnable before him, stating the issues and the amount of damages and the items of the bill of costs and an execution counting on a judgment between the parties for the same sums, are not admissible in evidence in an action of debt on judgment as showing a judgment rendered or as a substitute for proof of a record. *Davidson v. Murphy* (1839) 13 Conn. 218; *Wales v. Smith* (1825) cited in *note* to 13 Conn. 218.

The decision of the court upon issues which never passed into judgment and upon which no judgment was entered cannot avail a party to a collateral action whose rights depend upon the existence of a judgment in conformity with such decision. *Kidder v. Bork* (1885) 12 Misc. 519.

VIII. For the purpose, of putting the statute of limitations in motion.

The statute of limitations against actions on judgments is put in motion and runs from the time of the entry and not the rendition thereof. *Edwards v. Hellings* (1894) 103 Cal. 204; *Crim v. Kessing* (1891) 89 Cal. 478; *Trenouth v. Farrington* (1880) 54 Cal. 273.

And a party who desires to set it running may himself procure its entry at any time after its rendition. *Edwards v. Hellings, supra*.

This rule was applied to California Act of April 2, 1855, limiting the time for the commencement of an action to two years from the time the cause of action accrues, in *Parke v. Williams* (1857) 7 Cal. 247, the court holding that the statutes commenced to run against an action on a judgment from the time of the final entry thereof.

So the time within which to move under Minn. Gen. Stat., chap. 68, § 51, to open a judgment and be allowed to defend begins to run with the entry of judgment. *Washburn v. Sharpe* (1870) 15 Minn. 62. See, as to time for appeal, *supra*, V.

IX. For the purpose of vesting title.

The vesting of a title is not dependent upon the recording of a decree, under Alabama Act 1841,

court or a judge made or entered in writing, and not included in a judgment, is denominated an order,"—and the statute following: "An application for an order is a motion." The application for the order of dismissal was by motion. That writing fulfills every requirement of an order. It fulfills none of the requirements of a judgment. It is not "a final determination of the rights of the parties in the action," because it looks forward to further proceedings, viz. to the entry of a judgment. The order of dismissal was filed and recorded at length by the clerk in a book kept in his office, labeled "Order Book." Our attention has not been called to any statute which authorizes the clerks of district courts in the state to keep a record called an "Order Book."

But in our view of the practice, if the order in question had been entered in the official minutes of the court, as would be proper practice in a case where such an order is made when the clerk is present, its entry in the minutes would not operate to change its character as an order, and transmute it into a final judgment. We are not called upon to decide in this case whether the order of dismissal, if entered in the judgment book, would constitute a regular judgment. No such entry was made as a matter of fact. But we do not hesitate to say that, in our opinion, the practice of embodying in one compound document an order for judgment and a final judgment is loose practice, and should be avoided by the profession. Counsel for appellant contend that sim-

Clay's Dig., 354, § 57, requiring decrees in chancery vesting title to real property to be recorded with the clerk of the county in which it is situated, but is affected by a failure to record it in the same way as a deed would be affected by a failure to record under the registration laws, the title being good as between the parties and as against all persons having notice before acquiring an interest though the decree was not recorded. *Witter v. Dudley* (1868) 42 Ala. 616.

So the rights of the parties to an action for partition are fixed by the final decree therein and not by its enrollment, and such a decree is admissible in evidence in an action of ejectment by a party claiming title under it though it was not signed and docketed until after the commencement of the ejectment suit. *Lynch v. Rome Gas Light Co.* (1864) 42 Barb. 591.

And the fact that a judgment in partition severing a tenancy in common was not signed and filed at the time of the commission of a trespass by one tenant upon the part allotted to another does not affect the right to recover therefor. The judgment was complete at the time of the confirmation of the partition made by the commissioners, and if it was signed and filed in time for use at the action for trespass as evidence it is sufficient. *Van Orman v. Phelps* (1850) 9 Barb. 500.

2 N. Y. Rev. Stat., 360, §§ 11, 12, providing that no judgment shall be deemed valid so as to authorize any proceedings thereon until the record thereof shall have been signed and filed, or affect any lands, tenements, real estate, or chattels real, or have any preference as against other judgment creditors, purchasers, or mortgagees until the record thereof be filed and docketed, was intended to define and secure the lien of judgments upon land and does not apply to proceedings and judgments *in rem* as in partition where the judgment is in the nature of a specific decree. *Ibid.*

X. For the purpose of evidence.

It is to be observed that in a large number of the cases in which the sufficiency of the entry of a judgment or order is considered, except, perhaps, for the purpose of appeal, the question arises as one of the admissibility of the judgment or order for some particular purpose. Cases in which the court has treated the question as one of the sufficiency of the entry for some particular purpose, however, are treated in this note under the heading relating to that purpose, leaving such cases to be here treated only as are considered by the court from the standpoint of admissibility. But the subjects devoted to the sufficiency of the entry for particular purposes should be considered by the reader in connection herewith.

The general rule is that a mere decision or direction to enter judgment is not a judgment and admissible in evidence as such.

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Thus a mere minute of the proceedings of the court taken by the clerk to enable him to make up a record containing no judgment except the general entry "Judgment for the United States" is not evidence of a judgment and execution. *Leveringe v. Dayton* (1837) 4 Wash. C. C. 608.

And an entry in a book kept by the clerk of the district court indorsed "Judgment," "Records," and, "Register of actions and judgment book," showing the different steps in an action in the last of which was, "Judgment entered against defendants in favor of plaintiff for \$323.50," which was without date, is not an entry of judgment and is not admissible to prove a judgment. *Brown v. Hathaway* (1855) 10 Minn. 308.

Though a certified copy of docket entries of a judgment by default as follows: "October 27th defendant not appearing, and now to wit after hearing the allegation and proof, judgment is hereby given by default," shows a sufficient record thereof. *Wilson v. Greenwood* (1879) 5 Houst. (Del.) 519.

And a decision of the court signed by the judge and filed among the papers of the cause is not the judgment of the court and admissible in evidence as such until entered of record though indorsed as a decree in the proceeding. *Hall v. Hudson* (1853) 20 Ala. 284.

Nor do the findings of fact in a case upon which no judgment has been entered constitute evidence in another action of the facts found, though judgment has been directed to be entered thereon. *Child v. Morgan* (1862) 61 Minn. 116.

And the report of a master in chancery is not admissible in evidence as an adjudication between the parties until it has been accepted and a judgment rendered upon it. *Nash v. Hunt* (1874) 116 Mass. 237.

Nor is the report of a referee in a suit in equity brought to compel the removal of buildings placed over the line upon lands of an adjoining proprietor by mistake admissible in evidence in a subsequent writ of entry to recover possession of such lands, where the findings of the referee did not pass into judgment because of the failure of the plaintiff to comply with conditions attached thereto. *Hunter v. Carroll* (1892) (N. H.) 29 Atl. Rep. 639.

And a rule setting aside a judgment record which has not been enrolled or entered of record is inadmissible in evidence to disprove the existence of the judgment. *McKnight v. Dunlop* (1848) 4 Barb. 38; *Croswell v. Byrnes* (1812) 9 Johns. 267.

A decree in equity, however, may be given in evidence in another suit though it has not been formally enrolled. *Bates v. Delavan* (1835) 5 Paige, 299, 8 L. ed. 728.

And a final decree in partition is admissible in evidence in an action of ejectment brought by a party claiming title under it, though it was not signed and docketed until after the commencement

ilar orders, i. e. orders of dismissal made upon jurisdictional grounds, have uniformly been held final and appealable in other states. This is true. There are many such holdings. *Elderkin v. Spurbeck*, 2 Pinney 129, 52 Am. Dec. 148; *Ketchum v. Freeman*, 24 Wis. 296; *Zoller v. McDonald*, 28 Cal. 186; *Ross v. Evans*, 30 Minn. 206, and other cases. The grounds upon which these rulings have been placed is that courts directing the dismissal of such cases, being wholly without jurisdiction of the action, are powerless to enter a final judgment of dismissal. This reasoning is not quite clear to a majority of this court. It is conceded that in such cases the court possesses the requisite authority to decide upon its own jurisdiction, and, further, that the court has a right to formally announce

its decision of the question by an order of court, either entered in its minutes or written out, signed, and filed with the clerk. This authority being conceded, we confess our inability to see why the logic of the situation does not require that the court should go one step further, and cause its final determination of the jurisdictional question to be announced as in cases of its other final determinations, viz., by the entry of a formal judgment of dismissal. But in view of the numerous decisions upon the point made in other states, we should, under the rule *stare decisis*, feel bound to adhere to the practice of not entering a formal judgment of dismissal in cases where the dismissal is made on jurisdictional grounds, if we thought that the cases cited from other states were in

of the suit, the rights of the parties to the action for partition being fixed by the decree and not by its enrollment. *Lynch v. Rome Gas Light Co.* (1864) 42 Barb. 501.

And a judgment in an action for partition is complete at the time of the confirmation of the partition made by the commissioners, and if it is signed and filed in time for use at an action for trespass upon the part allotted to him, brought by one tenant against another, it is sufficient though it was not so signed and filed at the time of the commission of the trespass. *Van Orman v. Phelps* (1850) 9 Barb. 500.

So a judgment of an inferior court may be proved by memoranda of the magistrate upon his docket and the production of the original papers in the case verified by his testimony when they show all the essentials of a valid judgment and no extended record had been made. *McGrath v. Seagrave* (1861), 2 Allen, 443, 79 Am. Dec. 797.

And the entry of a judgment on the docket of a justice of the peace against the defendant in the action without showing that it is in favor of the plaintiff is not such a defect as to render the record thereof inadmissible as evidence. *Madison County Ct. v. Rutz* (1872) 63 Ill. 65.

But a docket entry of a justice of the peace not showing that the plaintiff appeared on any particular day, shows no authority to enter judgment and is not admissible to prove its validity. *Redman v. White* (1872) 25 Mich. 523.

And entries in the handwriting of a justice upon a writ and declaration returnable before him stating the issues and the amount of damages and the items of the bill of costs and an execution counting on a judgment between the parties for the same sums, do not show a judgment rendered, and are not admissible in an action of debt on judgment as a substitute for proof of a record where there is no proof of a record once existing and lost. *Davidson v. Murphy* (1830) 13 Conn. 213; *Wales v. Smith* (1825) cited in *note* to 13 Conn. 216.

The rule has been laid down that where the statute requires judgments to be entered and signed a paper purporting to be a judgment of a justice of the peace which is not signed by him is properly excluded. *Kingle v. Weston* (1864) 23 Ind. 568.

And that where the statutes of a sister state expressly require the record of a judgment to be signed by a judge of the court a record of such a judgment which does not show such signature is not admissible in evidence, though attested in the manner required by the act of congress for the authentication of a judgment. *Morris v. Patchin* (1862) 24 N. Y. 394, 32 Am. Dec. 811.

But in *Eastman v. Harteau* (1860) 12 Wis. 207, it was held that the record of a court is admissible in evidence and judgment entered therein is valid though the judge did not sign the record at the end of each day's proceedings as required by the 28 L. R. A.

Wisconsin statute in force in 1833, the provisions thereof being directory.

And in *Dean v. Stone* (1894) (Okla.) 35 Pac. Rep. 578, a transcript of a judgment of a court of another state, duly authenticated by the proper officers, was held to be admissible in evidence though it did not show that the judgment was signed by the presiding judge as required by law.

So the failure of the judge to attach his signature to the journal entry of a judgment of another state was held not to render a certified copy thereof inadmissible in evidence, in *Ritchie v. Carpenter* (1891) 2 Wash. 512.

And in *Ainsworth v. Territory* (1887) 3 Wash. Terr. 370, it was held that journal entries of the forfeiture of a bail bond are not rendered ineffective as evidence of the forfeiture by the failure of the judge to sign the entry, and that a signature of the journal at the end of the term is a sufficient signature.

The rule adopted in Maine is that until the record is made up and extended, the docket is the record, and is proper evidence of the judgment. *Davis v. Smith* (1887) 79 Me. 351; *Pierce v. Goodrich* (1850) 47 Me. 173.

Thus a suit on a bond, given for the prosecution of a proceeding in error, will not fail because the record of the original judgment sought to be reversed has not been completed, where the clerk's docket contains entries of all the proceedings during the progress of the suit affording all the data required to complete the record. *Pierce v. Goodrich*, *supra*.

And when the prevailing party to an appeal neglects to furnish copies of the papers necessary to make up an extended record, the clerk's docket showing an entry of the amount of debt and costs recovered may be admitted in evidence in an action upon a recognisance taken to prosecute the appeal as a record of the judgment, though the time has elapsed within which the papers could be filed to authorize the clerk to complete the record. *Leathers v. Cooley* (1860) 49 Me. 337.

In *State v. Robbins* (1883) (Me.) 6 New Eng. Rep. 170, however, it was held that an extended record of a case made by a deceased clerk is not admissible as evidence when not signed by him.

So it is not necessary, under Conn. Gen. Stat., p. 440, § 84, providing that when a suit has been heard and determined by any justice of the peace who shall have neglected to make up a record of the same, his files and minutes thereof shall be admissible as evidence in all actions brought on such judgment after his decease or removal from the state, that the minutes should be technically full and accurate. If they satisfy the triers that a judgment of a certain amount was actually rendered they are sufficient. *West v. Hayes* (1884) 51 Conn. 533.

And *Paschal's Texas Dig.*, arts. 4710, 5023, requiring judgments and decrees relating to land to

point here. After a rehearing, and upon further consideration of the point, a majority of the members of this court are of the opinion that the cases cited are not precedents which can be followed in this state. The leading Minnesota case upon the question, *Ross v. Roane*, 30 Minn. 206, states the ground of the rule as follows: "No costs were allowed or were taxable, and no further action of the court was required." This language would be wholly inappropriate as applied to a case arising in this state. Under a statute of this state expressly dealing with cases of dismissals for want of jurisdiction, further action is required at the hands of the district court, and costs in such cases are expressly allowed to the party procuring the dismissal. We think that, at the time the cases cited from Wisconsin,

Minnesota, and California were decided, no similar statute had been enacted in either of the states mentioned. Section 5194, Comp. Laws, reads: "When an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs must be adjudged against the party attempting to institute or bring up the action." Two features of this statute deserve a special notice: First, it applies to cases originating in the district courts, as well as those begun in courts inferior to that court; second, the right to enter judgment for costs depends wholly upon the antecedent ruling that the court is without jurisdiction of the case. In such cases it is obvious that the right of the prevailing party to have judgment entered in his favor for costs

be recorded, is not intended to absolutely prohibit their introduction in evidence until recorded, but merely to apply the system of registration to them and to deny the right to introduce them in evidence, unless they are shown to be registered, or it is made to appear that as between the parties they are admissible under the general registration laws without registration. *Thornton v. Murray* (1878) 50 Tex. 161.

Objection to the admission of a docket entry as evidence instead of a copy of a judgment must be made when it is offered or it will be regarded as waived. *Fitzgibbon v. Brown* (1897) 43 Me. 390.

XI. To prevent collateral attack.

The failure of the clerk to sign a judgment upon the entry thereof is not such an irregularity as will enable a third person to assert its invalidity on that ground. *Artisan's Bank v. Treadwell* (1861) 84 Barb. 558.

And a judgment entered before the time to plead has expired is irregular but not void, and while it might be set aside on motion or by proceedings in error, it is not subject to collateral attack. *Mitchell v. Aten* (1887) 37 Kan. 53.

And a judgment by confession not entered within a reasonable time after filing of the statement is not void under Iowa Code, § 3895, requiring judgments to be entered "forthwith," but voidable only, and cannot be collaterally impeached by a party thereto. *Burchett v. Casaday* (1895) 18 Iowa, 344.

But a record of a judgment by confession showing it to have been indorsed upon the statement for confession and docketed before an assignment by the judgment debtor for the benefit of creditor's where in fact it was not so indorsed and entered until more than six months after the filing of the assignment, may be properly attacked in an action by the assignee to determine an adverse claim to lands assigned. *Hunter v. Cleveland Co-operative Store Co.* (1884) 31 Minn. 508.

A docket entry in an action of replevin showing that a trial was had and that judgment was rendered against the defendant for the property claimed, without any finding as to its value or that the plaintiff is entitled to possession or assessment of damages and no order for the delivery of the property, is not a judgment which can be regarded as valid in a collateral action. *Beemis v. Wylie* (1865) 19 Wis. 319.

XII. To constitute a bar to another action.

The entry of a judgment is usually deemed necessary to make it effective as a bar to another action for the same cause.

Thus in *Gilpatrick v. Glidden* (1899) 82 Me. 201, it was said that in chancery practice proceedings are not regarded as at an end until the final decree of 28 L. R. A.

the court has been signed and enrolled. It then becomes a matter of record,—can be pleaded in bar or estoppel,—execution can issue upon it and there can be no rehearing on motion or petition, the only remedy being by bill of review.

And in *Bode v. New England Investment Co.* (1890) 1 N. Dak. 121, 6 Dak. 499, it was held that an order overruling a demurrer to an answer and sustaining a demurrer to a complaint upon which no judgment was entered is not a final judgment upon the merits which will constitute a bar to another action.

As to entry of orders sustaining or overruling demurrers for the purpose of appeal, see *supra*, under heading, *Orders for judgment*.

But the mere failure of the clerk to sign a judgment will not prevent it from being a bar to a subsequent action for the same cause. *Lythgoe v. Lythgoe* (1894) 75 Hun, 147.

So a determination by the justice of the peace is not a bar to a second action for the same cause where he omits to enter judgment therein. *Young v. Rummell* (1843) 5 Hill, 60 (1844) 7 Hill, 508; *Benaway v. Bond* (1860) 2 Pinney, 449, 54 Am. Dec. 147.

Or where he fails to enter judgment therein within the time limited by statute after its submission to him. *Bloomer v. Merrill* (1865) 1 Daly, 485.

And where the court intimates an opinion against a party in a case tried before it, who thereupon withdraws the suit and pays cost, it is a mere discontinuance of the suit and will not bar another action for the same cause. *Jones v. Walker* (1827) 5 Yorg. 427.

And a mere memorandum made by the justice and handed to his clerk for entry in form upon the docket, which was never done and the memorandum not preserved, does not constitute a judgment. *Benaway v. Bond*, *supra*.

In *Felter v. Mulliner* (1807) 2 Johns. 181, however, the failure of a justice of the peace to enter judgment on a verdict of a jury rendered in an action tried before him was held not to prevent the determination thereof from being a bar to another action for the same cause, the verdict being regarded as the final determination of the case.

But in *Dunlap v. Robinson* (1861) 12 Ohio St. 530, it was held that a verdict in an action before a justice of the peace upon which he failed to enter judgment for a period of ten months will not constitute a bar to a subsequent action for the same cause, such neglect to enter the judgment effecting a discontinuance of the action.

The fact that a judgment against a party upon a default made during his lifetime was entered after his death will not affect it as a bar to another suit for the same cause of action. *Reid v. Holmes* (1873) 127 Mass. 326.

So in the early chancery practice in England a

depends entirely upon the legal validity of the dismissal. On appeal from such a judgment, it certainly would be reversed where it appeared that the dismissal was error. The statute defines a judgment as follows: "A judgment is the final determination of the rights of the parties in the action." Comp. Laws, § 5024. But the term "judgment" is often used in different senses, and it does not necessarily signify a final determination of the rights of the parties. A judgment, within the meaning of the appeal law, may be final which does not attempt to pass upon the issue or upon the merits of the controversy between the parties. This well settled rule is stated in Hayne on New Trials and Appeals (page 555) as follows: "The judgment is final if it disposes of the ac-

tion or proceeding in which it is made so far as the court which made it is concerned, without reference to the question whether the claims of the parties may not be litigated in some other action or proceeding." If, then, such an adjudication is a final judgment, it must, we think, logically follow that it should be entered of record in the manner provided by the statute for the entry of all other final judgments, viz. by an entry of judgment in the judgment book. Our position, therefore, is that in this class of cases, as in other cases of dismissal, there should be a formal judgment entered, embracing an adjudication of dismissal, as well as for costs in favor of the prevailing party. Such a judgment would authorize an execution, and would, when docketed, be-

decree which was not signed and enrolled could not be pleaded as a bar to a subsequent action for the same cause. Anonymous (1754) 8 Atk. 809; Kinsey v. Kinsey (1754) 2 Ves. Jr. 877.

The registrar's minutes of a decree dismissing a bill were not pleadable in bar to another suit brought for the same matter the minutes being but evidences of the judgment of the court. Charles v. Rowley (1765) 2 Bro. P. C. 485.

But in New York an exemplification of a bill, answer, and decrees in chancery is sufficient to show a matter therein determined to be *res judicata* without showing an actual enrollment of the decree. Winans v. Dunham (1830) 5 Wend. 47.

Though a decree in a former suit between the same parties cannot be pleaded in bar until it is signed and enrolled, it may be insisted upon by way of answer. Davoue v. Fanning (1819) 4 Johns. Ch. 190, 1 L. ed. 513.

And the rule that a decree must be enrolled before it can be pleaded in bar of a second suit for the same cause applies only to a case of a bill and cross-bill and is not applicable to a case where the bill is filed to impeach a decree on the ground of fraud. Pearce v. Dobinson (1865) L. R. 1 Eq. 241, 14 Week. Rep. 121, 35 L. J. Ch. 110, 18 L. T. N. S. 519.

And a verdict for damages to be released upon certain conditions is conclusive as to the same matters coming directly in question in another suit, upon the parties and their privies, though judgment was not entered upon the verdict because of the performance of the conditions. Estep v. Hutchman (1826) 14 Serg. & R. 435.

And while generally a judgment must be entered upon the verdict in order to make it operate as a bar to a future action for the same cause, the rule does not apply where both parties treat the verdict as serving the office of a judgment, especially where the record shows that indulgence upon the verdict was stipulated for at the time it was entered and in fact granted and there is no suggestion that the verdict was ever set aside or modified or that there was any order for an arrest of judgment. Webster v. Dundee Mortg. & T. Co. (1893) 93 Ga. 275.

Cases as to the effect of a verdict without judgment generally have been omitted from this note as not within its scope, the two above set forth having been included because in them the verdict served or was treated by the parties as serving the office of a judgment.

XIII. Judgments of justices of the peace.

Decisions with relation to the entry of judgments of justices of the peace in which the rules laid down are general, and apply to the other subdivisions of this note will be found respectively under the headings to which they apply.

Thus as to the effect of an entry of judgment by 26 L. R. A.

a justice of the peace on his right to subsequently change the judgment rendered, see *supra*, under heading, *For the purpose of terminating the power of the court to change.*

As to the necessity of an official signature of an entry of judgment by a justice in his docket, see *supra*, under heading, *Signature of judgment or record.*

As to the sufficiency of an entry of judgment by a justice to render it admissible in evidence, see *supra* heading, *For the purpose of evidence.*

And as to the sufficiency of such entry to make the judgment a bar to another action for the same cause, see *supra*, heading, *To constitute a bar to another action.*

a. Upon submission.

A justice of the peace is usually required by statute to render judgment within a specified time, usually four days, after the submission of the cause to him.

There are numerous cases holding that a failure to render judgment within the time prescribed deprives the justice of jurisdiction to subsequently render it, which have been omitted as referring distinctly to the rendition and not the entry of the judgment.

Where the statute requires both the rendition and entry of the judgment within a prescribed time, it has been held generally that a failure to render judgment within the time limited deprives the justice of jurisdiction and renders a judgment subsequently entered a nullity. Wiseman v. Panama R. Co. (1857) 1 Hill. 300; Watson v. Davis (1836) 19 Wend. 371; Berrian v. Olmstead (1855) 4 E. D. Smith, 279; Burton v. McGregor (1853) 4 Ind. 550; Harper v. Albee (1860) 10 Iowa, 389.

So, in Eaton v. French (1873) 23 Ohio St. 590, it was said that the statute (Ohio Justice's Court Act, § 107), limiting the time within which a justice must enter his judgment is clear and specific and peremptory and the power of the justice must be measured by it.

And Sunday is not to be excluded in computing the statutory time within which a justice must enter a judgment in an action submitted to him. Bissell v. Bissell (1851) 11 Barb. 95.

But the statutory limitation of time for the rendition and entry of judgment by a justice being designed for the convenience and protection of the parties, may be waived by them, and where they stipulate that more time may be taken, it may properly be done at any time within the stipulated extension. Barnes v. Badger (1857) 41 Barb. 93.

But such a stipulation is void for indefiniteness if no time is fixed, and when made by an attorney his authority to make it must be shown. Flynn v. Hancock (1887) 46 Hun. 368.

Where the statute limits the time for the rendi-

come a lien upon real estate to the amount of the costs; and, moreover, on appeal from such a judgment, the court of review could dispose of all questions in the case on one appeal. On the other hand, two appeals might become necessary,—one to settle the question of the validity of the dismissal, the other to settle questions of costs alone.

We think that an order of the district court dismissing an action or an appeal for want of jurisdiction is, in effect, when construed in the light of the statute authorizing a judgment for costs in such cases, equivalent to an order for the entry of a formal judgment embracing a dismissal and costs, and that such orders should, in strictness, direct the entry of such judgment in terms. When such an order is

entered or filed, formal judgment thereon can be entered without further action of the court or judge. It is well settled that orders for judgment are not appealable orders. *Lamb v. McCanna*, 14 Minn. 513 (Gil. 385); *Hodgins v. Heaney*, 15 Minn. 185 (Gil. 142); *Thorp v. Lorens*, 84 Minn. 850. Our conclusion is that in this state an order of the district court directing a dismissal is one which looks forward to and requires the entry of a formal judgment, and therefore is not an appealable order under the statute regulating appeals to this court. The statute does not make such an order appealable in terms, and it is quite clear that an order which is the basis for the entry of a formal judgment cannot be construed as an order which "prevents a judgment from

tion of the judgment only, however, without including its entry, the entry is regarded as a clerical act which can be done at any time, and even when both acts are included, as in the New York statute, the rule was adopted in *Hall v. Tuttle* (1843) 6 Hill, 38, 40 Am. Dec. 382, and seems to have been since followed, at least in New York, that so far as the act of entry is concerned the statute is directory only, and that the mere omission to enter a judgment duly rendered does not invalidate it and is not a ground for reversal.

Thus in the entry and recording of a judgment whether it be done by the clerk, as in the New York district court, or by the justice of the peace himself as is done in justice's courts generally, the requirement is from the ministerial character of the act merely directory and may be validly performed after the expiration of the time within which the judgment is required to be rendered. *Dalton v. Loughlin* (1877) 4 Abb. N. C. 187.

And his omission to make an entry of judgment preceding the statement of the amount will not render the entire proceeding a nullity, as the making of such entry is a mere ministerial act. *Stephens v. Santee* (1872) 49 N. Y. 85, reversing 51 Barb. 553.

Nor will the failure of a justice of the peace to enter on his docket a minute of a fine imposed upon a delinquent juror on attachment issued against him affect the validity of the conviction, 2 N. Y. Rev. Stat., 241, § 37, requiring such entry being directory only. *Robbins v. Gorham* (1858) 26 Barb. 563.

So in *Evarts v. Kiehl* (1886) 102 N. Y. 236, which was an action against a justice for failure to render and enter judgment within four days of the submission of the cause to him, a distinction was drawn between the rendition and the entry of a judgment but the case was decided upon other grounds.

This doctrine was criticised in *Barnes v. Badger* (1857) 41 Barb. 98, the court by Mason, J., saying: "I am at a loss to ascertain how any court can say that the legislature intended that the first should be mandatory and the second directory" but was adhered to in the subsequent cases, and has been extensively adopted in the other states.

Thus a justice of the peace acts ministerially and not judicially, in making up and completing the record of cases tried before him and may do so at any time, even after his commission had expired. *Matthews v. Boughton* (1834) 11 Me. 377.

And a justice's judgment which was rendered and entered upon his minutes by the justice is not rendered invalid because it was not transcribed upon his docket within the statutory period. *Saunders v. Tloga Mfg. Co.* (1873) 27 Mich. 520; *Swain v. Gilder* (1864) 61 Miss. 667; *Walrod v. Shuler* (1848) 2 N. Y. 124.

And Mich. Comp. Laws, § 3890, requiring justices

of the peace to keep a docket and enter judgments rendered by them therein, is directory only and the validity of a judgment is not affected by non-compliance therewith. *Hickey v. Hinsdale* (1890) 8 Mich. 267, 77 Am. Dec. 450.

The statute is substantially complied with where judgment is rendered and publicly announced within the prescribed time though the clerical work of entering it on the docket is not completed until afterwards. *Conwell v. Kuykendall* (1883) 20 Kan. 707.

If it appears that every fact has been found which is necessary to the right to have judgment entered, and the entry made was intended as the final act of the court applying the law to the facts nothing remaining but the clerical duty of entering up final judgment, the judgment though irregular and informal will be sustained. *Swain v. Gilder, supra*.

But it is not enough that a justice of the peace decided a case in his own mind within the four days limited by law, he must also declare it by some official act such as indorsing an entry or minute of his decision upon the process returned before him from which the clerk docketts or registers the judgment. *Seaman v. Ward* (1856) 1 Hill, 82.

Thus an entry by the justice of the peace upon his docket, made upon the return of a certiorari, that on demurrer to the plea in abatement he decided that the plea was sufficient and discharged the defendant noting his costs on the margin, does not constitute a judgment which could be affirmed or reversed. *Nellis v. Turner* (1847) 4 Denio, 553.

And the entry by a justice upon his minutes of a verdict for defendant returned before him and "judgment for costs against plaintiff," putting down the items of costs, but omitting one item and failing to add the items, and afterwards forming a mental conclusion as to the amount and announcing to the successful party, is not a sufficient entry of judgment; and when after the expiration of four days he enters the other item and adds them up it constitutes an entry at the later time and renders the judgment void as not having been rendered forthwith as required by statute. *Putnam v. Van Allen* (1867) 46 Hun, 492.

And an entry on the docket showing that the defendant was tried and that he was fined a designated sum with costs does not constitute a judgment or authorize the commitment of the defendant. *Jeffries v. McNamara* (1874) 49 Ind. 142.

But the failure of a justice of the peace to enter a judgment in his docket as required by statute will not invalidate it when he has indorsed upon his minutes a memorandum entitled in the case "judgment for plaintiff" in a specified sum stating the amount of damages and costs separately. *Flah v. Emerson* (1871) 44 N. Y. 876.

And an entry on the minutes, "5th damages \$30-\$4.00," is sufficient to constitute a judgment, the

which an appeal might be taken." Our view of the matter is that, upon appeal from a judgment of dismissal embracing the costs, it would be the duty of this court to review the dismissal upon its merits, as well as any question connected with costs which might properly appear upon the face of the judgment record. The supreme court of South Dakota has recently had occasion to decide the precise question we are discussing. There the appeal was taken from a judgment after the time for an appeal from an order had expired. The dismissal of the circuit court of an appeal taken

from a justice's judgment was made upon jurisdictional grounds, and the order of dismissal was followed by an entry of judgment, from which the appeal was taken. The case is particularly in point because it arose under the identical statutes which are in force in this state, and its facts are on all fours with those in the case at bar. *Mouser v. Palmer*, 28 Dak. 466. The time for appeal from the order of dismissal had expired before the appeal was taken, and the learned court expressly held that the appeal was from a judgment, and not from the order. The court, after hold-

return stating that the \$4.00 was entered as cost. *Goodrich v. Sullivan* (1873) 1 Thomp. & C. 191.

So an entry in a justice's docket, "The court is of the opinion that the plaintiff has no cause of action, judgment against the plaintiff for costs of suit, costs \$13.31,"—is a valid judgment. *Nett v. Serwe* (1871) 28 Wis. 663.

And an entry by a justice that he had no jurisdiction of the case "therefore plaintiff for costs" though not formal, is a substantive judgment. *Kase v. Best* (1850) 15 Pa. 101, 53 Am. Dec. 573.

So one stating the names of the parties and that judgment is rendered for a stated sum is a good judgment. *Elliott v. Jordan* (1874) 7 Baxt. 376; *Johnson v. Billingsly* (1842) 3 Hump. 153.

But an entry upon a warrant issued by a justice of "Judgment \$37.00" is not a judgment but a mere nullity because of uncertainty. *Hubbard v. Birdwell* (1850) 11 Hump. 220.

b. Upon verdict.

So, the statutes of many of the states require a justice of the peace before whom a verdict is returned to render judgment thereon forthwith or within a given time, and under such statutes the general rule is that the justice has no authority to subsequently render it.

And under the New York statute it is the duty of a justice on receipt of a verdict to forthwith render judgment and enter it in his docket. *Allen v. Swan* (1883) 6 N. Y. Civ. Proc. Rep. 58.

But a justice is only required to render judgment upon a verdict forthwith, he is not required to enter it in his docket forthwith. *Wearne v. Smith* (1873) 32 Wis. 412.

And a judgment rendered by a justice of the peace or a verdict in due time will not be reversed under a statute requiring it to be forthwith rendered because not entered in the justice's docket until several days afterward. *Hall v. Tuttle* (1843) 6 Hall, 38, 40 Am. Dec. 332.

Hall v. Tuttle, *supra*, distinguishes *Watson v. Davis*, 19 Wend. 271, upon the ground that that was a case heard by the justice himself and that he was required to terminate his judicial labors within four days from the time it was submitted to him and the amount was not settled in the mind of the justice until after the four days had elapsed.

So where a justice of the peace renders judgment instantly upon receipt of a verdict by audibly so stating, naming the prevailing party and the amount of damages with costs, in the hearing of the parties and bystanders, he may subsequently within a reasonable time make the necessary docket entries without affecting the validity of the judgment. *Kleinstaub v. Schumacher* (1874) 35 Wis. 608; *Wearne v. Smith*, *supra*.

A justice who receives and enters a verdict but fails to enter judgment thereon before adjournment may and should subsequently enter it upon his attention being called to the matter, and his authority to do so is not affected by an appeal taken in the meantime. *Fugitt v. Cox* (1866) 2 Neb. 370.

But delay to make the necessary docket entries by a justice of the peace after announcement of a

judgment upon a verdict rendered before him for about thirteen days was held to be unreasonable and to invalidate the judgment, in *Kleinstaub v. Schumacher*, *supra*.

And a delay of fourteen hours was held to deprive the justice of jurisdiction and render a judgment subsequently entered void, in *Hull v. Mailory* (1832) 56 Wis. 355.

In New York, however, the entry by a justice of the peace of a verdict returned at about midnight, at daylight the next morning, was held to be sufficient. *Goodrich v. Sullivan* (1873) 1 Thomp. & C. 191.

So in California it is held that the failure of a justice of the peace to enter up a judgment after entering a verdict found by a jury on a trial before him though an irregularity is not one which will vitiate a sale made under execution thereon reciting a judgment. *Lynch v. Kelly* (1871) 41 Cal. 232.

And in Indiana such failure does not affect the validity of the judgment but leaves it in full force. *Martin v. Pifer* (1834) 96 Ind. 245.

Wisconsin Rev. Stat., § 3062, requiring a justice to forthwith render judgment upon receipt of a verdict in replevin and immediately enter an order in his docket, is not satisfied by reading the verdict aloud to all present and entering it in the docket. *Smith v. Bahr* (1885) 62 Wis. 245.

And in *Perkins v. Jones* (1871) 28 Wis. 243, it was held that a justice may enter judgment on the 22d day of February on a verdict rendered that day by virtue of the requirement to render judgment forthwith, notwithstanding Wis. Laws 1861, chap. 58, declaring that no court shall transact any business on that day.

Though in New York the entry of a judgment by a justice of the peace on Sunday is held to be wholly void and a ground for reversal. *Allen v. Godfrey* (1871) 44 N. Y. 438; *Hoghtaling v. Osborn* (1818) 15 Johns. 119.

He should wait until the following Monday to enter a judgment upon a verdict rendered on Sunday. *Allen v. Godfrey*, *supra*.

Martin v. Pifer, *supra*, distinguishes *Burton v. McGregor* (1853) 4 Ind. 510, on the ground that that case was tried by the justice and no decision was given and no entry made of the judgment until after the four days prescribed for that purpose had expired while in the present case the verdict of the jury fixed the judgment.

So in Michigan the failure of a justice of the peace to formally enter judgment upon a verdict is immaterial the finding a verdict being deemed in effect a judgment. *Gaines v. Betts* (1845) 2 Dougl. (Mich.) 98.

And in *Davis v. Pinckney* (1857) 20 Tex. 340, the mere entry of a verdict by a justice of the peace without any entry of judgment upon it was treated as a sufficient entry of judgment to sustain certiorari to review.

And in *Overall v. Pero* (1859) 7 Mich. 315, it was held that an entry by a justice in his docket stating the amount of damages given by a verdict, and the amount of costs, is a sufficient entry of judgment to sustain an execution.

F. H. R.

ing the appeal was valid, proceeded to consider the merits of the dismissal as embodied in the judgment of the court below. The case is direct authority for reviewing the question of dismissal by means of an appeal from a judgment entered upon an order of dismissal. No appeal will lie in that state or in this, or in California, from a judgment until the judgment is entered in the judgment book, and hence we must conclusively presume that the judgment in the South Dakota case was so entered before the appeal was taken, although the case as reported does not show affirmatively that the judgment was entered. See *Brady v. Burke*, 90 Cal. 1. Under section 6186, Comp. Laws, which provides that in certain cases the district court shall "order the appeal to be dismissed," the argument is advanced that the statute requires that such dismissal shall be made by an order only. It must be conceded that no judgment of dismissal or other judgments can, in any case, be regularly entered in the district courts of this state until an order therefor is first made by the court or a judge thereof. *Gould v. Duluth & D. Elevator Co.* 8 N. Dak. 96. But it is transparently clear to our minds that in enacting section 6186, *supra*, the legislative purpose was not either to establish or regulate the practice of district courts with respect to the mode of entering final determinations of record. Other provisions of the code of civil procedure deal specifically with the procedure in entering judgments in the district courts. See numerous citations upon this point already made.

We will say, in conclusion, that a majority of the members of this court are convinced that the practice of entering final judgment in this class of cases should not, under our statute, be discriminated from the practice in recording other final determinations of the district courts of this state in civil actions, including judgments of dismissal not made on jurisdictional grounds. Under the statute awarding costs, a judgment for costs is authorized, and we think that such a judgment must necessarily include a judgment of dismissal. No judgment has been entered in this case, and it follows that this action was still pending in the district court when this proceeding was commenced to prevent proceedings in the justice's court based upon a judgment entered in that court from which an appeal was taken to the district court. Whether such appeal was or was not authorized by law has never been finally determined by the district court. The district court has by an order passed upon the right to appeal, but such order was purely interlocutory, and, until judgment upon the order is entered, the question is not finally disposed of by the district court.

The judgment must be affirmed.

Corliss, J., concura.

Bartholomew, Ch. J., dissenting:

I am unable to concur in all of the foregoing opinion. In my judgment, an attempted appeal that gives the appellate court no jurisdiction of the case is properly dismissed by an order. No judgment of dismissal is necessary or proper, and the order of dismissal is a final

appealable order. I will state my reasons, and apply them to this case briefly.

The action was forcible entry and detainer, and was brought to determine the rights of the parties to the possession of certain realty. In justice's court the defendant practically defaulted, but undertook to appeal from the judgment against her. Motion was made in the district court to dismiss the appeal. On the hearing of the motion, the court made an order stating, *inter alia*: "And it further appearing that said appeal was without authority of law, now, therefore, it is ordered that said appeal be and the same is hereby dismissed." The correctness of that order is not questioned. It stands as the law of the case. Was it effective to dismiss the case? The majority opinion says it was not, and that the case still remains and will remain pending in the district court until the clerk makes a formal entry in the judgment book reciting the substance of the order, and concluding with a judgment for costs. The argument is this: Our statute permits an appeal from "an order affecting a substantial right, made in any action when such order in effect determines the action and prevents a judgment from which appeal might be taken." This was an order dismissing an appeal for want of jurisdiction. But section 5194, Comp. Laws, provides: "When an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs must be adjudged against the party attempting to institute or bring up the action." Therefore, say my brothers, the order of dismissal could not be a final appealable order, because it does not terminate the action, and must be followed by a judgment for costs. I disagree. The order of dismissal did, in my judgment, in effect terminate the action. After its entry, no further step could be taken by either party; at best, there remained only the clerical duty to enter judgment for costs which the law imperatively demanded. The action was terminated. Did the order prevent a judgment from which an appeal might be taken? I think it did, under our statute, which declares a judgment to be "the final determination of the rights of the parties in the action." Clearly, after the order of dismissal no final determination of the rights of the parties could be made. The dismissal barred any such judgment. Nor do I think we are warranted in assuming that when the legislature used the word "judgment" in the appeal law it did not mean the judgment as defined by statute. If the order of dismissal in this case was not a final appealable order, it might be difficult to conceive such an order. Take a case where a defendant appears specially, and moves to dismiss by reason of defective service of summons. If the motion be granted the case is terminated, and the order appealable. *Ryan v. Davenport* (S. Dak.) 58 N. W. Rep. 568, and yet the defendant would be entitled to costs under section 5194. If the motion be denied, the order is not appealable, because the case stands for hearing on the merits. The principle is identical in this case. Again, section 6186, Comp. Laws, speaking of dismissals of appeals from justice's court in certain cases, says: "The same shall

be dismissed by the order of the court." That language is plain, and I deem it safer to make the case correspond with the statute rather than refine upon the statute to make it correspond with the desired case.

It is conceded in the majority opinion that by the great weight of authority, in the absence of statutes granting costs, when appeals are dismissed for want of jurisdiction, such dismissals are affected by order; that the court can enter no judgment for costs, and take no action except to brush the case from the calendar. No reason was suggested at the argument, nor is any suggested in the majority opinion, why it should take other or greater process to dismiss the appeal in the one case than in the other. If an order will dismiss the appeal when costs are not allowed, it is incomprehensible to me why the same instrument will not effect the same purpose when costs are allowed. The statute directing costs presupposes a dismissal. There was a reason for the statute. It was unjust to compel a party to employ counsel and follow a fictitious appeal to the higher court, and there procure its dismissal, and yet be able to recover no costs. To remove that injustice this statute was enacted. It is strange if so simple a purpose can be effected only by a total change in the method of obtaining dismissals for want of jurisdiction. Nor do I think the majority opinion at all strengthened by reference to the case upon which it is based. *Mouser v. Palmer*, 2 S. Dak. 466. That is a South Dakota case, and the statutes there are the same as ours. It is based upon *Zoller v. McDonald*, 28 Cal. 136, and *Bowie v. Kansas*, 51 Mo. 459. The former expressly holds that an order dismissing an appeal for want of jurisdiction is a final appealable order. The Missouri case holds that to be a final judgment which, under the holding in the majority opinion as to what constitutes a judgment, and in which I concur, would constitute no judgment whatever in this state. It was simply an order of dismissal for failure to amend, and it is stated that "no final judgment was rendered in form," and the court adds: "But the case was entirely out of court, dismissed against the will of plaintiff, and was a finality so far as plaintiff was concerned." In other words, it performed the service that I claimed for the order in this case. It ended the case, although no judgment for costs or otherwise was entered. The case is an authority for the appealability of the order of dismissal in this case. My associates find support for a distinction between cases when costs are and are not allowed in the language in *Ross v. Evans*, 80 Minn. 206. When the language is read with the context I do not think it is or was intended to be decisive of that point. In holding the order of dismissal in that case appealable and final, the court uses the language quoted by *Judge Wallin*: "No costs were allowed or were taxable, and no further action of the court was required," and immediately adds: "From the nature of the case, if the court has not required any jurisdiction to take cognizance of the action, the order was necessarily a final one, which prevented further proceedings in the district court." The condition of this case on appeal to the district court was the same. 28 L. R. A.

That court was without jurisdiction to take cognizance of the case as such. Dealing with the case, it could do nothing but dismiss it. It could enter no judgment affecting the rights of the parties. By virtue of the statute, costs could be recovered against the party who undertook to bring up the case on appeal. But that did not affect the status of the case. That was dismissed. Costs are not a necessary part of a judgment. *Mouser v. Palmer*, *supra*. They "are an incident or appendage of the judgment" (*Scott v. Burton*, 6 Tex. 322, 55 Am. Dec. 782), and their omission does not render the balance of the judgment less final and appealable. *Williams v. Watt*, 2 S. Dak. 210. Had the dismissal in this case been entered in the judgment book, without costs, it would have been final and appealable under the logic of my associates. But it would have been in form and effect an order only. No execution or process could have issued on it. It would have been a lien upon nothing. It would have settled no rights. It would have performed no functions of a judgment, and all of the functions of an order. It would have been entered upon the determination of no issue raised by pleadings, either of law or fact. It would have been entered in response to a motion,—the proper application for an order. And yet my associates insist that the dismissal must be by judgment, and cannot be by order. It is true, as claimed, that the rule of practice adopted by my associates is, in theory at least, productive of greater uniformity and simplicity in case of appeal to this court. But I cannot for that reason alone adopt, without protest, a rule which I believe to be contrary to the clear weight of authority, and destructive of our statutory definition of a judgment and of an order, and in direct opposition to the provisions which declare that an appeal from justice's court may be dismissed by order of the district court.

PEOPLE'S BANK OF ST. PAUL. *Recept.*,

2.

SCHOOL DISTRICT NO. 52 of Barnes County, *Appt.*

(3 N. Dak. 492.)

- *1. Where a statute authorized the issue of municipal bonds payable in not less than ten years from date, bonds issued thereunder, payable in eleven days less than ten years from date are void, even in the hands of a bona fide purchaser.
 - *2. The invalidity of such bonds does not affect the liability, if any, of the municipality, independently of the bonds.
 - *3. It is elementary that even bona fide purchasers of negotiable municipal securities are
- *Headnotes by CORLISS, J.

NOTE.—The above case is one of several valuable cases on the subject of municipal bonds which were decided by the supreme court of North Dakota, presenting several important phases of that subject. See *Flagg v. School Dist. No. 70 of Barnes County* (N. Dak.) 25 L. R. A. 363; *Erskine v. Steele County*, *post*, 645, and *Coler v. Dwight School Twp.* *post*, 649.

charged with knowledge of all the requirements of the statute under which the securities were issued.

(December 16, 1893.)

APPEAL by defendant from a judgment of the District Court for Stutsman County in favor of plaintiff in an action to enforce the amount alleged to be due on certain coupons to bonds which had been issued by defendant.

Reversed.

The facts sufficiently appear in the opinion. *Messrs. G. E. Andrus and Edgar W. Camp*, for appellant;

When fraud or illegality in the inception of negotiable paper is shown the burden of proof is then thrown upon the holder of the negotiable paper to show his *bona fides*, but in this case, notwithstanding all the fraud which the defendant showed in his proof, the court did not even submit the question whether the plaintiff was a bona fide holder, to the jury, which was error.

Richards v. Monroe, 85 Iowa, 859; *Joy v. Dieffendorf*, 180 N. Y. 6; *Goodman v. Simonds*, 61 U. S. 20 How. 843, 15 L. ed. 384; *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140; *Honegger v. Weinstein*, 94 N. Y. 252; *Kavanagh v. Wilson*, 70 N. Y. 177; *Vosburgh v. Dieffendorf*, 119 N. Y. 357; *Farmers & Citizens Nat. Bank v. Noron*, 45 N. Y. 762; *Grocers Bank v. Penfield*, 69 N. Y. 502, 25 Am. Rep. 281; *Comstock v. Hier*, 73 N. Y. 278, 29 Am. Rep. 143; *Seymour v. McKinstry*, 106 N. Y. 240; 1 Dan. Neg. Inst. 746, 749, 751, 795, 796, 799, 801; *Canajoharie Nat. Bank v. Dieffendorf*, 10 L. R. A. 677, 128 N. Y. 191; *Williams v. Huntington*, 68 Md. 590; *Stewart v. Lansing*, 104 U. S. 505, 26 L. ed. 866; *First Nat. Bank of Cortland v. Green*, 43 N. Y. 298; *Ocean Nat. Bank v. Carll*, 55 N. Y. 440; *Smith v. Livingston*, 111 Mass. 342; *Sullivan v. Langley*, 120 Mass. 437; *Smith v. Sac County, Iowa*, 78 U. S. 11 Wall. 189, 20 L. ed. 102; *McLaughlin v. Bank of Potomac*, 48 U. S. 7 How. 220, 228, 12 L. ed. 675, 679; *Jones v. New York Guaranty & Indemnity Co.* 101 U. S. 632, 630, 25 L. ed. 1080, 1085; *Holden v. Cosgrove*, 12 Gray, 216.

One who receives negotiable paper in part payment of an account is not a bona fide holder for value, and is affected by all the equities existing against his predecessor in title.

Lyon v. Fitch, 46 N. Y. S. R. 541; *Joy v. Dieffendorf*, *supra*; *Kain v. Bare*, 4 Ind. App. 440; *Bookheim v. Alexander*, 64 Hun, 458; *Marsh v. Fulton County Supra*, 77 U. S. 10 Wall. 876, 19 L. ed. 1040.

In *Barnett v. Denison*, 145 U. S. 135, 36 L. ed. 652, the court holds that the provisions of the statute authorizing them must be strictly pursued, and that the purchaser of such bonds is chargeable with notice of requirements of law under which they are issued.

Ogden v. Daviess County, 102 U. S. 634, 26 L. ed. 268; *Marsh v. Fulton County Supra*, *supra*; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Northern Nat. Bank of Toledo, Ohio, v. Porter Trp. Trustees*, 110 U. S. 608, 28 L. ed. 258; *Hayes v. Holly Springs*, 114 U. S. 120, 29 L. ed. 81; *Merchants Exch. Nat. Bank of New York v. Bergen County Chosen Freeholders*, 115 U. S. 834, 29 L. ed. 430; *United States v. Knox County Ct.* 122 U. S. 806, 30 L. 28 L. R. A.

ed. 1153; *Coler v. Oledurne*, 181 U. S. 163, 83 L. ed. 146; *Lake County Comrs. v. Graham*, 180 U. S. 674, 32 L. ed. 1065; *First Nat. Bank of Decorah v. Doon Dist. Trp.* 86 Iowa, 330.

The burden of proof was on the bondholder to show, not only authority of law for this issue of his bonds, but also that all conditions precedent to their issue as expressed in the vote were literally complied with irrespective of any and all recitals on the bonds.

People v. Bishop, 111 Ill. 124, 58 Am. Rep. 605; *Prairie v. Lloyd*, 97 Ill. 179; *Eddy v. People*, 127 Ill. 428; *Bissell v. Kankakee*, 64 Ill. 249, 31 Am. Rep. 554; *Middleport v. Aetna L. Ins. Co.* 82 Ill. 562; *Spitzer v. Blanchard*, 82 Mich. 284; *National Bank of Commerce v. Granada*, 48 Fed. Rep. 278; *Heard v. Calhoun School Dist.* 45 Mo. App. 660; *Savage v. Walshe*, 26 Ala. 619; *Central Branch Union Pac. R. Co. v. Smith*, 23 Kan. 745.

Even a bona fide holder cannot recover upon bonds or their coupons, where there was no authority to issue them.

Brenham v. German-American Bank, 144 U. S. 173, 36 L. ed. 390; *Nebitt v. Riverside Independent Dist.* 144 U. S. 610, 36 L. ed. 562; *McClure v. Orford Trp.* 94 U. S. 429, 24 L. ed. 129.

We deny in our answer that school district 52 was ever organized, that it ever had any legal existence, and that the issue of the bonds in suit were without authority in law and therefore illegal and void. This we offered to prove and the proof was refused by the court. This was error.

Dartmouth Sav. Bank v. School Districts 6 & 31, Minnehaha County, 6 Dak. 332; *Northern Nat. Bank of Toledo, Ohio, v. Porter Trp. Trustees*, 110 U. S. 608, 28 L. ed. 258; *Hayes v. Holly Springs*, 114 U. S. 127, 29 L. ed. 85; *East Oakland Trp. v. Skinner*, 94 U. S. 255, 24 L. ed. 125; *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669; *Lewis v. Shreveport*, 108 U. S. 282, 27 L. ed. 728; *Driftwood Valley Turnp. Co. v. Bartholomew County Comrs.* 72 Ind. 226; *Nashville v. Ray*, 86 U. S. 19 Wall. 468, 23 L. ed. 164; *Baltimore v. Eschbach*, 18 Md. 282; *Lee v. Munroe*, 11 U. S. 7 Cranch, 366, 3 L. ed. 373; *Dill. Mun. Corp.* § 381.

Municipal corporations possess no power or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or other statutes applicable to them.

Dill. Mun. Corp. § 21; *Hopper v. Covington*, 8 Fed. Rep. 777; *Treadway v. Schnauber*, 1 Dak. 230; *Union School Trp. v. First Nat. Bank of Crawfordsville*, 102 Ind. 464.

A contract beyond the scope of the corporate power is void, although it be under the seal of the corporation.

Dill. Mun. Corp. § 477; *Anthony v. Jasper County*, 101 U. S. 693, 25 L. ed. 1006; *Clark v. Des Moines*, 19 Iowa, 189; *Field, Ultra Vires*, 442; *Union School Trp. v. First Nat. Bank of Crawfordsville*, *supra*; *Wallis v. Johnson School Trp.* 75 Ind. 863.

School districts have no power to issue negotiable paper save in the manner and form prescribed by law.

12 Am. & Eng. Encyclop. Law, p. 274; *Brenham v. German-American Bank*, 144 U. S. 173, 36 L. ed. 390; *Farmers & M. Nat. Bank of Val*

lay City v. School Dist. No. 53, 6 Dak. 255; *Capital Bank of St. Paul v. Barnes County School Dist. No. 53*, 1 N. Dak. 479.

It is within the power of a state to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liabilities.

Anthony v. Jasper County, 101 U. S. 693, 25 L. ed. 1005; *Coler v. Oleburne*, 181 U. S. 162, 38 L. ed. 146; *Norton v. Dyersburg, Tenn.* 127 U. S. 160, 32 L. ed. 85; *Barnum v. Okolona*, 148 U. S. 898, 37 L. ed. 495; *Brenham v. German-American Bank, supra*; *Barnett v. Dentson*, 145 U. S. 185, 36 L. ed. 652.

The fact that they matured only a few days earlier than the law allowed can make no difference in the enforcement of the rule.

Norton v. Dyersburg, Tenn., *Barnum v. Okolona*, and *Brenham v. German-American Bank, supra*; *Brownell v. Greenwich*, 4 L. R. A. 685, 114 N. Y. 518.

The bonds, being not drawn in pursuance of the act, are nullities.

Anthony v. Jasper County, *Coler v. Oleburne*, *Norton v. Dyersburg, Tenn.*, and *Barnum v. Okolona, supra*; *Rainsburg v. Fyan*, 4 L. R. A. 336, 127 Pa. 74.

Messrs. White & Hewit for respondent.

Corliss, J., delivered the opinion of the court:

The plaintiff has recovered judgment against the defendant upon certain interest coupons of bonds issued by the defendant. That judgment is here assailed on several grounds. We find it unnecessary to allude to them all. In our judgment the bonds are void upon their face. It is elementary that power to issue such municipal securities is derived wholly from statute. The statute may prescribe the conditions on which such power shall be exercised. It may also declare what terms shall be embodied in the bonds it authorizes to be issued. The donee of the power must take it burdened with all statutory requirements, as well with respect to the terms of the bonds to be issued as with regard to the conditions on which they may be issued. The statute authorizing defendant to issue bonds provides that they "may be made payable in not less than ten nor more than twenty years from their date." The bonds which were issued under this power were dated September 12, 1884, and were in terms payable September 1, 1894. They were therefore made payable in less than ten years from their date. We do not see how such a bond can be regarded as being authorized by the statute. There is no more power to issue bonds payable eleven days less than ten years from date than nine years less. If the question is to depend upon the magnitude of the departure from the statutory requirement, it will be impossible to know where to draw the line. If we ought not to draw it at the period of eleven days, on what principle can we draw it, at thirty days, or six months, or a year? Authority to issue bonds payable in not less than ten years from date is not authority to issue them payable in less than ten years. There is an eminent authority in favor of this view. *Norton v. Dyersburg, Tenn.*, 127 U. S. 160, 32 L. ed. 85; *Barnum v. Okolona*, 28 L. R. A.

148 U. S. 898, 37 L. ed. 495; *Brownell v. Greenwich*, 114 N. Y. 518, 4 L. R. A. 685; *Hoag v. Greenwich*, 183 N. Y. 152; *Potter v. Greenwich*, 92 N. Y. 663. In the case in 148 U. S. and 37 L. ed. the bonds were payable in from eleven to seventeen years from date. Under the statute the time of payment was not to extend beyond ten years from date. Therefore, as to some of the bonds, the violation of the statute was only to the extent of making them payable a year later than the statute prescribed; and yet these bonds were held void on this ground. The court did not indicate that the extent of the violation was at all material to the inquiry whether the law had been disregarded. *Mr. Justice Shiras*, in his opinion, says: "Accordingly if, in the present instance, the legislature of Mississippi, in authorizing the town of Okolona to subscribe for stock in a railroad company, and to pay for the same by an issue of bonds, prescribed that such bonds should not extend beyond ten years from the date of issuance, such limitation must be regarded as in the nature of a restriction on the power to issue bonds. . . . Our conclusion upon the whole case is that the town of Okolona had no power to issue the bonds in suit." While the statute refers to the date of the bonds as the period within not less than ten years from which the bonds shall be payable, yet it may be that the true spirit of the provision requires that the time shall be computed from the time of actual issue, where interest is payable only from such time, and not from date, subject, of course, to the right of an innocent purchaser to rely upon and be governed by the date of the bonds, when the bonds on their face show that they were payable in not less than ten years from the date of issue. But this consideration will not help the plaintiff, as it is averred in the complaint that the bonds were not only dated September 12, 1884, but were actually executed and delivered on that day. They also bore interest from that day. No injustice will result from a rigid enforcement of the requirements of the statute in this regard. While the bonds are void, the holder of them can fall back upon the original transaction, and recover. If he has loaned money to the municipal corporation which it had authority to borrow, he can recover it in a proper action. The want of power in such a case merely affects the form of security issued to evidence the loan. The written obligation is void. Whatever liability there exists independent of such obligation remains undisturbed. *Hoag v. Greenwich*, 183 N. Y. 152.

Plaintiff cannot derive any benefit from its claim that it is an innocent purchaser, because, under all the authorities, even bona fide purchasers of such securities are charged with knowledge of the terms of the statute under which the bonds are issued. *Barnett v. Dentson*, 145 U. S. 186, 36 L. ed. 652. In this case the terms of the statute informed the plaintiff that the bonds must be payable in not less than ten years from their date, whereas upon their face they appeared to be, and were in fact, payable in less than ten years from date. We were not cited to any case holding contrary to our ruling; but we have discovered an authority in the federal supreme court which at first glance would appear to be in conflict with the later

cases in that court, — *Rock Creek Twp. v. Strong*, 66 U. S. 271, 24 L. ed. 815. The question presented in that case for decision was whether the bonds were void because payable thirty years and thirty-five days from the date of execution, when they only drew interest at the expiration of thirty-five days from date, or, in other words, during only the period of thirty years. The bonds were dated September 10, 1872, and were made payable thirty years from October 15, 1872. The statute provided that the bonds should be payable in not more than thirty years from date. It did not appear, as it did in this case, that the bonds were delivered the day they were dated, and, as they were not registered until October 17, 1872, there was some reason for inferring that the real date of issue was October 15, 1872. What makes the essential difference between that case and the one before us, and makes it conclusive that the real date of the bonds, as fixing the time they were to run, was October 15, 1872, is the fact that interest was payable only from that date, and not from September 10, 1872, the nominal date of the bonds. Said the court: "Their legal effect is precisely what it would have been had the date inserted been October 15 instead of September 10, 1872." Had these bonds borne interest from September 10, 1872, the case would have been entirely different. That, then, would have been their actual, as well as their nominal, date. In so far as the case is opposed to the later decisions of the same court it is, of course, in effect overruled by them.

It is urged that this specific point cannot be raised here, because it was not raised in the court below. This rule has no application where it appears that the objection could not have been obviated if made in the trial court. As plaintiff itself avers that the nominal date is also the date of execution and delivery, and therefore the actual date, there is no escape from the conclusion that the bonds are void. Nor is it true that the point was not raised below. The court, against the objection of the defendant, directed a verdict for the plaintiff. To this ruling of the court the defendant excepted. This ruling was erroneous. A verdict should have been directed for the defendant. This error was an error of law occurring at the trial. It is properly before us. It is for this error that we reverse the order and judgment herein; the action being upon the coupons themselves, and there being no evidence on this record establishing the validity of the debt independent of these bonds.

The order and judgment are reversed, and the district court is directed to dismiss the action.
All concur.

Charles E. ERSKINE *et al.*, Admrs., etc., of
Massena B. Erskine, Deceased, *Respts.*,
v.

STEELE COUNTY, Appts.

(.....N. Dak.....)

* The county of Steele was formed in the
• Headnote by WALLIN, J.

NOTE.—See *People's Bank of St. Paul v. Barnes County School Dist. No. 52*, ante, 642; and *Coler v. Dwight School Twp.* post, 649.
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year 1883, out of the territory previously lying within the counties of Trall and Griggs. In that year the commissioners of Steele county, without legislative authority, agreed with one M. that the latter should transcribe from the records of Griggs and Trall counties, into the records of Steele county, such parts of such records as related to real estate situated in Steele county, for the agreed price of \$2,010 in cash. It was further agreed that M. should receive, as compensation, a county warrant sufficient in amount, when sold at the prevailing discount, to realize the contract price of \$2,010. Under this arrangement a county warrant of Steele county was issued for the face amount of \$2,680, and delivered to M., the additional sum included in the warrant being given to make good a prevailing discount upon Steele county warrants. A warrant was issued by Steele county officials to one B. for \$389.77, which was issued wholly to make good a discount upon other warrants delivered to B. Both of the warrants were purchased by the deceased, Massena B. Erskine, during his lifetime. This action is upon both warrants. Held: First, that the warrant issued to M. was wholly illegal and void from its inception, for the reason that the commissioners of Steele county, in the absence of legislative authority, either general or special, to do so, were without power to enter into any such arrangement. Their contract with M. was *ultra vires*, and hence they had no power to issue said warrant to M. Second, such portion of the warrant to M. as represented discount upon Steele county warrants is illegal and void. The commissioners were without power to enter into an agreement for such discount. Third, the warrant to B., being wholly issued for discount, is void for the same reasons. Fourth, county warrants are non-negotiable instruments, within the meaning of the law-merchant, and hence the plaintiff, as a good-faith purchaser of the warrants, occupies no better position than that occupied by the parties to whom the warrants were originally issued. Plaintiff cannot recover.

(November 8, 1894.)

APPEAL by defendant from a judgment of the District Court for Steele County in favor of plaintiff in an action brought to enforce payment of certain county warrants. *Reversed.*

The facts are stated in the opinion.

Mr. F. W. Ames, with Mr. George Murray, for appellant:

If McMahon acted without the character of an official, he had no authority with the records of Steele county, except under the supervision of the duly constituted incumbent of the office where such records belonged. The county commissioners could invest him with none; they have no control over these records, except to provide a place for their safe keeping; and as to their contents, it is none of their business whatever. If he acted as register of deeds, his fees are established by law, and he must show a statute providing his compensation.

Rothrock v. Easton School-Dist. 133 Pa. 487; *Pugh v. Good*, 19 Or. 85.

It is not enough that the public or private convenience may require the books to be kept, nor can the county be assessed because no one else can be made to respond.

Rasmussen v. Clay County, 41 Minn. 268.

Counties have only such powers as are ex-

pressedly conferred upon them, or necessarily implied.

McCunn v. Otos County Comrs. 9 Neb. 324; *Manitowoc County Suprs. v. Sullivan*, 51 Wis. 115; *Merrick County Comrs. v. Baity*, 10 Neb. 176; *Gould v. Sterling*, 28 N. Y. 463; *Perrine v. Chesapeake & D. Canal Co.* 50 U. S. 9 How. 172, 13 L. ed. 92; *Brady v. New York*, 20 N. Y. 312; 1 Dill. Mun. Corp. §§ 457, and following.

City warrants are evidences of indebtedness, or promises to pay and are payable with interest prescribed by law, and the corporation cannot cast upon the taxpayers any further burden in respect thereto.

Arnott v. Spokane, 6 Wash. 442; *Clark v. Des Moines*, 19 Iowa, 199; *Foster v. Coleman*, 10 Cal. 279; *Bauer v. Franklin County*, 51 Mo. 205; *State v. Wilson*, 71 Tex. 291; *Dorsey County v. Whitehead*, 47 Ark. 205; *Barton v. Sneyton*, 44 Ark. 437; *Shirk v. Putnaki County*, 4 Dill. 209.

Messrs. Newman, Spalding & Phelps, for respondent:

The commissioners had the power to procure the transcription in question.

Comp. Laws, §§ 545, 592; *Webster County v. Taylor*, 19 Iowa, 117; *Kilington v. Superior*, 18 L. R. A. 45, 83 Wis. 222.

Their power being otherwise unrestricted, they could make any contract which would be valid if made by an individual.

Dill. Mun. Corp. § 472; *Brady v. Brooklyn*, 1 Barb. 584; *Kelley v. Brooklyn*, 4 Hill, 263; *Jackson County v. Rendleman*, 100 Ill. 379.

Contracts payable in gold have always been held valid and specifically enforceable.

Lane v. Gluckauf, 28 Cal. 288, 87 Am. Dec. 124, and *note*.

Wallin, J., delivered the opinion of the court:

This action is brought to recover the amount purporting to be due according to the terms of certain county warrants issued by the officials of Steele county, and which were subsequently purchased by Massena B. Erskine, deceased, during his lifetime. The warrants were drawn on the general fund of the county, and were presented to the county treasurer for payment. Payment was refused for want of funds, and the warrants were then registered for payment. The warrants which are now contested are two in number, described as follows: A warrant dated November 19, 1883, for \$2,680, issued and delivered to one E. J. McMahon; a county warrant dated March 31, 1884, for \$389.77, issued and delivered to one Charles R. Black. The fact of issuing and delivering the warrants, and their sale to the deceased during his lifetime, is not controverted. The defense set out in the answer as to both warrants, when briefly stated, is that they were issued without authority of law and without lawful consideration. A jury trial was waived, and, after a trial upon the merits, the court filed its findings of fact and conclusions of law, and directed judgment for the plaintiff, whereupon judgment was entered for the full face amounts of said warrants, with interest added.

The findings are as follows: "(1) That 28 L. R. A.

the said defendant, on the 19th day of November, 1883, made and delivered to E. J. McMahon a certain county warrant or order upon its county treasurer, whereby said treasurer was directed to pay to said E. J. McMahon, or order, the sum of \$2,680 out of the general funds of the treasury of defendant, not otherwise appropriated, and belonging to said county. That said county warrant or order is in the words and figures following, to wit: 'Treasurer of Steele County. Pay to E. J. McMahon, or bearer, twenty-six hundred and eighty 00-100 dollars, out of the general funds in the treasury, not otherwise appropriated, for transcribing records in Traill and Griggs counties.' That said warrant was thereafter, for value, duly transferred to this plaintiff, and was on the 30th day of November, 1883, duly presented to the treasurer of said county defendant for payment, and payment was refused, and the said warrant was thereupon indorsed: 'Presented for payment November 30, 1883, but not paid for want of funds in treasury. Clarence J. Paul, County Treasurer.' That said warrant was so as aforesaid issued to said McMahon under and by virtue of a contract made and entered into by and between said McMahon and the said defendant, under and by virtue of which it was agreed that the said McMahon should transcribe for the defendants so much of the records of the counties of Traill and Griggs as related to real property within the county of Steele for the sum of \$2,010 in cash. That the said warrants of said county were, at the time of the issue of said warrants, worth only seventy-five cents on the dollar; and the said warrant was so as aforesaid issued for the sum of \$2,680, pursuant to, and in fulfillment of, the contract of the said defendant and the said McMahon. That no part of said warrant has been paid. (2) That on the 31st day of March, 1884, defendant made, executed, and delivered to Charles R. Black its certain county warrant or order upon its treasurer, whereby said treasurer was directed to pay to said Charles R. Black, or order, the sum of \$389.77 out of the general funds in the treasury of the defendant, not otherwise appropriated, which said county warrant or order was in the words and figures following, to wit: 'Treasurer of Steele County. Pay to Charles R. Black, or bearer, three hundred and eighty-nine and 77-100 dollars, out of the general funds in the treasury, not otherwise appropriated, for amount due on county building %, discount on orders.' That thereafter, and on the 31st day of March, 1884, said warrant was presented to the treasurer of the defendant for payment, and payment thereof refused, and said warrant indorsed as follows, to wit: 'Presented for payment March 31, 1884, but not paid for want of funds in the treasury, and registered for payment March 31, 1884. That said warrant was so as aforesaid issued to said Black for the balance due him under and by virtue of the contract made and entered into between said Black and the defendant, whereby the said Black agreed to erect for the defendant a certain jail building, for which it was, under and by virtue of said agreement, agreed

that he should receive \$1,210 in cash, and that the defendant should issue its warrant for sufficient to cover the discount on its warrants at the then market price of same, and to make the amount paid by such warrants equal to the sum of \$1,210 in cash. That said warrant so as aforesaid issued to said Black was the balance due him under and by virtue of said contract. That said warrant was thereafter, for a valuable consideration, duly transferred to this plaintiff, and no part of the same has been paid.

"On the foregoing facts I find as conclusions of law: Conclusions of law: (1) That the warrant or order mentioned and described in the first finding of fact herein is a valid, existing indebtedness of the said defendant, and that the plaintiff is entitled to recover thereon the sum of \$2,680, with interest thereon from the 30th day of November, 1883, amounting to the sum of \$4,526.24. (2) That the warrant mentioned and described in the second finding of fact herein is a valid, existing indebtedness of the defendant, and the plaintiff is entitled to recover thereon the sum of \$389.77, with interest from and after the 31st day of March, 1884, amounting to the sum of \$649.26. That plaintiff is entitled to judgment for his costs and disbursements herein, to be taxed by the clerk."

The findings of fact are not assailed in this court, and the appellant assigns error only upon the conclusions of law found by the trial court, to the effect that the plaintiff was entitled to judgment. It is conceded that the territory now embraced within the boundaries of Steele county was formerly, and until March, 1883, included within the limits of the counties of Traill and Griggs. It appears from the first finding of fact that the warrant issued to McMahon for the lump sum of \$2,680 was issued in accordance with the terms of a contract between McMahon and the county commissioners, but upon considerations which were distinct and independent in their nature. Under the contract, McMahon was to transcribe from the records of Traill and Griggs counties such parts thereof as related to real estate situate within the county of Steele; and by the terms of the contract a warrant was to be delivered to McMahon, in payment for the work, sufficiently large to yield the contract price, taking into account the discount at which the warrant would or could be sold in the market. In short, the commissioners agreed to issue, and did issue, a warrant which would yield, when sold in the market, \$2,010 in cash, which was the contract price for the work. County warrants are non-negotiable paper, within the meaning of the law-merchant, and hence the plaintiff purchased the warrants subject to whatever defenses were available as against the parties to whom they were originally made payable. The plaintiff has all the rights which the original holders of the warrants had, but has no other or different rights. Was the warrant in question a valid warrant when issued? We think this question must be answered in the negative. In our opinion, the warrant was issued without a valid consideration, without authority of law, and in defiance of the law. Prior to

issuing the warrant in question there never had been any special legislation clothing the commissioners of Steele county with power to contract for a transcription of the records such as that under consideration, or any other. Some four years after the warrant to McMahon was issued, a general statute was enacted by the territorial legislature, expressly authorizing all county commissioners to procure such work to be done. Comp. Laws, § 545. This statute cannot, of course, be invoked in aid of the respondent's contention. If the enactment has any bearing, it tends to show that, in the opinion of the legislature at least, the power did not exist at the time the commissioners of Steele attempted to exercise it. Counsel for respondents cite Comp. Laws, § 592, and *Kilvington v. Superior*, 88 Wis. 232, 18 L. R. A. 45, and other cases, none of which appear to us to be in point. Subdivision 5, § 592, Comp. Laws, empowers county commissioners to furnish necessary blank books, blanks, and stationery to certain county officers, including registers of deeds; but such language cannot possibly be stretched sufficiently to cover an authority such as respondent is contending for. It does not appear that McMahon was ever register of deeds of Steele county; much less does it appear that the commissioners were empowered by the section cited, or by any law, usage, or custom then in existence, to compensate the register of deeds out of county funds for any entries or transcriptions made in his official record for the benefit of private parties. The precise opposite is true. The statute in terms makes it the duty of registers of deeds to place upon record certain documents and muniments of title at the request of private parties and at their expense, not exceeding the sums prescribed as fees in the statute. It was the official duty of the register of deeds in Steele county, his fees therefor being tendered, to place any and all such papers upon record upon presentation to him of the original papers or properly certified copies thereof. Comp. Laws, §§ 624-632. When so entered of record, such record became notice to the world, and could, under certain circumstances, be used in court as evidence. *Id.* §§ 5309-5311. Whether the transcription made by McMahon would or would not possess any legal validity as notice, or otherwise, is unnecessary to decide in this case; but, to say the least, there is grave reason to doubt the legal value of such transcribed records. In the case of *Kilvington v. Superior*, cited by counsel, the court held that the general power conferred upon village trustees to "appoint a board of health, prevent the deposit of unwholesome substances, and prevent or abate nuisances is sufficient to authorize a contract for the erection of a crematory for the consumption of any matter calculated to affect the health or comfort of the community." The reason of this holding is plain. While the authority to erect a crematory was not expressly conferred by the legislature upon the trustees, such authority was implied if necessary in carrying out the power to abate nuisances, etc., which power was given in clear terms. But we see no analogy in the case cited to

the case at bar. The right to enter into a contract such as that concluded with McMahon was not expressly conferred upon the commissioners, nor was such authority necessary or at all appropriate to the execution of any power vested in the commissioners by any law of the territory then existing. In the absence of legislative authority authorizing it, any such contract was, in our opinion, clearly *ultra vires* in character. We therefore hold that the warrant was wholly void from its inception. It was issued without authority of law, and upon no legal consideration. *Rasmussen v. Clay County*, 41 Minn. 288; *Pugh v. Good*, 19 Or. 85.

We are equally clear that so much of the McMahon warrant as represented discount (\$670) is illegal and void upon independent grounds. Essentially the same question has been frequently presented to courts in other jurisdictions, and the authorities, as far as we have examined them, are unanimous in condemning such discount transactions. Judge Dillon, in his learned treatise upon Municipal Corporations (vol. 1, 4th ed. § 503), says: "Without express authority from the legislature, a municipality cannot discount its warrants for more than the sum actually due the claimant; and as to the excess they are void, and the holder will be treated only as the equitable assignee of the valid, legal claim of the payee." In *Foster v. Coleman*, 10 Cal. 278, a claim for services to the amount of \$1,650 was allowed by the board of supervisors. County warrants of the county were then at a discount, and worth only 40 cents on the dollar. The board ordered a warrant to issue for a sum which, at the prevailing discount, would sell for \$1,650, the amount due the claimant. Upon such order the warrant issued. A taxpayer of the county brought suit, and the county treasurer was enjoined from paying the warrant. The supreme court, in the course of its opinion, referring to the order of the board directing the warrant to issue said: "The effect of the order was to create a debt or liability on the part of the county, and this the supervisors were not empowered to do for any purpose except as provided by law. Their action was entirely without authority, and altogether indefensible." The settlement and allowance of an illegal claim against the county when made by a county board, has no more conclusive effect than such an adjustment would have if made by private persons. See *Leavenworth County Comrs. v. Keller*, 6 Kan. 511. In a recent case, clearly in point, the supreme court of the state of Washington, in referring to the act of a municipality in discounting its own warrants, uses the following language: "Such a proceeding is manifestly beyond the scope of legitimate corporate power, and a practice of that character might lead to ruinous results. City warrants are evidences of indebtedness, or promises to pay, and are payable with interest prescribed by law; and

the corporation cannot cast upon the taxpayers any further burden in respect thereto, and the courts have uniformly, as far as we are advised, disapproved of any effort to do so." *Arnott v. Spokane*, 6 Wash. 442. See also, *Clark v. Des Moines*, 19 Iowa, 199; *Bauer v. Franklin County*, 51 Mo. 205; *Shirk v. Pulaski County*, 4 Dill. 209, Fed. Cas. No. 12,794. The authorities cited, and others to the same effect, are severe in their animadversions upon discount transactions, when attempted by municipal corporations in endeavoring to bring their depreciated warrants up to par. The principal ground upon which the cases rest is the essential illegality and want of power in the governing body to enter into such financial transactions; and the cases uniformly and strenuously condemn all attempts to engage in such discounts as being highly dangerous, and likely to lead to disastrous results.

Respondents' counsel contends that the cases cited should be distinguished from the case under consideration for the reason, as counsel claims, that it does not appear in such cases that the discount was given as a result of a contract made in advance to do so. This contention, we think, is not true in fact of all the cases (see *Arnott v. Spokane*); but, if it were true, we think the cases cited are strictly in point. To our mind it is a self-evident proposition that, if the law forbids county boards to allow claims, and issue warrants to make good their depreciated paper, for the reason that such discount transactions are vicious, dangerous, and wholly without authority of law, for the same reason county boards would be without authority to enter into contracts to issue such warrants. It would certainly be a signal and dangerous perversion of fundamental principles of law to sanction a transaction which is clearly in violation of law upon the ground that it is done under a contract to do the illegal act. If the thing done is without authority of law, the agreement to do it must be equally so, and for the same reason. The act of issuing discount warrants to bring depreciated municipal orders up to par is also, in our opinion, distinctly usurious in character, inasmuch as such transactions, in their practical operation, if carried out, compel the corporation to pay a bonus upon deferred payments above the rate of interest established by statute. In all points of view, such discount transactions are illegal, as well as vicious and dangerous in their tendencies.

What we have written upon the discount feature of the McMahon warrant renders it unnecessary to comment upon the warrant referred to in the second finding of fact. That warrant is void also for the reason that it was issued to make good a discount bonus, and for no other consideration whatever.

It follows that the judgment entered below must be reversed, and the action dismissed.

All concur.

W. N. COLER & CO., *Respts.*,DWIGHT SCHOOL TOWNSHIP, *Appt.*

(@ N. Dak. 249.)

*1. The county superintendent of schools, under chapter 14, Laws 1879, organized a school district. School-district officers were elected and exercised the functions of their respective offices; teachers were employed by the district, and school was taught therein, and a school meeting was held in the district to vote upon the question of issuing bonds to build a schoolhouse. Such bonds were thereafter issued. In an action upon some of the interest coupons of such bonds,—*Held*, that the district was a *de facto* municipal corporation, and that therefore the defense could not be interposed that the bonds were void on the ground that the district had no legal existence because of failure to comply with provisions of the statute regulating the organization of such districts in matters which went to the jurisdiction of the county superintendent to organize the district.

2. Municipal corporations are estopped, as against bona fide holders of municipal bonds, from setting up as a defense to an action thereon that all the preliminary steps necessary to authorize the issue of the bonds were not taken, when the officers who have charge of the issue of such bonds are especially or impliedly authorized to determine whether all the conditions precedent to the issue of valid bonds have been complied with, and recite in the bonds so issued that they have been complied with. It is not necessary to estop the corporation that this statement should set forth in detail that all the preliminary steps have been taken. It is sufficient that it declare that the bonds are issued in pursuance of a certain statute, specifying it. Neither is it essential that the officers issuing the bonds should be expressly authorized to determine such questions. It is sufficient if they are given full control in the matter.

3. A school township organized under chapter 44, Laws 1883, becomes, immediately upon such organization, liable for debts of a district, the schoolhouse and furniture of which become the property of the school township. This liability is complete, and does not depend upon the settlement of equities between several districts included in the new school township, under section 136-138, chapter 44, Laws 1883.

(April 25, 1893.)

APPEAL by defendant from a judgment of the District Court for Richland County in favor of plaintiffs in an action brought to compel payment of interest coupons which had been attached to bonds issued by defendant. *Modified and affirmed.*

The facts are stated in the opinion.

Mr. W. E. Purcell, for appellant:

The complaint does not allege a settlement between the several districts included in the defendant township. Such settlement is a condition precedent to any liability on the part of the school township.

Laws 1883, chap. 44, §§ 136-143.

*Headnotes by CORLISS, J.

NOTE.—See People's Bank of St. Paul v. Barnes County School Dist. No. 52, ante, 642, and Erskine v. Steele County, ante, 645.

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The contention that no settlement is required to render the defendant liable for the debts of any district included in it would render the law unconstitutional.

3 Am. & Eng. Encyclop. Law, p. 692; *Hoagland v. Sacramento*, 52 Cal. 142; *Sadsbury Twp. Supra v. Dennis*, 96 Pa. 400; *Hasbrouck v. Milwaukee*, 13 Wis. 42, 80 Am. Dec. 718; *Cooley*, Const. Lim. 669.

In order that the bonds should be legal and valid obligations, it is necessary that the supposed district should have been at the time of their issue a legally constituted school district.

Laws 1881, chap. 24, § 1.

Unless the supposed district was such a school district the Laws of 1881, under which it is claimed they were issued, has no application.

Dartmouth Sav. Bank v. Minnehaha County School Dist. 6 & 31, 6 Dak. 332.

Municipal bonds are commercial paper and municipal corporations have no general or implied power to issue such paper.

Hopper v. Covington, 8 Fed. Rep. 777; *Rogan v. Watertown*, 30 Wis. 259.

The superintendent, in the matter of organizing a school district acts judicially, with a special and limited jurisdiction, and all jurisdictional facts must be shown by positive proof. There are no intendments in favor of his jurisdiction.

Swain v. Chase, 12 Cal. 283; *Thatcher v. Powell*, 19 U. S. 6 Wheat. 119, 5 L. ed. 231; *Kane v. Desmond*, 68 Cal. 464; *Bloom v. Berdick*, 1 Hill, 180, 87 Am. Dec. 299; *Striker v. Kelly*, 7 Hill, 9.

These facts must appear upon the record and cannot be shown *aliunde*.

Foot v. Stevens, 17 Wend. 488; *Denning v. Corwin*, 11 Wend. 647; 12 Am. & Eng. Encyclop. Law, p. 274.

The delivery of the petition to Kennedy at the home of French is not a filing in the office of county superintendent.

Gorham v. Summers, 25 Minn. 81; *Appleton Mill Co. v. Warder*, 42 Minn. 117.

Unless all the requirements are complied with there is no legal organization.

4 Am. & Eng. Encyclop. Law, p. 197; *Dartmouth Savings Bank v. Minnehaha County School Dist.* 6 & 31, 6 Dak. 332; *Lamoille Valley R. Co. v. Fairfield Selectmen & Treasurer*, 51 Vt. 257; *Essex County R. Co. v. Lunenburg Selectmen & Treasurer*, 49 Vt. 143.

The petition for election to issue bonds is jurisdictional.

Essex County R. Co. v. Lunenburg Selectmen & Treasurer, and *Lamoille Valley R. Co. v. Fairfield Selectmen & Treasurer*, *supra*; *Starin v. Genon*, 23 N. Y. 439; *Gould v. Sterling*, Id. 456; 1 Dill. Mun. Corp. 163; *People v. Smith*, 45 N. Y. 731.

The defense of want of authority to issue bonds is available against all holders.

1 Randolph, Com. Paper, p. 488; *Cagwin v. Hancock*, 84 N. Y. 532; *Hancock v. Chicot County*, 32 Ark. 575; *Story*, Agency, § 807a.

The defendant is not estopped to deny the validity of the bonds.

Marsh v. Fulton County Supra, 77 U. S. 10 Wall. 676, 19 L. ed. 1040; *Dartmouth Sav. Bank v. Minnehaha County School Dist.* 6 & 31, *supra*.

All persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or its officers to make the contracts.

Dill. Mun. Corp. § 372.

Where the mode of contracting is plainly prescribed and limited, that mode is exclusive.

Dill. Mun. Corp. § 373; *McCoy v. Briant*, 53 Cal. 247; *Argenti v. San Francisco*, 16 Cal. 283; *McCracken v. San Francisco*, 16 Cal. 620; *Zottman v. San Francisco City & County*, 20 Cal. 102, 81 Am. Dec. 96.

A failure to present a petition to the superintendent of schools to organize district No. 22, and a failure of the superintendent to furnish the county commissioners with a written description of district No. 22, and a failure to file a written description in the office of the registrar of deeds, is a want of requisite records and goes to the power of the district to issue bonds.

Lamoille Valley R. Co. v. Fairfield Selectmen & Treasurer, 51 Vt. 257; *Essex County R. Co. v. Lunenburg Selectmen & Treasurer*, 49 Vt. 143.

Mr. L. B. Everdell also for appellant.

Mr. John L. Pyle, with *Messrs. McCumber & Bogart*, for respondent:

When bonds show by their recitals that the power was exercised as provided by legislature, proof that all of these recitals are incorrect will not be admissible.

3 Herman, Estoppel, pp. 1871-1876, 1881; *Grand Chute v. Winegar*, 82 U. S. 15 Wall. 355, 21 L. ed. 170; *Nicolay v. St. Clair County*, 3 Dill. 168; 1 Randolph, Com. Paper, § 845; 1 Dill. Mun. Corp. §§ 519-537; *Marshall County Supra. v. Schenck*, 72 U. S. 5 Wall. 781, 18 L. ed. 558.

One who purchases bonds in good faith is not bound to look any further than to see that there is legislative authority for its issue, and that so far as appears by official certificate, all conditions precedent to its issue have been performed.

1 Randolph, Com. Paper, §§ 843, 845.

Power to issue bonds being clearly shown (legislative power) the defendants as against bona-fide purchasers are estopped to deny that the power was properly exercised.

Rogers v. Burlington, 70 U. S. 3 Wall. 654, 18 L. ed. 79; *Aller v. Cameron*, 3 Dill. 198.

The Act of 1883 makes the township absolutely liable.

Barkley v. Leves Comrs. 93 U. S. 258, 23 L. ed. 898.

The legislature has complete control over property and revenue, and in creating new corporations out of old may impose debts of the latter on the former.

1 Dill. Mun. Corp. §§ 68, 64, and notes.

Receiving proceeds will be a waiver of irregularity.

1 Randolph, Com. Paper, § 846; *Capital Bank of St. Paul v. Barnes & Cass Counties School Dist. No. 85* (S. Dak.) 42 N. W. Rep. 774.

Corporate existence cannot be drawn in question in private action.

1 Dill. Mun. Corp. § 48.

In an action between third parties and the corporation it is only necessary to show that officers assumed to act as officers of the corporation.

Abbott, Trial Ev. pp. 198, 194, 198; 1 Dill. 36 L. R. A.

Mun. Corp. §§ 213, 237, p. 240, note, p. 261, note.

Existence and organization of school districts, road districts, and the like may be proved by reputation and acts where these facts do not appear of record.

1 Dill. Mun. Corp. § 84, note, p. 110; *Abbott*, Trial Ev. pp. 39, 40, 48.

Public officers are presumed to have done their duty.

2 Best, Ev. Morgan's ed. p. 622, and cases cited; *Nelson v. People*, 23 N. Y. 293.

Corliss, J., delivered the opinion of the court:

The plaintiffs have recovered judgment upon a number of coupons representing the interest on bonds issued by an alleged municipal corporation known as School District No. 22, in Richland county, in the then territory of Dakota. Defendant, not having issued them, is sought to be held liable on these bonds and their interest coupons, by virtue of chapter 44, Laws 1883. At the threshold of the case we are met with the proposition that there is no liability because there was no such corporation as School District No. 22 in existence when these instruments were executed and delivered. It is asserted that the proceedings instituted to effect the organization of such a municipality were fatally defective. It is, in the first place, insisted that there was no petition for the erection of the district presented to and filed by the county superintendent of schools, signed by a majority of the citizens residing in the territory to be affected. Such a petition is required by the statute. Chapter 14, Laws 1879, § 10. The trial judge has found that there was such petition made, and that it was filed as required by law. This finding is challenged. We think that the evidence is sufficient to sustain it. The petition itself was not produced, but we are satisfied that there was ample evidence to warrant a finding by the trial judge that it could not be found, but had been lost or taken away by some former county superintendent, either the one with whom it was originally filed or by one of his successors. There was ample evidence to justify the trial court in holding that diligent search had been made for the paper. The court therefore properly admitted secondary evidence as to the signing and filing of the petition. This evidence sustains the finding.

It is next contended that there was a failure to comply with the provisions of the statute requiring the county superintendent to furnish the county commissioners of the county with a written description of the boundaries of the district, and declaring that such description must be filed in the office of the register of deeds before such district should be entitled to proceed with its organization by the election of school district officers. Chapter 14, Laws 1879, § 10. It is undisputed that the only attempt to comply with this requirement was by filing a paper, which in words, figures, and form is as follows:

"On January 1st, 188 , the above-named

district comprised the following described lands, viz.:

Description.	Sec.	Town.	Rge.	Description.	Sec.	Town.	Rge.
For sub	seq	uent	chan	ges see	opp	osite	page

"Plat of School District No. 22.

Township...					Range...					Township 132, Range 49				
6	5	4	3	2	1	6	5	4	3	2	1			
7	8	9	10	11	12	7	8	9	10	11	12			
13	17	16	15	14	13	18	17	16	15	14	13			
19	20	21	22	23	24	19	20	21	22	23	24			
30	29	28	27	26	25	30	29	28	27	26	25			
31	32	33	34	35	36	31	32	33	34	35	36			
6	5	4	3	2	1	6	5	4	3	2	1			
7	8	9	10	11	12	7	8	9	10	11	12			
18	17	16	15	14	13	18	17	16	15	14	13			
19	20	21	22	23	24	19	20	21	22	23	24			
30	29	28	27	26	25	30	29	28	27	26	25			
31	32	33	34	35	36	31	32	33	34	35	36			

Township... Range... Township... Range...
Filed 24th October, 1881, at 11 A. M.
J. M. Ruggles, Co. Clerk.

"Organized October 24th, 1881, by J. H. Kennedy, Co. Supt. of Schools."

We are clear that this does not contain a written description of the boundaries of the district. It merely purports to be a plat of the district. Whether the district is within or without the lines of the plat is left to speculation. But does it necessarily follow that the organization of the district is thereby rendered void? The county superintendent creates the district. His decision, embodied in written form, is the act which calls the new corporation into being, provided he has been given authority to proceed by the presentation and filing of the proper petition. The statute requires him to keep a record of his official acts (sec. 12), and it is to this record that the court must look to see if the district has been formed. The record so kept by the county superintendent shows the following entry: "District No. 22, organized October 24th, 1881, and includes the following described territory: South half of sections 19, 20, 21, 22, and 23, and all of sections 26, 27, 28, 29, 30, 31, 32, 33, 34, and

*Not Included.

26 L. R. A.

35, in township 133, range 49, and one half of section 5, in township 132, range 49, and sections 24, 25, and 36, township 133, range 50." The statute does not declare that furnishing the county commissioners with a written description of the boundaries, and the filing thereof in the office of the register of deeds, are conditions precedent to the existence of the district. Quite the contrary. The statute refers to the district as a corporation already formed before the doing of these acts. It does not withhold corporate life until the description is furnished and filed. It merely provides that the district shall not be entitled to proceed with its organization by the election of school officers before these acts are performed. The corporation exists; the district officers exist; but no election of officers can be held until after certain acts are performed. This is the plain reading of the statute. Said the court in *Union School Dist. No. 4 Directors v. New Union School Dist. No. 2 Directors*, 135 Ill. 464: "And the failure of the township trustees to file with the county a map showing the lands embraced in the new district will not have the effect to destroy its corporate existence, or to prevent the directors of a new district from levying taxes for school purposes therein," citing *Winnebago School Directors of Dist. No. 5 Twp. 43 v. School Directors of Dist. No. 10*, 78 Ill. 250. A municipal corporation may have life, although there are no officers in office. No claim is made that the officers who in fact signed the bonds and coupons were not at least *de facto* officers of the district provided there was a legal organization thereof. Nor could it be successfully contended that such officers were not at least *de facto* officers, there having been an attempt to comply with the law requiring the furnishing and filing of the description before officers should be elected, and the officers being in actual possession of their respective offices and exercising the functions thereof, and there being no other persons pretending to lay claim to such offices. Nor would we reach a different conclusion were we of opinion that the organization of the district was so defective that the proceedings would be set aside on certiorari, or the right of the district to act as such would be denied by judgment in quo warranto. At the time these bonds were issued the district was acting as a *de facto* district under at least color of organization. It had elected its district officers; held its district meetings; had voted to borrow money to build a schoolhouse; and it appears to be undisputed that the proceeds of these bonds were used for that purpose, and the inhabitants received the benefit thereof. A schoolhouse has been built, and school has been taught therein. To allow the defense that the proceedings in the organization were defective to defeat the debt represented by these bonds would, under these circumstances, be to sanction repudiation of an honest obligation. We are firm in the opinion that the legality of the organization of a municipal corporation cannot be thus collaterally attacked. Citizens of the district who are opposed to the formation of such a corporation are not without remedy. Certi-

orari will reach the action of the county superintendent when without jurisdiction. *People v. Gladwin County Suprs.* 41 Mich. 647. The statute allows an appeal. Section 25, chap. 14, Laws 1879. The corporate existence may be attacked by quo warranto. *State v. Bradford*, 32 Vt. 50; *People v. Clark*, 70 N. Y. 518; *Cheshire v. People*, 116 Ill. 498; Comp. Laws, § 5348, subd. 3; *Territory v. Armstrong*, 6 Dak. 226. The evils resulting from a doctrine which would permit the legality of the organization of a municipal corporation to be inquired into collaterally—in an action to enforce a debt, in a proceeding to collect a tax levied by the *de facto* corporation, or in a litigation over a tax growing out of a tax imposed by such municipality—would be as great as the evils which would flow from the collateral inquiry into the title of a person to an office, the functions of which he is in fact exercising. This same argument reaches the objection that no petition was ever presented and filed, even assuming that the record sustained the claim that this requirement of the statute was not complied with. It does not follow, because the organization was illegal for want of power in the county superintendent, that at all times, in every species of litigation, and by any person, the existence of the *de facto* district can be assailed. It is no more essential to the exercise by the county superintendent of this power that a petition should be filed than that it should be signed by a majority of the citizens residing in the district. It is the fact, and not the decision of the superintendent that the fact exists, which gives him jurisdiction. A petition is filed lacking the signature of one citizen to make it a petition signed by a majority of the citizens; in all other respects the organization is regular; bonds are issued, a schoolhouse built, and school taught. Is all this to be ignored, to be treated as illegal, because there was no *de jure* district? Who are the real parties interested in defeating such a debt? The taxpayers within the district. In what position are those to object who participated in the organization? They have attempted to form a district. They for a time believed that they had formed it. They elect officers; borrow money on bonds for district purposes; build a schoolhouse therewith; and use the money for other purposes connected with the functions of the district. On what principle can the existence of the district be denied by them for their benefit? If any within the district refrained from affirmative action, still they are chargeable with passive acquiescence when they might have acted, and acted effectually, against the *de facto* existence of the district, and thus have prevented an imposition upon the innocent who were justified in taking that to be a legal district which was acting as such, and to all appearances was warranted in acting as such. Those who were silent, when in conscience they should have spoken, have no claim upon the equity of this court. They did not protest; they did not appeal; they did not resort to certiorari; they made no effort to have the district attorney overthrow this *de facto* district by quo warranto; and when the bonds were voted for 28 L. R. A.

they appealed to no chancellor to protect their property from an illegal debt. Not only the considerations which lie at the foundation of the rule protecting the public in dealing with a *de facto* officer, but also a principle very analogous to that of equitable estoppel, protects these bondholders against repudiation under the forms of the law. If there cannot be a *de facto* school district, there cannot be a *de facto* city. If illegality in the proceedings to effect organization is fatal to the existence of a district, it is equally as fatal to the existence of a municipal corporation of a higher grade. Given a case where the defects in the incorporation of the city are as fatal as in this case, and then deny to that corporation any effect, although a city government is in fact inaugurated and carried on, and the consequences would be intolerable. Open and acknowledged anarchy would for some reasons be preferable. In after years tax titles would be destroyed; every officer of the city would be a trespasser when the discharge of what would be his duty on the theory of the existence of the corporation led to an interference with the property or person of others. Every police or other peace officer and every magistrate acting under the supposed authority of the city government would be liable for extortion, for assault and battery, for false imprisonment, and could be prosecuted criminally for acts done in good faith in the enforcement of the criminal law. An army of creditors whose savings have gone into the city treasury, and through the treasury into public buildings and other public improvements, find, to their astonishment and dismay, that they have received in exchange beautifully lithographed but worthless bonds as souvenirs of their abused confidence. All that has been done in good faith under color of law is only barefaced usurpation, and to be treated as such for all purposes. Such a doctrine would be the author of confusion, injustice, and almost endless litigation. The imagination cannot embrace all the gross wrong to which it would lead when pushed, as it must be, to its logical consequences. On the other hand, no great injury can result to the citizens or state by recognizing a *de facto* corporation; one acting as such under color of organization. If the law is disregarded in the attempt to organize the municipality, the violation of law always can be nipped in the bud by appropriate judicial proceedings. We find that our views are by no means novel. The rule that the existence of a *de facto* municipal corporation cannot be collaterally assailed has frequently been recognized and applied by the courts. *Stuart v. Kalamazoo School Dist. No. 1*, 30 Mich. 69; *People v. Maynard*, 15 Mich. 470; *Krutz v. Paola Town Co.* 20 Kan. 897; *Tisdale v. Minonk Trustees*, 46 Ill. 9; *Geneva v. Cole*, 61 Ill. 397; *People v. Farnham*, 35 Ill. 562; *Jameson v. People*, 16 Ill. 257, 68 Am. Dec. 804; *Sherry v. Gilmore*, 58 Wis. 824; *State v. Central Pac. R. Co.* 21 Nev. 75; *Cheyenne County School Dist. No. 2 v. Cheyenne County School Dist. No. 1*, 45 Kan. 548; *Atchinson, T. & S. F. R. Co. v. Wilson*, 33 Kan. 223; *Clement v. Everett*, 29 Mich. 19; *Stockie v. Silsbee*, 41 Mich. 615;

Hurt v. Winona & St. P. R. Co. 81 Minn. 472; *Mendenhall v. Burton*, 42 Kan. 570; *Union School Dist. No. 4 Directors v. New Union School Dist. No. 2 Directors*, 185 Ill. 464; 15 Am. & Eng. Encyclop. Law, p. 965; 1 Dill. Mun. Corp. § 48; *Mendota Trustees v. Thompson*, 20 Ill. 197; *Enterprise v. State*, 29 Fla. 128. See 2 Dill. Mun. Corp. § 891; *State v. Weatherby*, 45 Mo. 17; *Comanche County Commrs. v. Lewis*, 183 U. S. 198, 38 L. ed. 604; *Austrian v. Guy*, 21 Fed. Rep. 500. In some of the cases time seems to have been considered an element of some importance, but the public may as effectually be deceived by a *de facto* organization the day after it is complete as a decade thereafter. The time a *de facto* officer has been in possession of an office is never regarded as controlling. He is as much an officer, as to the public, the day after he intrudes into the office as a year later. "The same rule which recognizes the rights of officers *de facto* recognizes corporations *de facto*, and this is necessary for public and private security." *Clement v. Everest*, 29 Mich. 19-23.

We have treated this power as if the action were upon the bonds themselves, because the holders of interest coupons may recover if they could maintain an action on the bonds under the same circumstances. It is also urged that there was a failure to comply with certain conditions precedent to the valid exercise of the power conferred upon such districts by law to borrow money on district bonds. The statute regulating the issuing of such bonds provides, in substance, that they can be issued only when a majority of the electors of the district present and voting at a district meeting shall vote to issue the same. Chapter 24, Laws 1881, § 1. Section 2 of this Act provides: "Before the question of issuing bonds shall be submitted to a vote of the district, notices shall be posted in at least three public and conspicuous places in said district, stating the time and place of meeting, the amount of bonds that will be required to be issued, and the time in which they shall be made payable, at least twenty days before the time of meeting; and the voting shall be done by means of written or printed ballots, and all ballots deposited in favor of issuing bonds shall have thereon the words 'for issuing bonds,' and those opposed thereto shall have thereon the words 'against issuing bonds;' and if the majority of all the votes cast shall be in favor of issuing bonds, the school board, or other proper officers, shall forthwith proceed to issue bonds in accordance with the vote; but if a majority of all the votes cast are opposed to issuing bonds, then no further action can be had, and the question shall not be again submitted to vote for one year thereafter: provided, however, that the question of issuing bonds shall not be submitted to a vote of the district, and no meeting shall be called for that purpose, until the district school board shall have been so petitioned, in writing, by a majority of the resident electors of said school district." It is contended that the school board was not petitioned to submit the question of issuing the bonds to a vote as required by the proviso to 28 L. R. A.

section 2. We think the defendant is not in position to raise this point. The plaintiffs are bona fide holders of the coupons. The recital in the bonds is therefore fatal to this defense. Upon their face appears the following statement: "This bond is issued on the 24th day of June, 1882, by School District No. 23, county of Richland, D. T., for building and furnishing a schoolhouse under, and in pursuance of, and in strict conformity with, the provisions of an act of the legislative assembly of the territory of Dakota, entitled 'An act to empower school districts to issue bonds for building schoolhouses,' approved March 8, 1881, and of a vote of said district at a special meeting had on the 29th day of November, 1881." Upon the back of each bond is the following certificate, signed by the clerk of the district: "I certify that the within bonds are issued in accordance with a vote of School District No. 23, of Richland county, Dakota territory, at a special meeting held on the 29th day of November, A. D. 1881, to issue bonds to the amount of twelve hundred dollars." It is obvious from the statute that the officers by whom the bonds are to be issued are intrusted with the duty of determining whether the statute has been complied with as to all matters necessary to give them authority to issue the bonds. Their statement embodied in these bonds therefore estops the district and its successors from showing aught to the contrary. The rule and the reason for it have been so often shown, and are so well known to the profession, that it will suffice to cite some of the numerous authorities on the point: *Bernards Twp. v. Morrison*, 183 U. S. 523, 38 L. ed. 726; *Oregon v. Jennings*, 119 U. S. 74-92, 30 L. ed. 823-829; *Moultrie County v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 681, 23 L. ed. 681; *Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583; *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *Dixon County v. Field*, 111 U. S. 88, 28 L. ed. 360; *Humboldt Twp. v. Long*, 92 U. S. 642, 23 L. ed. 752; *Knox County Commrs. v. Aspinwall*, 62 U. S. 21 How. 539, 16 L. ed. 208; *Fulton v. Riverton*, 42 Minn. 395; 15 Am. & Eng. Encyclop. Law, pp. 1295 *et seq.*; *Burroughs, Pub. Secur.* 299 *et seq.* It is not necessary that the power to determine these facts should have been expressly conferred upon the district officers by the statute. "It is enough that full control in the matter is given to the officers named." *Bernards Twp. v. Morrison*, 183 U. S. 523, 38 L. ed. 726; *Fulton v. Riverton*, 42 Minn. 395. Nor is it essential that the statement should set forth in detail that all of the various conditions precedent have been complied with. It is sufficient if it is stated that the bond was issued in pursuance of the statute, designating it in such a manner as to identify it. This is in legal effect a statement that each and all of the necessary preliminary steps were taken to authorize the issue of the bonds. *Bernards Twp. v. Morrison*, 183 U. S. 523, 38 L. ed. 726; *Dixon County v. Field*, 111 U. S. 88, 28 L. ed. 360; 15 Am. & Eng. Encyclop. Law, p. 1800; *Moultrie County v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 681, 23 L. ed. 681. But the statement went much further. It asserted that the bonds had

been issued under and in pursuance of, and in strict conformity with, the act authorizing their issue, "and of a vote of said district at a special meeting had on the 29th day of November, 1881." The certificate indorsed on the bonds by the clerk was required by the statute to be indorsed thereon. Chapter 24, Laws 1881, § 4. The statute specifies what the certificate shall contain, and this provision was strictly complied with in the issuing of these bonds. This requirement indicates that it was for the protection of the purchaser of the bonds, who might implicitly rely upon the clerk's certificate as conclusive evidence that all necessary preliminary steps had been legally and regularly taken.

We come now to the claim that the plaintiffs have sued the wrong corporation. The defendant did not issue these bonds. If liable at all, it must be by virtue of some statute. Chapter 44, Laws 1883, is pointed to as the act which binds the defendant to pay these bonds. This law provides for a new system. The district school system was to be abolished, and the township school system to take its place. Under this statute it was the duty of the board of county commissioners to divide all organized counties into school townships. The finding of the court is that on May 28, 1883, the commissioners of Richland county duly organized the school township of Dwight in that county, and that the territory within this new school township embraced nearly all of the territory of the old school district No. 22; and that the schoolhouse and school furniture belonging to the district were received into and are owned by the defendant. There is sufficient evidence to support the finding that the schoolhouse belonging to district No. 22 is within the territorial limits of the defendant. Under these facts the liability of the defendant on these bonds would be clear, under section 144 of the Act, were it not for the provisions of section 186, to which we will in a moment refer. Section 144 provides as follows: "Every school township shall be liable for, and shall assume and pay fully, according to their legal tenor, effect, and obligation, all the outstanding bonds and the interest thereon, of every school district, the schoolhouse and furniture of which are received and included within the school township, and owned thereby, the same as if said bonds had been issued by said school township; and the law which authorized the school district to issue bonds shall apply to the school township the same as if it had originally been authorized to issue, and had issued, the said bonds. The bonds shall be deemed in law the bonds of the school township, with the same validity for securing and enforcing the payment of principal and interest that they would have had against the district that issued them." There can be no question as to the power of the legislature to impose upon a new municipality, which includes all or a portion of the territory of an old municipal corporation, liability for the debts of the old corporation, where the property of the latter is turned over to and received by the former under the law. *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 28 L. R. A.

699; 1 Dill. Mun. Corp. § 63; *State v. Lake City*, 25 Minn. 404; *Winona v. Winona County School Dist. No. 22*, 40 Minn. 13, 3 L. R. A. 46; *Demattos v. New Whatcom*, 4 Wash. 127; *Laramie County Comrs. v. Albany County Comrs.* 92 U. S. 307, 23 L. ed. 552; *Schriber v. Langlade*, 66 Wis. 616, and cases cited in opinion; *Knight v. Ashland*, 61 Wis. 246. See also note to *State v. Clevenger*, 20 Am. St. Rep. 677 [27 Neb. 422]. Indeed, many of the cases go much further than is necessary to support this legislation. But it is contended that school district No. 22 has not ceased to exist; that the organization of the defendant is not complete; and the argument from these premises is that district No. 22, and not the defendant, is at present liable for these bonds. The section of the statute on which the claim rests is section 186. It provides as follows: "The adoption of the system herein provided, and the passage and approval of this act, shall not have the effect to discontinue, abolish, and render null such school districts or their organization as they may now exist in any county, but they shall continue to exist, and their officers to act as such, in law and fact, until the school township organization is complete, so far as it includes any particular district or districts, or the larger part of any particular district. And such township organization shall not be deemed complete, nor such districts so cease to exist, and their officers to act as such, until all matters between the district and the township are adjusted, and the property delivered, funds paid over, and an adjustment is reached for the equalization of taxes and property between the districts which enter into the school township, so far as such taxes and property remain permanent in houses, sites, furniture, and other parts of houses and grounds." The next two sections prescribe the procedure by which the equalization of taxes is to be determined, and the rules which are to govern such equalization. Now, it is quite clear to our mind that section 186 was incorporated in the statute merely to keep the old districts alive, for the purpose of adjusting their rights among themselves, so that taxpayers living in each portion of the new township which formerly constituted a school district should not pay more of the aggregate of the old indebtedness of the several districts embraced in the township than would be equitable, considering the rights of the taxpayers of the other districts, so included, to the same treatment. The school boards of the several old districts constituted, with the county superintendent, a body to adjust these matters, and it was necessary to keep the districts alive for this special purpose after the organization of the township. The legislature intended to work an immediate, radical revolution in the school system for the whole territory. We do not believe that they contemplated that, while a long-drawn-out contest was going on to settle these questions between the old districts, this new system should be held in abeyance. Moreover, there would be no reason for making the organization of the school township, and its right to carry on the school system, depend upon the determination of a

matter, the prior settlement of which was not essential to the corporate existence of the school township and the administration of the school law. Settlement must inevitably come. Should those charged with the duty of making it fail to obey the law, mandamus would set them in motion. The nature of their decision could not be dictated by any court; but they could be compelled to make some decision. The discharge of this duty, whether voluntary or under compulsion, can as well go on after as before the school township becomes liable for the district debts and is authorized to carry on the schools. The township is by the statute made liable for these bonds. It is the formal party against which judgment may be recovered. When execution in the form of mandamus to compel a levy of taxes is applied for, the court will observe the decision of the board of adjustment in the apportionment of the burden. If no settlement has at that time been voluntarily reached, the court in a separate proceeding will compel the performance of this duty specially enjoined by law, and when such adjustment is consummated the writ of mandamus to compel the levy of a tax to pay the judgment must observe and follow this adjustment in the apportioning of the tax among the several old districts of the new township. The statute is not clear. The question is by no means free from doubts. If the eye is riveted on section 136 alone there is much force in the defendant's position. But we must scan the whole act to find out its spirit, and in the light of that spirit he must interpret section 136. We can discover a good reason for keeping these districts alive, after the organization of the school township, for the special purpose of adjustment of equities. We believe it would be highly inconvenient to preserve their existence thereafter for general school purposes, and that such was not the intention of the law-making power. The existence of these districts for this particular purpose is not incompatible with the existence of the school township. It in no man-

ner interferes with the full exercise by the school township of all its powers. These districts were to be kept alive for a short period, to accomplish a special object entirely foreign to the power conferred upon school townships. Their utter extinction for all purposes contemporaneously with the creation of school townships would have left the latter no more completely in possession of all their functions as municipal corporations.

Finding no error, *the judgment is affirmed.*
All concur.

A petition for rehearing was subsequently filed in response to which on May 31, 1893, the following opinion was handed down:

We are asked to grant a rehearing on the assumption that we have overlooked the case of *Dartmouth Soc. Bank v. Minnehaha County School Dist.* 6 & 31, 6 Dak. 332. We had not overlooked it. We do not regard it as in point. In that case it might be said that there was no color of organization. There was no petition ever filed, or even signed. In so far as that decision can be regarded as conflicting with our conclusions we feel constrained to differ from the court which pronounced it.

Another matter is referred to in the petition for rehearing which strikes us with much force. It is insisted that, unless we modify the judgment, it will stand as an unqualified judgment against the defendant, to be collected the same as any other judgment against it. To save any question, we will modify the judgment so that the collection of it must be enforced according to the provisions of sections 136-141, chap. 44, Laws 1883. The district court will modify the judgment by inserting therein the following clause: This judgment is to be enforced subject to the provisions of sections 136-141, chap. 44, Laws 1883; the debt on which it is rendered being a debt subject to equalization as therein provided.

Modified and affirmed.

All concur.

SOUTH CAROLINA SUPREME COURT.

Charles W. McCREERY, *App't.*,

v.

J. Henry DAVIS, *Resp't.*

(.....S. C.....)

1. The marriage relation is not a res within a state in which only one of the parties resides so as to give a court of that state jurisdiction to dissolve the marriage and bind the absent party who is a citizen of another jurisdiction, by substituted or actual notice of the proceedings given without the jurisdiction.

NOTE.—As to constructive service on nonresident to give jurisdiction in divorce cases, see the cases collected in the note to *Butler v. Washington* (La.) 19 L. R. A. 514.

The present case is an unusually valuable addition to the subject by virtue of its vigorous discussion of the principle of the decision.

28 L. R. A.

tion of the court where the proceeding is pending.

2. Only valid divorces and not a void divorce in another state are referred to in Rev. Stat., § 2160, excepting a divorced person from the prohibition of marriage by one who has a former wife or husband.

3. Specific performance of a contract for land cannot be enforced by the vendor when the land is subject to an inchoate dower right of his wife.

4. A void divorce granted to a wife in another state will not be given effect on the theory that she is estopped so as to relieve her husband's land in a suit between him and a third person from her inchoate dower right, especially where the question of dower was reserved in the decree of divorce.

(April 20, 1895.)

A PPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Richland County in favor of defendant in an action brought to compel specific performance of a contract to purchase real estate. *Affirmed.*

The exceptions taken by plaintiff were as follows:

"(1) Because his honor held that: 'According to the uniform decisions of the courts of this state, marriage has been adjudged to be a civil contract.' (2) Because his honor held that: 'Assuming that marriage is a civil status, that can be modified or changed by the law of the domicile, it does not follow that the judgment of divorce changing the matrimonial status of Mrs. Rhoda McCreery in Illinois can have the effect of dissolving the matrimonial status or relations of her husband as a citizen of South Carolina. It cannot have such effect if, as universally conceded, each state has the sovereign right to fix and regulate the domestic status of its own citizens. The judgment of divorce granted Mrs. Rhoda McCreery in Illinois cannot affect the matrimonial status of her husband, Charles W. McCreery, as a citizen of this state, under section 1 of article 4 of the Constitution of the United States, giving faith and credit to foreign judgments in this state. This provision of the Constitution of the United States was never intended to afford one state the means of fixing or changing the marital status of the citizens of another state, in hostility to the laws and public policy of the latter state with reference to marriage. To give such effect to this constitutional provision would be to authorize one state to legislate for, and to control the domestic policy to govern in, another state. If divorces could be granted for any cause in this state, public policy might demand a recognition in this state of the judgment of divorce granted in Illinois. No country will, however, consent to recognize a foreign judgment which is contrary to its views of public policy and morality. If one state has the unquestioned right to adopt and enforce its own domestic policy with reference to marriage and divorce, the same right must be accorded to every other state. If Charles W. McCreery's marriage is to be regarded as contracted in South Carolina, his present marital status or condition must be determined by the decisions of our own courts with reference to marriage. This court will not undertake to overrule the well-settled law of this state relating to the marriage contract, in order to change the matrimonial status of Charles W. McCreery in this state to suit the changed status of his wife under the laws of Illinois.' (8) Because his honor held that: 'Regarding the marriage of Charles W. McCreery as having been contracted in South Carolina, I conclude, as matter of law, that the judgment of divorce granted in the state of Illinois at the instance of Mrs. Rhoda McCreery did not dissolve the matrimonial status of her husband, Charles W. McCreery, in this state. If the judgment of divorce granted in Illinois could have the effect of dissolving the matrimonial relations of Charles W. Mc-

Creery in this state, it could not divest the inchoate right of dower of his wife, Mrs. Rhoda McCreery, in the first lot of land referred to in the agreement between plaintiff and defendant, of which Charles W. McCreery was seized in fee prior to the date of said judgment of divorce. The statute of Illinois also reserves the wife's right of dower.' (4) Because his honor held that: 'If the marriage of Charles W. McCreery is to be regarded as having been contracted in the state of New York, the judgment of divorce granted in Illinois, under the New York decisions, could not have the effect of dissolving the matrimonial relations of Charles W. McCreery.' (5) Because his honor held that: 'Considering the marriage of Charles W. McCreery as contracted either in this state or in New York, I conclude, as matter of law, that the judgment of divorce granted in Cook county, in the state of Illinois, upon the application of plaintiff's wife, Mrs. Rhoda McCreery, does not dissolve the matrimonial relations of her husband, the plaintiff, Charles W. McCreery, as a citizen of this state.' (6) Because his honor erred in passing upon the marital status of Charles W. McCreery, whereas it was only necessary to the decision of this case to pass upon the marital status of Rhoda McCreery. (7) Because his honor should have held that under the Constitution of the United States, and the acts of congress passed in pursuance thereof, the judgment of divorce granted by the courts of Illinois is valid and binding in the courts of this state. (8) Because, it having been admitted that the proceedings for divorce were regular, and the judgment therein valid, and in accordance with the laws of the state of Illinois, it was error to hold that the said judgment was ineffectual to dissolve the marriage contract in this state. (9) Because his honor held that: 'The plaintiff is not entitled to compel specific performance of the agreement by the defendant, J. Henry Davis, and that plaintiff's complaint be dismissed, with costs.' (10) Because his honor held that: 'The doctrine of estoppel, as to Mrs. Rhoda McCreery, need not be considered, as she is not a party to this action.'"

Messrs. Lyles & Muller for appellant.

Messrs. Alston & Patton for respondent.

Pope, J., delivered the opinion of the court:

On the 3d day of January, 1898, the plaintiff and defendant entered into a written agreement whereby the plaintiff, for a valuable consideration, agreed to sell and convey to the defendant, free of incumbrance or defect of title of any character, two certain lots of land situate in the county of Richland, in the state of South Carolina. When the plaintiff tendered his deeds of conveyance of said two lots of land to the defendant, the defendant refused to accept said deeds, claiming that the same were not free from incumbrance or defect of title, in this respect, namely, that there was no renunciation indorsed on said deed of the dower of Rhoda Baldwin McCreery, the wife of the

plaintiff; and the said defendant still refused said deeds after he had exhibited to him a certified copy of a judgment of the circuit court of Cook county, in the state of Illinois, in an action wherein the said Rhoda Baldwin McCreery was plaintiff and the said Charles W. McCreery was defendant, rendered at the May term, 1891, of said court, and whereby the bonds of matrimony theretofore existing between the said Rhoda and Charles were dissolved. On the 3d of February, 1893, the plaintiff, Charles W. McCreery, commenced his action, by summons and complaint, against the defendant, J. Henry Davis, in the court of common pleas for Richland county, in the state of South Carolina, for a judgment requiring the said J. Henry Davis to specifically perform his contract, and that when the plaintiff, Charles W. McCreery, should deliver his deed, with full warranty, for said two lots of land, to the defendant, J. Henry Davis, he should accept the same, and pay the purchase money therefor to Charles W. McCreery. The defendant, in his answer, admitted the facts set up in the complaint, "except that he denies that the title offered him by the said plaintiff is free from defects or incumbrances; and he alleges that the said deeds of conveyance offered him by said plaintiff are defective, in this: that the said plaintiff is, and at the time mentioned in said complaint was, a married man, and that his wife was, and is now, alive, and that said deeds of conveyance bear no renunciation of dower by his said wife." The cause, being thus at issue, came on to be heard by his honor, Judge Witherspoon, at the spring (1893) term of the court of common pleas for Richland county, in the state of South Carolina, on the pleadings, and on the following written agreement as to the admitted facts:

"(1) That on or about the 4th day of February, 1885, the plaintiff, then and ever since a citizen of the city of Columbia, state of South Carolina, was lawfully married, in the city of Brooklyn, in the state of New York, to one Rhoda Baldwin, then a citizen of Brooklyn, and state of New York. That very shortly thereafter the plaintiff, with his wife, returned to the said city of Columbia, state of South Carolina,—his said place of residence,—where they lived together as husband and wife until on or about the 7th day of June, 1887, at which date his said wife left his house and home, and moved to the city of Chicago, Cook county, state of Illinois. That on the 14th day of March, 1891, the said Rhoda McCreery, plaintiff's wife, filed in the circuit court of said Cook county, state of Illinois (a court of record, and general jurisdiction), her bill of complaint against the plaintiff, for a divorce *a vinculo matrimonii* from him, in which complaint she alleges that she was an actual resident of the county of Cook, and had been for more than twenty months, then last past, a resident of the state of Illinois; that on the 4th day of February, 1885, she was lawfully married to the said Charles W. McCreery, and from that time until about the 7th day of June, 1887, she lived with the said Charles

W. McCreery, as his wife, at which time she was compelled to leave him on account of his extreme and repeated cruelty to her,—and further alleging and setting forth in detail his acts of cruelty towards her; extreme and repeated cruelty being one of the causes for which divorces are granted in the statute law of said state of Illinois. That thereupon there issued out of said court, and under the seal thereof, the people's writ of summons, directed to the sheriff of said Cook county to execute. That said summons, and due notice of the filing thereof and of the complaint, were served upon the plaintiff by publication, in strict accordance with the laws of the state of Illinois, but this plaintiff did not appear, answer, or demur to said complaint. That thereafter, to wit, at the May term, 1891, thereof, there was filed in said circuit court of Cook county a decree affirmatively finding the facts alleged in the complaint of the said Rhoda McCreery, and ordering, adjudging, and decreeing that the bonds of matrimony theretofore existing between the said Rhoda McCreery and this plaintiff be dissolved, a copy of which decree is hereto attached, as Exhibit B; and made a part of this agreement. (2) That plaintiff was seized in fee of the premises first described in said agreement prior to the date of the said decree of divorce, and that he acquired title to the premises second described in said agreement subsequent to the date of said decree of divorce. (3) That by the statute law of the state of Illinois (1 Starr & C. Anno. Stat. p. 904, par. 14) it is provided: 'If any husband or wife is divorced for the misconduct of the other, except when the marriage was void from the beginning, he or she shall not thereby lose dower nor the benefit of any such jointure; but if such divorce shall be for his or her own fault or misconduct, such dower or jointure, and any estate granted by the laws of this state in the real or personal estate of the other, shall be forfeited.' That in volume 1, at page 896, par. 1, of said Starr & Curtis' Annotated Statutes, it is provided 'that the estate of curtesy is hereby abolished, and the surviving husband or wife shall be endowed of the third part of all the lands whereof the deceased husband or wife was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form.' (4) That by this act of the legislature of the state of New York, passed in 1828, now section 1756 of the Code of Procedure of said state, it is provided: 'In either of the following cases, a husband or wife may maintain an action against the other party to the marriage, to procure a judgment divorcing the parties, and dissolving the marriage, by reason of the defendant's adultery: (1) Where both parties were residents of this state where the offense was committed. (2) Where the parties were married in this state. (3) Where the plaintiff was a resident of this state when the offense was committed, and is a resident thereof when the action is commenced. (4) Where the offense was committed within the state, and the injured party when the action is commenced is a resident of the state.' (5)

It is admitted that the deed tendered by the plaintiff did not have a renunciation of dower by Mrs. Rhoda McCreery, wife of grantor.

"Exhibit B. 'State of Illinois, Cook County—ss.: Circuit Court of Cook County, May Term, A. D. 1891. *Rhoda McCreery v. Charles W. McCreery*. Bill. This day came again the said complainant, by John C. Hendricks and Charles Bary, Esq., as solicitors, and it appearing to the court that said defendant has had due notice of the pendency of this suit by publication and mailing notice according to the statute in such case made and provided; that the default of said defendant was taken, and the complainant's bill of complaint herein taken as confessed by said defendant; and the court having heard the testimony in open court in support of said bill of complaint (a certificate of which evidence is filed herein), and now being fully advised in the premises, doth find that the complainant is an actual resident of Cook county, and has been a resident of the state of Illinois for over one whole year prior to the filing of the bill in this case, and that the defendant has been guilty of extreme and repeated cruelty towards the complainant, as charged in the complainant's bill of complaint. On motion of said solicitors for the complainant, it is ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, and the statute in such case made and provided, doth order, adjudge, and decree, that the bonds of matrimony heretofore existing between the complainant, Rhoda McCreery, and the defendant, Charles W. McCreery, be, and the same are hereby, dissolved; and the same are dissolved accordingly.'"

Thereafter, to wit, on the 31st day of May, 1893, his honor Judge Witherspoon, decreed: "Considering the marriage of Charles W. McCreery as contracted either in this state or in New York, I conclude, as matter of law, that the judgment of divorce granted in Cook county, in the state of Illinois, upon the application of plaintiff's wife, Mrs. Rhoda McCreery, does not dissolve the matrimonial relation of her husband, the plaintiff, Charles W. McCreery, as a citizen of this state. I further conclude, as matter of law, that the plaintiff is not entitled to compel specific performance of the agreement by the defendant, J. Henry Davis, and that plaintiff's complaint must be dismissed, with costs. The doctrine of estoppel need not be considered, as she is not a party to this action. It is ordered and adjudged that the plaintiff's complaint be dismissed, with costs."

Thereupon the plaintiff appealed to this court, upon ten grounds, which are designed to present, in its different phases, the question of the duty of our courts (we mean the courts of this state) to recognize as valid the judgment of the circuit court for Cook county, in the state of Illinois, whereby Rhoda McCreery and Charles W. McCreery were declared no longer man and wife. We will not reproduce in this opinion these grounds of appeal, but direct that they be included in the report of this case.

So far as marriage, and the estate of the wife in the lands of which her husband was

seised in fee during coverture, which is called "dower," are concerned, as fixed under the laws of this commonwealth, they are what were fixed for each under the common law of the mother country. The doctrines of the common law pertaining to marriage and dower are too well understood to need any extended references. The union of one man with one woman for life, in matrimony, is a mystery. In nature, man and woman, each for himself and herself, are endowed with those qualities that attract and attach each to the other. They were made for each other. In marriage (we speak it reverently) they gratify the propensities which are unlawful otherwise to gratify. They procreate by this union the species, and thereby perpetuate the race. Their mysterious union is the source of unalloyed pleasure, in the uplifting and development of the natures of both parties composing it. Its very design is its continuance until dissolved by death. It is a unit in social life. A combination of such units makes up society. Government itself is but the creation of society, whereby life, liberty, and property are protected. The form of such government is the choice of the units composing it, and all laws are but the expression of rules which the many units, as composing society, may prescribe for their control. No individual human creature can attain excellence in life, in thought, in action, without an ideal before his or her eyes at which they make an effort to attain. Without this ideal the individual may be said to drift. Society being made up of these individual human creatures, and government being their creature, these ideals become incorporated in the framework of their government. One of the ideals before the minds of the members of society is progressive development. Granted that it is never fully attained; still progress towards the goal fixed by the ideal is, in the nature of things, improvement. Now, all admit that the true ideal in marriage is such a perfect union that it leads to the indestructibility of the relation of man and wife; for, in its very inception, such is the declared purpose of the parties to it, and of the society in which it occurs. Such is in exact accordance with the moral law, "And they twain shall be one flesh." England held this view for centuries, and while she held it the thirteen colonies in America were planted, each adopting this view of the mother country. Of these thirteen colonies, South Carolina was one, and, with the exception of the interval between the years 1872 and 1878, she has constantly retained this view. If others have drifted, she cannot be so charged to have done. The appellant here contends that marriage is not a civil contract, but a status,—a condition; that marriage is a ~~ree~~ that accompanies the husband and wife, or either of them, wherever they, or either of them, may be domiciled. Is marriage a status,—not a contract? Is it true that although formed by a contract by one man and one woman, whereby they, each, for life, become husband and wife, when the union is complete the man has the status of husband, and the woman the status of wife,

separate and apart from the civil contract? Is it true that this status, in each, may be said to exist when separate and apart? Is it true that this status in both, or either one, of them is a *res*? Is it true that either one of them, by becoming domiciled in a state different from that in which the other is then domiciled, thereby gives a jurisdiction to the court of the state of the new domicile of the status of such husband or wife there domiciled, by which the *res* is under the control of the courts of the new domicile, through which the *res* may be destroyed therein? Is it so, that under the Constitution of the United States, and its subsequent legislation to enforce it, whereby the acts and judgments of one state must be given by every other state the same force and effect had in the state where the act was passed or the judgment rendered, a judgment of the state of Illinois rendered in an action of Rhoda, the wife, against Charles, the husband, for an absolute divorce, granting said divorce, to which action he did not appear, answer, or demur (he being then domiciled in South Carolina), must be recognized by the courts of South Carolina as valid in South Carolina, notwithstanding the state of South Carolina grants no divorces, and especially for the cause of *sævitia*, on which ground this alleged divorce was granted? Or, on the other hand, is it true that the doctrine that "once married always married, until one of the parties dies," obtains so firmly in this state that, if the court of any state grants a divorce to either Charles or Rhoda McCreery for any cause save that of adultery, such judgment will not be respected here? We use the qualifying words, "of adultery," because divorces are recognized by the state of New York, where this marriage was solemnized, for this cause alone. We have been delighted with the tone, the ability, and the fidelity with which each side to the controversy has presented its views. That we have been interested, is true. That we have been left in some doubt, at times, is true. But that the conclusion we have reached is now entirely satisfactory to us, is equally true.

These parties, Charles W. and Rhoda McCreery, were married in the state of New York, but immediately thereafter removed to, and were domiciled in, South Carolina,—the home of the said Charles W. McCreery. We are inclined to think that this contract of marriage wore a twofold aspect or character; partaking of certain characteristics under the laws of New York, and partaking, again, of certain characteristics under the laws of the state of South Carolina, where it was to be performed. Story, Conf. L. § 299; 2 Kent, Com. 460. But, concerning this phase of this matter, we do not feel that it will be profitable to devote any time to its discussion; for the divorce in this case, if it be a divorce, was for a cause not recognized in the state of New York, or that of South Carolina. Confessedly, the contract was entered into, therefore, where *sævitia* was not recognized as a ground for divorce. If Mr. Bishop or Mr. Black or Mr. Freeman be correct in their respective views that marriage creates a relation between husband

and wife which clothes each one of them with a status, and that this status, in each one of them, is entitled to be treated as a *res*, then it will be a matter of no moment where this marriage was celebrated,—whether in New York or in South Carolina, or, for that matter, in any other country. This view is presented most ably by Mr. Bishop in his work on Marriage, Divorce, and Separation, to which we will have occasion hereafter to refer; and such is his will power and his rugged strength in stating his propositions, together with the masterly arrangement observed in presenting them, that it is with difficulty one escapes his conclusions. We cannot but be impressed, however, with the view that he has taken too much for granted when he announces that, although marriage is entered into by the parties to it under a contract, yet that as soon as the contract is executed, at once, there is breathed into the relation an import far higher than a contractual relation; in fine, that a status becomes thereby assigned to the parties, over and above and beyond that of any contract. He cites in support of his theory the facts that all contracts may be annulled by the parties who create them, except marriage, under which neither party to it, nor both parties to it, can, of themselves, terminate it, and that the law alone can extinguish the contract of marriage. He masses, so to speak, the difficulties in viewing it as a contract, as follows: "Marriage, as distinguished from the agreement to marry, and from the act of becoming married, is the civil status of one man and one woman legally united for life with the rights and duties which, for the establishment of families and the multiplication and education of the species, are, or from time to time may thereafter be, assigned by the law to matrimony." "We know that the foregoing definition of 'marriage' is correct, because it accurately describes what the courts constantly decide. That marriage executed is not a contract, we know, because the parties cannot mutually destroy it; because the act of God, incapacitating one to discharge its duties, will not release it; because there is no accepted performance which will end it; because a minor of marriageable age can no more recede from it than an adult; because it is not dissolved by a failure of the original consideration; because no suit for damages will lie for the nonfulfillment of its duties; because its duties are not derived from its terms, but from the law, because legislation may annul itself at pleasure; and because none of its other elements are those of contract, but all are of status." Now, this author admits that Bigelow, in *Little v. Little*, 18 Gray, 264, correctly stated the proposition that "all authorities concur in the conclusion that marriage has its origin and foundation in a purely civil contract." This is an, or rather the, initial point. How do these authors reach the conclusion which Dr. Bishop announces? "And though the new relation [that is, the status] retains some similitudes reminding us of its origin, the contract does in truth no longer exist, but the parties are governed by the law of husband and wife."

Is it not an assumption coined in order to give a plausible basis to the solution of an otherwise untenable position? Is it not by this means that they hope to give currency to an otherwise baffled policy, namely, to so construct a plan that thereby they may successfully invoke that portion of the Federal Constitution relating to the effect to be given by all the states to the acts and judgments of one state, and thus force all other states to give effect to judgments for absolute divorces? If marriage were still esteemed a civil contract, they could not hope to escape the defect of jurisdiction hereafter to be discussed. But by coining this new term, "status," and ascribing the efficacy of "*res*" to it, under certain principles hereafter to be referred to, it is deemed by them that the difficulty has been overcome. We will investigate these later matters hereafter. Just now we are interested in this discovery made by Dr. Bishop in the year 1853, which seems to have become very popular with all those persons who favor divorce laws. We still press the inquiry, How have these people changed what was confessedly a civil contract into a status or *res* apart from such civil contract? Investigation will show that it is by an assumption of such a result. When pressed for an answer, they say it cannot be changed by the parties, and therefore it is not a contract. What principle of law is more familiar than what there is in the law pertaining to a certain contract at the time it is made becomes a part of such contract, as much so as if specifically named in the contract when made? It is a part of every contract of marriage that it is indissoluble by the parties themselves. Such being so, how need it be said that such a fact will show that the contract of marriage is not a civil contract, but a status? Reflection will show that this must be so, from the very nature of the union of man and woman in this contract of marriage, and why the law should wisely say to an infant of marriageable age, who has become a party to it, "You are as much bound as an adult." Nor does the fact that the act of God, incapacitating one party to the marriage to discharge its duties, will not release the other from the marriage; for such was the law when the contract was entered into. It did not need this status to show such result. Nor does the fact that no accepted performance will annul it; for how can there be an accepted performance of a contract that is not fully performed until one of the parties thereto shall die? Nor does the fact that no action will lie in behalf of one of the parties against the other for a non-fulfillment of its duties. Such is of the very essence of the law existing when it is entered into. Nor will the alleged fact that its duties are not derived from its terms. On this point we suppose the author means that when the marriage is solemnized or contracted an exact inventory is not made up, or a list of the duties incident to marriage repeated in the presence of the parties. The wise God who created us furnished us those incentives to the union in our very physical organization when he made us male and female. No necessity existed to repeat what each already

knew. Besides, in the eyes of the law, their duties existed as incidents to this union, and were incorporated in the contract when it was formed. Again, they say it is not a civil contract because the legislative power may annul the marriage at will. Governmental force has annulled many solemn contracts, and such a fact has never been held to sustain the position that contracts were not contracts on that account. It needs no extended reference to history to learn of the exercise of this governmental force. The horror of mankind at the conduct of Henry VIII. as to divorces from his wives is an apt illustration of this governmental force. And, lastly (now listen!), because none of its other elements are those of contract, but all are of status. In other words, the author would have us believe it is not a contract because he says it is not a contract; it is a status because he says it is a status! And this is a proof that an executed civil contract is no longer an executed civil contract, but instead has become a status. Just here it might be well to call attention to the fact that, in the author's definition of "marriage," it nowhere appears that he has considered what the Creator of the Universe announced as the cause of woman's creation: "And the Lord God said, It is not good that the man should be alone: I will make him a helpmeet for him." Gen. ii. 18. Any idea of marriage which leaves out of view the companionship of the husband and wife ignores one of the chief beauties of the union, and one of its most attractive features. It may be assumed, however, that it was so much more important to coin this "status" and originate this "*res*," in connection with marriage, that many things necessary to the true conception of marriage might be well overlooked by Dr. Bishop and his allies. Before referring to the author more directly, in regard to the pernicious effect of his new doctrines, it is but just to say that in his work so largely relied upon by the appellant here, and whose title has already been stated, and from which such heavy quotations have been made, he intimates that divorces should be confined to the cases of adultery, desertion, and *sævitia*. While this is true, he distinctly lays down doctrines that are at variance with Holy Writ, and seems to take pleasure in the reflection that he first coined the terms "status" and "*res*," as applied to marriage and divorce. Now, candor compels us to say that the good doctor occupies very dangerous ground; that, instead of deriving consolation from these reflections, he might really view them with consternation and terror. If his views so announced are calculated to lead his kind to disregard the Sacred Law, then, indeed, he is in peril. There is no need to announce, for it must be patent to every one who thinks that one of the direct results of this pandering to divorce is sure to prove one of the most potent agencies to the poisoning of the public mind, by not only suggesting evil, but by suggesting a plausible excuse for it. When the ends of the creation of man and woman, as Nature has made them, are perverted, and man, who was created the stronger, and therefore the

protector of woman, and woman, who was created the weaker, and therefore the protected, are made equals, with no inducement to reverence man by woman as her temporal lord, and no incentive to man to tenderly protect and cherish woman, as the weaker sex, then the bonds of society are weakened, indeed, and the restraints that a different course would tend to increase are lost to society.

But one of the chief difficulties in this case is this: Grant that marriage in South Carolina is a civil contract, indissoluble by any act of the parties, and, under her laws, indissoluble in her courts for any purpose. Yet if Mrs. McCreery has received an absolute divorce from her marriage by the judgment of a court of general jurisdiction in the state of Illinois, under the Constitution of the United States (article 4, § 1), and the Act of Congress to carry the same into effect, the judgment of the Illinois court, when pleaded or offered in evidence in the courts of South Carolina, the latter state must receive the same with like force and effect that it obtains in the state of Illinois, where rendered; and, if this be so, Mrs. McCreery is entitled to no dower in the lands owned by Charles W. McCreery in South Carolina, and therefore the plaintiff is entitled to his decree for specific performance of the contract between himself and the defendant. This section of the constitution reads as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and judicial proceedings shall be proved, and the effect thereof." And the Act of Congress (1 Stat. at L. 122) provides: "The said records and proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or may be taken." It will be at once seen that the framers of our Federal Constitution have, by this section, provided that while, under the law of nations, from principles of comity, the judgments of foreign countries should be respected as such in every other country, when produced, provided such foreign judgments accord with her domestic policy etc., that it should be the duty of every state in this Union of states to give full force and effect to the judgments of any other state, when duly authenticated. Hence, if this doctrine is sound law, holders of judgments obtained in a different state have the right to produce such judgments in the courts of this state, and it is our duty to respect them, and give them the same force and effect they have in the state where rendered, as required by the constitution of the general government. We would properly and naturally look to the adjudications in the Supreme Court of the United States for the interpretation of this legislation, and in doing so we find a goodly number of cases bearing upon this matter. Among these cases are *Ross v. Himely*, 8 U. S. 4 Cranch, 269, 2 L. ed. 617; *Mills v. Duryee*, 11 U. S. 7 Cranch, 36 L. R. A.

484, 3 L. ed. 413; *Hampson v. McConnel*, 16 U. S. 8 Wheat. 234, 4 L. ed. 878; *McElmoyle v. Cohen*, 38 U. S. 18 Pet. 812, 10 L. ed. 177; *Landes v. Brant*, 51 U. S. 10 How. 848, 13 L. ed. 449; *Webster v. Reid*, 52 U. S. 11 How. 487, 13 L. ed. 761; *D'Arcy v. Ketchum*, 52 U. S. 11 How. 165, 13 L. ed. 648; *Harris v. Hardeman*, 55 U. S. 14 How. 834, 14 L. ed. 444; *Christmas v. Russell*, 72 U. S. 5 Wall. 290, 18 L. ed. 475; *United States v. Arredondo*, 81 U. S. 6 Pet. 691, 8 L. ed. 547; *Wilcox v. Jackson*, 38 U. S. 13 Pet. 511, 10 L. ed. 270; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897; *Hanley v. Donoghue*, 116 U. S. 4, 29 L. ed. 536; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538. And there are other cases. We cannot undertake to quote from all these cases. Two will suffice. In *Thompson v. Whitman*, *supra*, Mr. Justice Bradley, who delivered the judgment of the court, in effect held that: "Neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the Act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. Want of jurisdiction may be shown either as to the subject-matter or the person, or proceedings *in rem*, as to the thing." Syllabus of the case. It was also held "that the want of jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provisions of the fourth article of the constitution and the Law of 1790, and notwithstanding the averments contained in the record of the judgment itself." And in *Hanley v. Donoghue*, *supra*, it was said: "Judgments recovered in one state of the Union, when proved in the courts of another [state], differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable on the merits, nor impeachable for fraud in obtaining them, if rendered by a court *having competent jurisdiction of the cause and of the parties.*" (Italics ours.)

Very naturally, we ask, did the court of the state of Illinois have jurisdiction of Charles W. McCreery when it rendered the judgment of divorce? It is conceded that at no time, either when such action was commenced, or while it was pending, or when decided, was Charles W. McCreery within the limits of the state of Illinois. He did not appear in such action, nor answer, nor demur. His domicile has never been in the state of Illinois, but, on the contrary, at all times in the state of South Carolina. "Jurisdiction" was aptly defined in *United States v. Arredondo*, *supra*, to be the authority of the court to take cognizance of the cause or controversy at bar. The authenticated judicial record is that of an action wherein Rhoda

McCreery is styled "plaintiff," and Charles W. McCreery is styled "defendant," and the judgment therein purports to dissolve the marriage of the said Rhoda and Charles. We assume that it will be admitted on all hands that, if it should be contended that such judgment was one *in personam*, it is an absolute nullity; for, as before stated, Charles W. McCreery was not within the jurisdiction of the court, and the only plan by which the courts of Illinois, under her statutes sought to have him within its jurisdiction, was by the publication of a notice in one of its newspapers, addressed to said Charles W. McCreery, of the pendency of the action commenced by his wife. The principle that, if the action was *in personam*, it is a nullity, is enforced in the United States Supreme Court in the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. In that case one Mitchell held a debt against Neff, and, while Neff was beyond the limits of the state of Oregon, said Mitchell brought suit against Neff to recover his debt. To that suit, notice of the pendency of the same, and requiring Neff to appear and plead, was duly published in a newspaper, as required by the statute of the state of Oregon in such cases made and provided; but Neff neither made appearance, nor did he plead. Judgment was rendered against Neff, and the sheriff sold a tract of land owned by Neff in said state. Pennoyer became the purchaser at said sale, and brought his action against Neff to recover the land. In this action by Pennoyer, Neff denied the validity of Mitchell's judgment under which the land was sold, because he was not in the state, and service was alone by publication. The Supreme Court of the United States decided that the court of Oregon was without jurisdiction to render such judgment, and dismissed Pennoyer's action. The supreme court of South Carolina, in the action of *Tillinghast v. Boston & P. R. Lumber Co.*, and *Moore v. S. C. Forsaith Mach. Co.*, 39 S. C. 484, 22 L. R. A. 49, adopted the same view, and held that jurisdiction, as to a defendant out of this state, could not be acquired by publication, so as to make judgment *in personam*. And the subsequent cases of *Toms v. Richmond & D. R. Co.*, 40 S. C. 520, and *Gibson v. Everett*, 41 S. C. 22, have enforced such doctrine.

But now comes the difficult question, which is raised in this way: Mrs. McCreery having resided in the state of Illinois for more than 20 months before she instituted her action for divorce against Charles W. McCreery, and, under the statute law of Illinois, service upon an absent defendant may be made by publication of the summons in some newspaper in that state, to be fixed by the court, it is contended, first, that it is always in the power of a state, through her courts, to establish the status of her own citizens, and that this was done in the case of Mrs. McCreery. Now, if marriage, by operation of law, creates the status of wife in Mrs. McCreery when she removes her domicile to that state, and such status is a *res*, then, under *Pennoyer v. Neff*, *Tillinghast v. Boston & P. R. Lumber Co.*, *Moore v. S. C.* 28 L. R. A.

Forsaith Mach. Co., Toms v. Richmond & D. R. Co., and especially *Gibson v. Everett*, *supra*, there would be a *res* in the state of Illinois, upon which the courts of the state of Illinois might fasten, by attachment or similar process, which would enable them to pass upon the right to relieve Mrs. McCreery from her marital relation to Charles W. McCreery, as her husband, notwithstanding his absence, and service by publication alone. If marriage is a civil contract, whereby the domicile of the husband is the domicile of the wife, and whereby the contract between them was to be located in that domicile, it is difficult to see how the absence in another state of either party to such contract from the state where was located the domicile of the marriage could be said to carry such contract to another state, even if we were to concede that an idea, a mental apprehension, or metaphysical existence could be transmuted so as to become capable of attaching to it some process of a court, whereby it might be said to be under the exclusive jurisdiction of such court. If Mrs. McCreery could carry that *res* in the state of Illinois, then Mr. McCreery had the same *res* in the state of South Carolina at the same time. In other words, the same thing could be in two distinct places at one and the same time, which *res* the courts of Illinois would have the power to control as if it were a physical entity, and which *res* the courts of South Carolina would have the power, at the same moment of time, to control as if it were a physical entity. Such a conclusion would be absurd. The justice who delivered the opinion in the case of *Pennoyer v. Neff*, *supra*, by way of illustration merely, purely as a *dictum*,—for that case had no earthly connection with marriage,—did say in that opinion: "To prevent any misapprehension of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the status of one of its citizens to a nonresident, *which would be binding within this state* [*italics ours*], though made without service of process, or personal notice to the nonresident. The jurisdiction which every state possesses, to determine the civil status and capacity of all of its inhabitants, involves authority to prescribe the conditions on which proceedings which affect them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which the *marriage relation between its own citizens shall be created, and the causes for which it may be dissolved*. [*Italics ours.*] One of the parties guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is granted. The complaining party would therefore fail, if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such cases, and proceedings be there instituted without personal service of process, or personal notice to the offending party, the injured citizen would be without redress." Now, if the remarks,

as *dictum* alone, of *Mr. Justice Field*, were intended to be restricted by him to cases where the marriage contract was executed while the domicil of both parties was in that state, and where the laws of such state authorized the granting of divorces, we suppose it correctly sets forth the law that should govern in such a case. But if it is intended to announce that such a conclusion would be proper in a case where a marriage contract was made in a state where both were domiciled, and in a state where divorce is not allowed, and where one of the parties to such contract of marriage should remove to a state where divorces are allowed, and there institute an action for divorce, causing the other party to the marriage contract to be served by publication alone, to which said latter party paid no attention, and a judgment for divorce was granted, we submit that such judgment is erroneous, so far as the same relates to the absent defendant, by the decisions of the Supreme Court of the United States. The defendant has the right to interpose as a defense to such wrong that he has been denied due process of law; to interpose for his protection from such judgment the Fourteenth Amendment to the Constitution of the United States, which provides, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It was concerning this very protection under this Fourteenth Amendment that *Mr. Justice Field*, in the case of *Pennoyer v. Neff*, *supra*, said: "Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments [where no personal service was made, or appearance entered, or pleading made] may be directly questioned, and their enforcement in the states restricted, on the ground that proceedings in a court of justice to determine the personal rights and obligation of parties over whom the court has no jurisdiction do not constitute due process of law." (Italics ours.)

Charles W. McCreery, and Rhoda, his wife, whether it be said their contract should be governed by the laws of the state of New York, where the marriage was solemnized, or whether of the state of South Carolina, which was the husband's domicil, and where he is still domiciled, and where the marriage was to be performed, never agreed that their rights, duties, and liabilities as husband or wife should be determined by the state of Illinois, or that the determination of these rights, duties, and liabilities might be had in an action for divorce for *sævitia*, where service upon either of them might be made by publication; and when, therefore, a judgment of this last-named state was rendered in an action to which Charles W. McCreery was no real party, such judgment was a nullity as to him. In the opinion of *Mr. Justice Field*, he further said on this point: "Whatever difficulty may be experienced in giving to these terms ['due process of law'] a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt as to their meaning, when applied to judicial proceedings. They then

mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceeding any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." Can there be any doubt but the judgment of the court of the state of Illinois does directly impinge upon the personal rights and liabilities, under the contract of marriage, of Charles W. McCreery with Rhoda McCreery? By that contract her personal presence with him was his right. It was his privilege, under his contract of marriage, to receive at her hands those ministrations incident to the marriage state. To allow this Illinois judgment to be effective as a divorce, as to Charles W. McCreery, cannot be law. In *Hull v. Hull*, 2 Strobb. Eq. 174, it was held that Gideon J. Hull having married his wife while both were domiciled in the state of Connecticut, under whose laws it was competent for either party to obtain a divorce for desertion, and in such a suit service might be made by publication, and he having deserted his wife, and thereafter she having procured a divorce from him, a *vinculo matrimonii* in an action wherein he was served by publication, such divorce was valid. This judgment was rendered because the marriage contract between them was said to have been made with all the provisions of the laws of Connecticut pertaining to marriage, including divorce, which had become part and parcel of such contract of marriage. And this was done and adjudged notwithstanding the state of South Carolina did not allow divorces.

Again, we say we refuse to recognize this judgment of the court of the state of Illinois as valid in our state, because there was no such thing as a status or *res* in the conception or in the records of these parties when the marriage was made by them. But even if we were to concede, for the sake of argument, that marriage created a status or *res*, as contended for by the appellant here, we do not concede that the courts of this state are bound to give it such effect here. The utmost that could be asked at our hands would be the recognition of the doctrine that, within the limits of the state of Illinois, Mrs. McCreery was not the wife there of Charles W. McCreery. Dr. Bishop has likened the status of husband and wife to that of parent and child, guardian and ward. A close examination of the decisions of the states will show that the status accorded in our state to the child is not that necessarily accorded in other states even where such status is established by the judgment of the courts of one state, which is duly authenticated and introduced in the courts of a different state. The industry of respondent's attorney Mr. H. Cowper Patton has brought to our attention these cases: (1) *Barnum v. Barnum*, 42 Md.

251. Here John B. Barnum was the child of parents living in the state of Arkansas, but who were not married at his birth. Subsequently the legislature of the state of Arkansas was induced to pass an act legitimizing said John B. Barnum, as the child of his parents. Subsequently there was property in the state of Maryland that, under her laws, would pass to the legal issue of John B. Barnum's father. Thereupon John B. Barnum brought his action in the courts of the state of Maryland to recover this property. It was there conceded that the property could be recovered by him if he was entitled to maintain the status of a child of his father. The statute of Arkansas was relied upon for that purpose, but the court held that he was not thereby made the child of his father in Maryland. The language of the decision on this point was as follows: "This act could have no extraterritorial operation whatever, except as to any rights that may have been acquired under it in the state of Arkansas. As to such it ought to be respected everywhere. Story, Conf. L. 101, 102. But as to capacity to acquire property beyond the state passing the act, by virtue of the particular status given the party, that the legislature could not confer. Even if the act had professed to legitimate John B. Barnum, without reference to a previous marriage, it could have no operation here, and no rights involved in this case could be affected by it. This would seem to be clear both in reason and authority." (2) The case of *Smith v. Derr*, 34 Pa. 126, 75 Am. Dec. 641. Here the brother of the deceased testator, Daniel Derr, who lived in the state of Tennessee, was the father of an illegitimate daughter, Nancy. On his petition, Nancy was duly legitimated by a decree of the circuit court of Giles county, in said state (Tennessee), where she then and still resided. And the question presented in the case just cited was whether she had any interest in the estate of the deceased testator who lived and died in the state of Pennsylvania. The court said: "Nancy is the illegitimate niece of the testator, born in Tennessee, and legitimated there, on the petition of her father, by a proceeding in court. This forgives the vice of her birth in Tennessee, but not here."

A capacity in Tennessee does not prove capacity here. So far as our law is concerned, legitimation by the subsequent marriage of the parties abroad, by act of a foreign legislature, or by judicial decree abroad, are all fruitless. If they are allowed to constitute inheritable capacity, then adoption might have the same effect. Then we should be without any law of inheritance in favor of relationship in other states, except such as our neighbors should be pleased to give us."

As to the matter of guardian and ward, it is proper to say there is a status assigned to each under the law where such relation is established. But, when the guardian attempts to assert his status as such in a state different from that wherein his appointment was made, the latter state refuses to recognize it. The decision of the United States Supreme Court in the case of *Hoyt v. Sprague*, 103 U. S. 631, 26 L. ed. 592, is in point here.

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In that case *Mr. Justice Bradley*, as the organ of the court, said: "One of the ordinary rules of comity exercised by some European states is to acknowledge the authority and power of foreign guardians; that is, guardians of minors and others appointed under the laws of their domicile in other states. But this rule of comity does not prevail to the same extent in England and the United States. In regard to real estate, it is entirely disallowed, and is rarely admitted in regard to personal property. *Justice Story*, speaking of a decision which favored the extraterritorial power in reference to personal property, says: 'It has certainly not received any sanction in America, in the states acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other states, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators.'" And let it be noticed that in the state of Rhode Island, where the *res* was located in the case just referred to, and where a court, by its judgment, had acted on that *res*, it was decided that such judgment had no extraterritorial operation. If, then, acts of the legislature and judgment of courts of states, pertaining to status of parent or child, guardian or ward, will not be entitled, when the said acts or judgments have been duly authenticated and presented in the courts of different states, to give such persons the same status as that obtained in the state where rendered, why should a different rule prevail touching the status of a husband or wife?

As far as the Supreme Court of the United States has ever gone in the matter of divorce is to assume that, for the purpose of obtaining a divorce, a wife may acquire a domicile apart from that of the husband; that divorce, when granted, does not impair the obligation of a contract; that it is in the power of a legislature in a state different from that of the domicile of the married parties to grant a divorce which is operative in the state where granted; that it is the exercise of a legitimate power when the state legislature grants a divorce, either by the legislature acting directly, or by conferring a power to do so upon the courts of that state, provided the constitution of such state does not deny such power; that a divorce so granted is effective even without the residence of both parties in the state at the time the divorce is granted. *Cheever v. Wilson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604; *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654. In the first case cited both parties (husband and wife) appeared to the action in the court of the state of Indiana, where the divorce was granted. In the second case cited the legislature of the territory of Washington acted on the prayer of the husband in the absence from that territory of the wife. But the Supreme Court of the United States has been careful to deny that the courts of the United States government had any original jurisdiction in the matter of granting divorces, and

it may be as well to say that, in both of the cases just cited, rights of property were involved under divorces which affected the rights of third parties.

Another reason which may be advanced why the conclusions of the circuit judge in denying force and effect to this Illinois judgment of divorce should be sustained by this court is that the whole record may be examined to see if the court pronouncing the judgment had jurisdiction, and that, even if it be admitted that divorce judgments should have accorded to them extraterritorial effect, in case the record discloses that such court based its judgment upon the seizure of the *res*, this authenticated judgment is silent as to any such jurisdictional allegation. But, while this is true, we prefer to meet the issue as it has been joined in the case at bar; and therefore we base our refusal to give force and effect to the judgment in divorce, as rendered by the court of the state of Illinois, upon the grounds already indicated.

It may not be amiss to refer to our own laws on the subject of marriage and divorce. As already indicated, we admit that there is no power in any court in South Carolina to grant any divorce other than that *a mensa et thoro*. While this latter divorce is a judicial barrier to any attempt to exercise the rights or enforce the duties of the parties affected by the judgment, yet the courts are only too willing to have the parties restored to their original *status quo*, upon good cause shown. While the remedy is a harsh one, and, to a certain extent, interferes with the operation of the laws of nature, still woman must be protected. After all, an unbending adhesion to the laws of right living has a healthy effect upon the lives of others. If self-denial is thus necessitated, it should not be forgotten that many natures are perfected through its beneficent influence. True philosophy would extract good from every condition. As to our law on the subject of divorce, we apprehend that the expressions used and admissions already made show that, in the state of South Carolina, we do not recognize the power in our courts to grant divorce *a vinculo matrimonii*. By article 4, section 15, of our Constitution, the courts of common pleas have exclusive jurisdiction in all cases of divorce; and by article 14, section 5, divorces from the bonds of matrimony shall not be allowed but by the judgment of a court, as shall be prescribed by law. Thus the general assembly is denied the power to grant divorces directly, but is permitted to clothe the courts of common pleas with that power. This last they have refused to do, by repealing the Act of 1872, which did permit the courts to grant divorces in this state for adultery. Thus we have the common law restored to us on this subject. And as before remarked, the common law is at variance with the dissolution of marriage by divorces. We might add case after case from our Reports on this subject, but they would every one confirm this doctrine.

It may be proper to say that if the present contention had been made in the courts of the state of New York, and an effort had been made there to interpose the divorce *a vinculo*

matrimonii granted by the court of the state of Illinois, on the ground of *saevitia* practiced by the husband, McCreery, upon the person of his wife, the courts of the former state (New York) would have refused to give such judgment of divorce any effect. In the leading case of *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274, the husband had been married to Sallie West, in the state of Ohio, in the year 1871, and thereafter the married couple resided at Rochester, in the state of New York. Some time afterwards the wife, Sallie West, returned to the state of Ohio, and began her action against Baker for an absolute divorce on the ground of gross neglect of duty by the husband. The husband was domiciled in the state of New York during the pendency of such divorce proceedings in the state of Ohio, and did not appear in or plead to such action. Divorce was granted. The husband, Baker, still domiciled in the state of New York, after such judgment of divorce, married again, whereupon he was indicted in the court of New York for bigamy. Being convicted, an appeal was taken. Thereafter the appeal from such judgment was finally considered in the court of appeals of the state of New York, and the conviction was then affirmed. The court held, among other things, in answer to the question: "Can a court in another state adjudge to be dissolved, and at an end, the matrimonial relation of a citizen of this state, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that state?" The court answered this question squarely in the negative, and that, too, after reviewing the federal decisions bearing on the subject. Many citations are made of New York decisions and those of other states by Judge Folger, who pronounced the judgment of that court. So, too, in the case of *Jones v. Jones*, 108 N. Y. 415, although the court of appeals of New York upheld a divorce of a New York marriage by the courts of Texas, it was done because the husband, who was domiciled in the state of New York when the wife began her action for divorce in the courts of the state of Texas, appeared in said action, and answered to the merits of the action. The court of appeals of the state of New York was careful to announce in its judgment "that the marriage relation is not a *res* within the state of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service, or actual notice of the proceeding, given without the jurisdiction of said court; and, like other contracts, the contract of marriage cannot be annulled by judicial sanction without jurisdiction of the person of the defendant." Extract from the syllabus of the case cited. And also the case of *Williams v. Williams*, 130 N. Y. 193, 14 L. R. A. 220, decided in December, 1891, is in point, as illustrating the attitude of the courts of New York on this question of divorce, so far as judgment therefor rendered by the courts of a state different

from that in which the domicile of the defendant was had, and to which action for divorce he neither appeared nor answered. In the case just cited the leading facts seemed to be these: The husband, after living a year or more with the wife after their marriage, demanded that the wife should give up all intercourse with her mother. This, at first, the wife declined to do, and he then lived apart from her. But before the husband removed to the state of Minnesota the wife made an unconditional offer, in good faith, to live with her husband. This last proposition he declined, and removed to the state of Minnesota, where he commenced an action for absolute divorce, on the ground of desertion. To this action the wife was made a party by publication. She was not in the state of Minnesota at any time, nor did she appear or plead to his action. Still the judgment adjudged that the parties were no longer husband and wife. When this husband returned to the state of New York the wife brought her action for a separation of the parties from bed and board forever, on the ground of abandonment. The husband attempted to set up in his answer his judgment for absolute divorce obtained in the courts of the state of Minnesota. But the court declined to recognize such a divorce as valid, and granted the wife's prayer for a legal separation for life. In the opinion of the court in the case just cited the court admitted that every state may adjudge the status of one resident therein towards a nonresident, and that, so long as such judgment is confined in its operation to the territorial limits of that state, other states must acquiesce; but it tenaciously adhered to the position announced in *Jones v. Jones, supra*, that "the marriage relation is not a *res* within the state of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted or actual notice of the proceedings given without the jurisdiction of the court where the proceeding is pending." We have thus taken the pains to consult the decisions of the courts of the state of New York for the purpose of showing that, even if the marriage could be regarded as a New York marriage, the divorce here in question could not be regarded as valid. Having been admitted that the courts of New York are only allowed, by the laws of that state, to grant absolute divorces for adultery, and the alleged judgment of the court of the state of Illinois having granted the same on account of cruelty of the husband to the wife, it will be easily seen that Mrs. McCreery's contract of marriage did not have, as a part thereof, any right to divorce, except for adultery. But it might have been contended that, at the time she entered into such contract of marriage within the state of New York, that state recognized as valid any judgment of divorce granted by other states than New York. This refuge is denied her, for we have seen such is not the case in the event such a judgment of absolute divorce was granted by the courts of any other state in an action therefor to which the husband was not a party.

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But the appellant suggests that divorces must be recognized in this state under the section of our Revised Statutes which reads as follows: "All marriages contracted while either of the parties has a former wife or husband living, shall be void: provided, that this section shall not extend to a person whose husband or wife shall be absent for the space of seven years, the one not knowing the other to be living during that time: nor to any person who shall be divorced, or whose first marriage shall be declared void by the sentence of a competent court." Section 2160. Upon examination, we found that that statute was adopted from the mother country where it was passed in the year 1712. We have no adjudications in our courts construing the statute, and yet we find that in the mother country the matter of divorce was never allowed under her laws until the year 1857. We do not propose to pursue the question to any extent. It cannot be considered that the divorce referred to in our statutes could be other than a valid divorce,—a divorce legal in its operation. As the states of New York and South Carolina recognize no divorces valid for the cause of cruelty of the husband to the wife, as is the present case at bar, it follows necessarily that no possible advantage can accrue to the appellant under this old statute.

Lastly, the appellant suggests that the plaintiff's titles tendered to the defendant are good and sufficient, notwithstanding the dower of Mrs. McCreery has not been renounced, and notwithstanding the judgment of divorce of the Illinois courts is void, because she would be estopped from making claim to dower. We do not care to base our views on this branch of the case upon the ground set out in the circuit decree, namely, that Mrs. McCreery is not a party to this case. In courts of equity, when questions of enforcing demand for specific performance of contracts are considered, we are not by any means prepared to say that the presence of a party who may possibly possess some right affecting the title tendered is always necessary before the court will proceed to pass upon such contract. Certainly, in the case at bar, by the agreed statement of facts, it is admitted that this decree of divorce obtained in Illinois especially reserved the question of Mrs. McCreery's right of dower. Apart from this, however, under our laws, we know of no way to defeat a woman's right of dower, that has once attached, unless it be under that section of our Revised Statutes (section 1903) which provides, if a wife elopes with another than her husband, and continues with her adventurer, and is not reconciled thereafter with her husband, she shall forfeit her dower in his lands. Under our law, "marriage is a valuable consideration. Some have considered it the highest known in law. None would say it was a lower consideration than money. There is nothing unreasonable in this. The great value of the consideration consists in this: that the wife surrenders her person and her self-dominion to the husband, and enters into an indissoluble engagement with him, foregoing all other prospects in life; and, if the consideration for which she

stipulates fails, she cannot be restored to the *status in quo*. She can have no remedy or relief." *Rivers v. Thayer*, 7 Rich. Eq. 144. In *Wilson v. McConnell*, 9 Rich. Eq. 513, the court used this language: "But this claim is met by a corresponding equity on the part of the widow, who is entitled, under her marriage, to the position of a purchaser for valuable consideration, against all but existing liens."—liens that existed before the marriage. So in *Brooks v. McMeekin*, 37 S. C. 303, this court held: "We are therefore enabled to declare it to be the law, as derived from our own decisions, that in the commonwealth marriage is a valuable consideration paid by the wife for those rights and estates that by our laws are accorded the wife as a wife." It is true, at present, this right of

dower of Mrs. McCreery in the lands of her husband, the plaintiff, is inchoate; yet it is substantial right of property, and not a lien. *Shell v. Duncan*, 31 S. C. 547, 5 L. R. A. 821. It must be remembered that this action of Mrs. McCreery in the courts of Illinois related only to the present and future relation of herself to her husband. It did not seek any action of the court as to the past, for she admitted she had been his lawful wife from 1885 to the date of her alleged judgment of divorce from him. We have held that this divorce is void in this state. It seems to us, therefore, that the plaintiff can derive no benefit from the alleged estoppel.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

MISSOURI SUPREME COURT (Div. 2).

ST. JAMES MILITARY ACADEMY, *Appt.*,

J. M. GAISER *et al.*, *Repts.*

(125 Mo. 517.)

1. A publication, in respect to an academy where dancing was practiced at

receptions and a dancing school taught, by pastors of churches, to the effect that they "regarded the institution under such administration as harmful to the moral and religious interests" of the community, and that they urged members of their churches and friends of good morals to absent themselves from and discountenance all receptions and other gatherings at

NOTE.—*Libel or slander by expressing opinions or comments without misstating facts.*

I. Rules and principles.

II. Illustrative cases.

- a. In general.
- b. Criticism of writings.
- c. Art criticism.
- d. As to officers and candidates.
- e. As to clergymen.
- f. As to other public or professional men.

I. Rules and principles.

"The free communication of thoughts and opinions is one of the invaluable rights of men, and every citizen may freely speak, write, or print on any subject, being responsible for the abuse of that liberty." This is the language of the Tennessee Bill of Rights, § 19, and similar language is found in the constitutions of many other states. Under such constitutional guaranty of the right of free communication of thoughts and opinions the only question of difficulty is as to what constitutes an abuse of the right. On this question the law is still unsettled if not chaotic. One phase of the subject but little touched by judicial decisions is the distinction between statements of fact and expressions of opinion, comment, or judgment upon facts. Notwithstanding the difficulty of exact definition of the terms there is nevertheless a real distinction recognized by everybody between false statement and false opinions—between misrepresentations of fact and assertions of erroneous inferences, generalizations, theories, or doctrines. This distinction is not taken or discussed in the above case of *ST. JAMES MILITARY ACADEMY v. GAISER*, although the facts presented it. In the present note the attempt is made to bring together all the decisions of the courts which expressly or impliedly present this question. The question of privilege for false statements of fact is not here entered upon except so far as it may incidentally be touched in presenting the matter of expressing opinions or comments without misstating facts. The expression of an opinion or belief as to the existence of a fact, being only another form of imputing the

fact is not regarded as a part of this subject. The expression of an opinion as to a theory, dogma, law, or course of conduct is not the imputation of a fact. Without expressing such opinions, no reform and indeed no question of public interest can be discussed. Such discussion cannot be had without the possibility at least of injuring some one's business. When facts are alleged the test of truth is a simple one. When a theory, or doctrine, or opinion on a moral, religious, scientific, or political subject is stated, the test of its truth by decision of a jury is an absurdity. To make the right to express such an opinion depend on what a jury may say of it is not only to put an incubus on thought, but utterly to abrogate the constitutional guaranty of freedom to communicate thoughts and opinions. The right to express opinions must extend to those whose opinions are foolish or even manifestly absurd to other people. "God forbid you should not be allowed to comment on the acts of all mankind provided you do so justly and truly," says Alderson, B., in a case of comment on a clergyman. *Gathercole v. Miall*, 15 Mees. & W. 319, 10 Jur. 337, 7 L. T. 89, 15 L. J. Exch. 179.

On an attempt to justify a libel in publishing a report by a medical officer the court says: "This is not a discussion or comment." It is the statement of a fact. To charge a man incorrectly with a disgraceful act is very different from commenting on a fact relating to him truly stated—where the writer may by his opinion libel himself rather than the subject of his remarks. *Popham v. Pickburn*, 7 Hurst. & N. 891, 31 L. J. Exch. 133, 8 Jur. N. S. 179, 5 L. T. N. S. 846, 10 Week. Rep. 324.

In denying privilege to make false statements of fact about a public person it is said in *Burt v. Advertiser Newspaper Co.*, 13 L. R. A. 97, 154 Mass. 238: "What is privileged, if that is the proper term, is criticism, not statement;" and again: "What the interest of private citizens in public matters requires is freedom of discussion rather than of statement."

It is said in *Merivale v. Carson*, L. R. 20 Q. B. Div. 275, 58 L. T. N. S. 331, 36 Week. Rep. 231, 53 J. P. 261, that the learned judge and the majority of the

the academy as long as dancing is allowed in the building, is sufficient to sustain an action for libel.

2. The justification, on the ground that dancing is immoral, of the published opinion that an academy where dancing is practiced is harmful to moral and religious interests, is a question for the jury under the constitutional provision making them judges of the law as well as of the facts in such cases.

3. The sufficiency of pleadings in a libel case is a question for the court although the jury are the judges of the law as well as of the facts in such cases.

(December 18, 1894.)

APPEAL by plaintiff from a judgment of the Circuit Court for Macon County in favor of defendants in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

The facts are stated in the opinion.

court in the case of *Henwood v. Harrison*, 1 L. R. 7 C. P. 606, 41 L. J. C. P. 208, 20 L. T. N. S. 938, 20 Week. Rep. 1000, seem to have erroneously treated the right of comment or criticism as a branch of the general law of privilege, but it is added that the question is rather academical than practical.

In sustaining an action for libel for publishing misstatements as to the acts of a public officer with severe comments thereon the court said: "The distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact;" and also, "it is one thing to comment upon or criticise even with severity the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct." *Davis v. Shepstone*, 11 App. Cas. 190, 55 L. J. C. P. 51, 55 L. T. N. S. 2, 34 Week. Rep. 722, 30 J. P. 708.

The distinction between comment and statements of fact is reiterated in *Cooper v. Lawson*, 8 Ad. & El. 746, 1 Perry & D. 15, 1 W. W. & H. 601, 3 Jur. 919, where Coleridge, J., says: "The comment introduced an additional fact and then it was for the jury to say whether that was fairly done or not." So *Lord Denman, Ch. J.*, said: "A comment may introduce independent facts, a justification of which is necessary;" and again, "Now a comment may be the mere shadow of the previous imputation; but if it infers a new fact the defendant must abide by that inference of fact and the fairness of the comment must be decided by a jury." This was a case in which perjury by a surety on an election petition was imputed, and in addition to this it was said that he must have been hired for the occasion.

The distinction between comment or censure of conduct and misstatement of fact is also clearly expressed in *Dibdin v. Swan*, 1 Esp. 28, which involved the question of false statements about a public singer to the effect that he untruly claimed to be the author of the songs which he sung, and also that he procured hired applause. *Lord Kenyon* in this case said: "The editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment; but it must be done fairly and without malice or view to injure or prejudice the proprietor in the eyes of the public. If so done, however severe the censure the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, that such is a libel and therefore actionable." It will be noticed that the rule as to comment is stated less liberally than 28 L. R. A.

Messrs. Silver & Brown and S. P. Hees, for appellant:

A corporation may sue for libel or slander against it "in the way of its business or trade."

Newell, Slander & Libel, p. 360. See also *Johnson v. St. Louis Dispatch Co.* 65 Mo. 539, 27 Am. Rep. 293.

A false imputation made for the purpose of injuring one in his profession or trade is actionable, even though the words may not, strictly speaking, be defamatory.

Morasse v. Brochu, 8 L. R. A. 524, 151 Mass. 567, and authorities cited; *Odgers, Libel & Slander*, pp. 89 *et seq.*

So words are actionable *per se* which convey an imputation upon one in the way of his profession or occupation, and in such case there need be no averment of special damages.

Morasse v. Brochu, 8 L. R. A. 524, 151 Mass. 575.

The imputation in the publication complained of is *inter alia* that plaintiff had opened

in most of the other cases, as it leaves it doubtful if comment can be justified if it is not just. But taking the whole statement together it is fairly to be inferred that *Lord Kenyon* meant to make the distinction between malevolence on the one hand and honest opinion on the other whether correct or not.

Expressing an opinion upon indisputable facts is held not to be libelous, in *Dickson v. Phillips*, 19 Jones & S. 162, where the court says: "The defendant did not charge that the plaintiff had been guilty of doing unmercantile things generally, but the things that were said by the defendant to be unmercantile were specified, such as, etc., etc. This amounts to no more than giving the opinion of the defendant as to plaintiff's conduct, leaving the employer of the plaintiff to form his own opinion on the subject." And again: "The substance is that the defendant states as facts certain things which are not alleged not to be facts, and giving his own opinion of them asks impliedly the opinion of the plaintiff's employer. The things said to be facts are not in their nature immoral or unlawful."

It is said in *Morrison v. Belcher*, 8 Post. & F. 614, in respect to an alleged libel on one who was charged with imposture: "His system might be described as an imposture, but facts must not be invented or misstated as to his past life with a view to destroy the credit of it."

Dissenting from a majority opinion which held that the truth need not be proved to justify a publication on a matter of public concern, but that the presumption was against malice, *Campbell, J.*, said, nevertheless: "No one does, and the court below does not dispute the amplest right to draw inferences from facts." And again, "The line is clearly drawn between false assertions and false deductions." *Miner v. Detroit Post & Tribune Co.* 49 Mich. 358.

So it is said in *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715: "No one denies the right of defendants to discuss and criticise boldly and fearlessly the official conduct of plaintiff, . . . but there is a broad distinction between fair and legitimate discussion in regard to the conduct of a public man and imputations of corrupt motives."

In respect to the discussion of official conduct by a citizen it is said in *Rowand v. De Camp*, 96 Pa. 438: "So long as he speaks the truth in words meaning nothing else he is not liable for damages whether his language be chaste or vulgar, refined or scurrilous."

The reasonable doctrine as to the right of discussion was tersely expressed in respect to the dis-

a dancing school in its academy building, and was thereby fostering a practice "harmful to the moral and religious interests of the community," and the publication further called upon the friends of religion and good morals to absent themselves from all receptions and other gatherings at plaintiff's school. The above charge is in effect that plaintiff's school has an irreligious and immoral feature and is coupled with a recommendation to the public as to the same necessarily and injuriously affecting the patronage and prosperity of the school.

Such publication is libelous *per se*.

Morasse v. Brochu, 8 L. R. A. 524, 151 Mass. 567.

A libel may be malicious and actionable, even though the motive was a good one, *a. g.*, reformation of morals or manners.

Com. v. Snelling, 15 Pick. 337; *Jellison v. Goodwin*, 43 Me. 287, 69 Am. Dec. 62; *Shurtleff v. Parker*, 130 Mass. 293, 39 Am. Rep. 454; *Cooley*, Torts, 2d ed. p. 245.

question of a candidate, in the old case of *Brewer v. Weakley* (1807) 2 Overt. 90, 5 Am. Dec. 656, as follows: "Let his talents, his virtues, and such vices as are likely to affect his public character be freely discussed, but no falsehoods be propagated."

That criticism should be honest and founded upon truth and not falsehood is the declaration of the court in *Spiering v. Andrae*, 45 Wis. 330, which though holding that a citizen may criticize those in office holds it to be actionable to call a justice of the peace a "damn fool of a justice."

It is said in *Williams v. Spowers*, 8 Vict. L. Rep. 62, that the defense of privilege in commenting on the acts of a public man must be sustained by proving the comments to be on actual and not supposed doings and sayings.

That the official act of a public functionary may be freely criticised, and entire freedom of expression used in argument, sarcasm, and ridicule upon the act itself, and then the occasion will excuse everything but actual malice and evil purpose in the critic, is declared in *Hamilton v. Eno*, 81 N. Y. 116.

While denying that a newspaper can with impunity charge a man with crime although he may be a public man and affect to be an educator of the people, the court said in *Smith v. Tribune Co.*, 4 Biss. 477: "Undoubtedly he can criticise his acts. They can hold him up to ridicule so far as they are justified in doing so by his public acts, by anything that he has done or said."

So in respect to criticism of a candidate it is said in *Express Printing Co. v. Copeland*, 64 Tex. 354: "All statements and comments in this respect must be confined to the truth or what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the issue."

Although denying that false charges of crime against an officer are privileged it is said in *Neeb v. Hope*, 111 Pa. 145, that the conduct of public officers is open to public criticism and that it is for the interest of society that their acts may be freely published with fitting comments or strictures, and it is added: "But a line must be drawn between hostile criticism upon public conduct and imputation of bad motives or of criminal offenses, or such motives or offenses as cannot be justly and reasonably inferred from the conduct."

Cockburn, Ch. J., said in *Campbell v. Spottiswoode*, 3 Best & S. 789, 3 Fost. & F. 421, 8 L. T. N. S. 201, 32 L. J. Q. B. 185, 9 Jur. N. S. 1069, 11 Week. Rep. 569: "A line must be drawn between criticism upon public conduct and the imputation of mo-

The existence of malice is a question for the jury, and this is particularly true under our constitutional provision, that the jury under the direction of the court "shall determine the law and the fact."

Const. art. 2, § 14; *State v. Armstrong*, 13 L. R. A. 419, 106 Mo. 395. See also *Flint v. Hutchinson Smoke Burner Co.* 16 L. R. A. 243, 110 Mo. 492.

In civil actions it is only "where the court can say that the publication is not reasonably capable of any defamatory meaning and cannot reasonably be understood in any defamatory sense that the court can rule as a matter of law that the publication is not libelous and withdraw the case from the jury or order a verdict for the defendant."

Twombly v. Monroe, 136 Mass. 464; *McGinnis v. Knapp*, 109 Mo. 131; *Teachy v. McKenna*, 4 Ir. C. L. Rep. 374.

Here the plaintiff was expressly charged with conducting an immoral business.

The prefatory matter alleged in the petition

times by which that conduct may be actuated. One man has no right to impute to another person whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives unless there is so much ground for the imputation that a jury shall find not only that he had an honest belief in the truth of his statement, but that his belief was not without foundation."

II. Illustrative cases.

a. In general.

In *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 323, the court says: "The editor of a newspaper has the right if not the duty of publishing for the information of the public fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition as upon any other matter of public interest, and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice." But it was said that false, reckless, and unjustifiable statements that the so-called Cardiff Giant had been sold for eight dollars and that it was an ingenious humbug, a sell, and a fraud, were libelous when causing special damages although made without intent to cause such injury.

A published report of the British Archaeological Society relating to recent alleged forgeries of figures called "pilgrim signs" claimed to have been obtained from the Thames, said that they were being offered in London and throughout the country but "the whole are proved to be of recent fabrication," and described them as a "gross attempt at deception and extortion." This was held not to be a libel on a dealer in them who was not personally mentioned or referred to, but the court added: "I am of opinion that this is no libel for that it is protected by privilege of fair discussion on a matter of public interest if not appearing that it was malicious." *Eastwood v. Holmes*, 1 Fost. & F. 347.

A newspaper article headed, "Encouraging servants to rob their masters" commented on a hand-bill offering high prices for rags, pewter, lead, zinc, plated metals, candle ends, bottles, etc., and this was held to impute the holding out of great temptation and encouragement to servants to become dishonest, but it was considered that liability for the publication depended on malice. The court in charging the jury said it would be no excuse if the article went beyond the tendency of the hand-bill and said anything against the plaintiff in his private life or the mode of managing his business, and that if the jury thought the hand-bill had the dan-

sufficiently shows the meaning and actionable character of the publication complained of, if indeed such was necessary.

Legg v. Dunleavy, 80 Mo. 558, 50 Am. Rep. 512.

The false and libelous character of the publication in this case consists: (1) In charging the plaintiff with "the opening of a dancing school in the academy building," whereas (as stated in the petition) it did not open a dancing school, but merely permitted some of the students who so desired to hire a dancing teacher and to take lessons from him in the terpsichorean art, and (2) in charging the dancing to be immoral and irreligious, and that the school was not worthy of public patronage, when in point of fact such is not the case—and thereby injuring plaintiff in its business.

Morasse v. Brochu, 8 L. R. A. 524, 151 Mass. 567.

The motion to strike out part of defendant's answer should have been sustained.

serious tendency suggested then the editor has done what may be salutary for the community in preventing such encouragement to be given. *Paris v. Levy*, 9 C. B. N. S. 342, 2 Fost. & F. 71, 30 L. J. C. P. 1, 7 Jur. N. S. 289, 8 L. T. N. S. 323, 9 Week. Rep. 71.

Where a newspaper article mentioning an advertisement by certain manufacturers, who were named therein, of a bag which they called the "bag of bags" said, "As we have not seen the bag of bags we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title which we think very silly, very slangy, and very vulgar, and which has been forced upon the public *ad nauseam*." It was held on demurrer by two of the three judges to be a question for the jury whether the language went beyond the limits of fair criticism or was intended to disparage the manufacturers in the conduct of their business. The other judge sitting considered the decision as a very dangerous extension of the law of libel since the writer set out the words upon which he comments and gave every opportunity of judging whether he was justified in his criticism. The dissenting judge said it was entirely a matter of taste and opinion to say that the title given to an article of manufacture was silly, slangy, and vulgar, and declared that he was unable to see in it any imputation on the character of the plaintiffs or of the mode in which they carried on their business. *Jenner v. A'Beckett*, L. R. 7 Q. B. 11, 41 L. J. Q. B. 14, 26 L. T. N. S. 464, 20 Week. Rep. 181.

A publication that a firm "are not worthy of our support," characterizing their conduct as "base treachery" and "foul and unfair dealings," was held not libelous when taken in connection with the particulars of the conduct complained of which showed a perfectly lawful transaction, namely the offering of higher rent for the premises occupied by the other party as lessee. *Donaghue v. Gaffy*, 43 Conn. 43.

A newspaper article charging another newspaper with copying advertisements from other papers "not only to swell the number of advertisements appearing in the columns of the paper referred to but in order to inveigle the manufacturers into payment by subsequently sending in bills for the spurious advertisements which in many cases would be paid for under the impression that they had been ordered by the representatives of the firm," characterizing it as a trick and as an audacious attempt to obtain money by false pretenses, was held on a plea of the general issue to be libelous. L. R. A.

Ibid.; *Com. v. Snelling*, *Jellison v. Goodwin*, *Shurtleff v. Parker*, and *Twombly v. Monroe*, *supra*.

Messrs. Dysart & Mitchell for respondents.

Burgess, J., delivered the opinion of the court:

This is an action for libel, by plaintiff, a corporation, and institution of learning and education, against the defendants. The charge in the petition is that plaintiff permitted dancing in its school building at receptions given occasionally in each year, and permitted its students to employ of their own accord and at their own expense a teacher to instruct them in the art of dancing; and that defendants published of and concerning plaintiff, and its said school and academy, a certain false, malicious, and defamatory libel, charging plaintiff with conducting and maintaining an "immoral school," a "danc-

ing school," and that the jury with the approval of the court, and is declared not to be privileged as a matter of general public interest. Another article speaking of the spontaneous generation of advertisements and giving specific instances of advertisements which were not ordered was held on a plea that it was true to be justified only by proving that the personal conduct of the publisher had been wrong, if the article could be regarded as making an imputation upon his personal conduct, and this question was left to the jury. *Latimer v. Western Morning News Co.* 26 L. T. N. S. 44.

An imputation in a publication that evidence of a witness before a committee of parliament was malicious and false is not fair comment, but it was left for the jury to say whether the charge of reckless testimony meant that it was reckless as to truth, or merely that it was given without sufficient caution, but without charging dishonesty. *Hedley v. Barlow*, 4 Fost. & F. 224.

A publication expressing the belief that a decision discharging a person accused of larceny would have been very different if all the evidence that might have been adduced on the part of the prosecution had been heard, was left to the jury to say whether it meant merely that the magistrates ought to have heard all the evidence, or all the evidence would have shown that the accused was guilty. It was held that the former was broad comment upon a public hearing, while the latter would have been libelous as charging a felony. *Hibbins v. Lee*, 4 Fost. & F. 245, 11 L. T. N. S. 541.

In *Wason v. Walter*, L. R. 4 Q. B. 73, 38 L. J. Q. B. 34, 19 L. T. N. S. 406, 17 Week. Rep. 100, 8 Best & S. 671, holding that a faithful report in a public newspaper of a debate in either house of parliament was privileged on the same principle as a correct report of proceedings in a court of justice; there was also involved the further question of the right of a newspaper to comment on such a debate on a matter of public interest. It was held that if the article was an honest and fair criticism on the facts, made with a reasonable degree of judgment and moderation, so that the jury shall deem it a fair and legitimate criticism on the conduct and motives of the party who was the subject of censure, it would not be actionable.

b. Criticism of writings.

In the early case of *Carr v. Hood*, 1 Campb. 365 note, it is said: "One writer in exposing the follies and errors of another may make use of ridicule however poignant," and also "Every man who publishes a book commits himself to the judgment

ing school," "harmful to the moral and religious interests of the community," "hurtful to the moral and spiritual well-being of the community," and calling upon friends of religion and good morals to absent themselves from plaintiff's school and gatherings at its academy. The defendants, who were resident clergymen of the city of Macon, published the following: "At the meeting of the Ministers' Alliance of Macon, Mo., on January 25, 1893, the following paper was unanimously adopted: Whereas, the St. James Military Academy of this city, a school formerly under the control of the Episcopal Church, at the beginning of this school year announced itself as a 'Nonsectarian Christian Institution,' and under the present administration there is fostered a practice, viz. dancing, which is antagonistic to the teaching of our churches and homes, the superintendent and others connected with the institution using their influence to draw

the young people of our churches and homes into the practice, which we believe and teach to be hurtful to the moral and spiritual well-being of all engaging in it; and whereas, we have respectfully requested, first, the superintendent of the school, and, second, the board of curators, that the aforesaid practice be discontinued, so as to enable us to lend our influence towards the building up of an institution of learning worthy of the patronage of all our people, our request having been ignored, and it being the apparent purpose of those in control of the institution to continue such objectionable practice, as evidenced by the opening of a dancing school in the academy building; therefore, be it resolved: First, that we regard the institution under such administration as harmful to the moral and religious interests of our community, and on this ground we hereby withdraw any influence or commendation we have heretofore given it; second, that we urge

of the public and one may comment upon his performance. If the commentary does not step aside from the work or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right." But it is also said that "anything personally slanderous against the plaintiff unconnected with the works he had given to the public" would be actionable.

In *Tabart v. Tipper*, 1 Campb. 351, Lord Ellenborough laid down this doctrine: "Liberty of criticism must be allowed or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication therefore I shall never consider a libel which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to review sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." But he held it actionable gravely to impute to a bookseller having published a certain poem of a ridiculous sort, which he had not in fact published.

The falsity of this statement is pointed out by the same judge in the case of *Carr v. Hood*, *supra*, as the basis of the decision, distinguishing it from a case of criticism or comment.

If a critic in criticizing a book goes out of his way to attack the private character of the author this cannot be justified, says *Lord Abinger* in *Fraser v. Berkeley*, 7 Car. & P. 321, 2 Moody & R. 3. In that case it was held that a magazine review of a book was a libel on the author and his family as well as an attack on the book, and where the author had made an assault on the publisher *Lord Abinger* said: "If this magazine had been a mere attack on the book, and nothing else, I should say it was no palliation of the assault."

So it is said in *Macleod v. Wakley*, 3 Car. & P. 311: "Whatever is fair and can be reasonably said of the works of authors or of themselves as connected with their works is not actionable unless it appears that under the pretext of criticizing the work the defendant takes the opportunity of attacking the character of the author; and then it will be a libel."

Remarks of a critic imputing to the author of a naval history a disregard of justice and propriety and insensibility to his obligation as a historian, the infatuation of vanity, the madness of passion, and low and paltry purposes, are libelous. The court says: "If an author has made himself ridiculous by his writings he may be ridiculed, if they show him to be vicious his reviewer may say so." And adds that for criticism "no action can lie. Certainly

not unless the criticism be grossly false and work especial damage to the proprietor of the book." But as to attacks on the moral character of the author the judge says: "I will not stop to weigh the argument which would disfranchise him because he happened to be an author." *Cooper v. Stone*, 24 Wend. 484.

An article reviewing a book declaring it the very worst attempt at a novel that has ever been perpetrated, adding that the writer is made more indignant than weary by its insanity, self-complacency, and vulgarity, its profanity, its indelicacy, its display of bad Latin, bad French, bad German and bad English, and the perpetual recurrence of abuse of great men living and dead wholly unconnected with the subject, was made the basis of a libel suit in *Strauss v. Francis*, 4 Post. & F. 93, but the plaintiff withdrew a juror after seeing the impression produced upon the jury by the reading of and comment upon various passages from the book by defendant's counsel. The court said he felt persuaded that the advice by plaintiff's counsel to his client to withdraw from the action was sound. This was evidently a case in which the comment was justified.

A newspaper publication charging that a work of fiction by a well-known author "is not only tainted with this one foul spot, it is replete with impurity and reeks with allusions that the most prudent scandal monger would hesitate to make," also recommending that the publishers discontinue it as unfit for circulation in families, was held in *Reade v. Sweetzer*, 6 Abb. Pr. N. S. 2, note, to be libelous on its face and not privileged within the rule as to criticisms. It is held in this case that to accuse one of writing and disseminating works calculated to debauch and demoralize the public mind is libelous. The court says: "The critic may say what he pleases of the literary merits or demerits of the published products of an author; but that with respect to his personal rights relating to his reputation the critic has no more privilege than any other person in assuming the business of criticism." It is also held in respect to an imputation upon an author of unworthy motives and evil designs upon society, "to charge an author with such motive and designs is a most serious imputation and if it is unwarranted the critic has committed a grievous wrong." It is not easy to determine from this case what the decision amounts to as bearing on the right to express opinions upon the morality or immorality of the work, or just what the court means. Any distinction between statements of facts such as the existence of unworthy motives or evil de-

upon the members of our churches and all friends of religion and good morals that they absent themselves from and discourage and discountenance in every way all receptions and other gatherings at the academy as long as dancing is allowed in the building; third, that a copy of these resolutions be given to each of our city papers, with a request for its publication, and also that a copy be sent each of our church papers in this state, with the same request. J. M. Gaiser, Pastor of the Cumberland Presbyterian Church. W. F. McMurray, Pastor of the M. E. Church South. T. J. Enyeart, Pastor of the M. E. Church. W. H. Barnes, Pastor of the First Baptist Church. Duncan Brown, Pastor of the First Presbyterian Church."

The foregoing matter is, with proper innuendoes charged in the petition to be false and malicious. The defendants answered, admitting the publication complained of,

and pleading its truth. Defendants further set up specially, in substance, that plaintiff had hired and procured a dancing master, and gave instructions in that art in its school; that, when plaintiff's school was opened, defendants' good-will and co-operation in its purpose were invited by plaintiff, and the same were given by defendants; that the latter and the Christian denominations to which they belong are conscientiously opposed to dancing; that defendants requested plaintiff to discontinue the objectionable feature of dancing at its school, which plaintiff refused to do; that the publication complained of was not false nor libelous, but was made by defendants in the conscientious discharge of a duty which they had the legal and moral right to perform. The defendants further state that the publication was not made concerning plaintiff, but of another institution which had succeeded plaintiff in the man-

signs, and opinions as to the moral or immoral effect of the book itself does not seem to have been in the mind of the court, at least it was not clearly expressed. The result was a verdict for merely nominal damages.

A criticism in a theatrical newspaper of a play as a hash up of ingredients "which have been used *ad nauseam* until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence" is left to the jury on the question whether the language was meant to charge that the play was immoral and founded upon adultery. It was considered that if so it was libelous as there was nothing of the kind in the play. *Merivale v. Carson*, 14 R. 20 Q. B. Div. 275, 58 L. T. N. S. 831, 38 Week. Rep. 231, 52 J. P. 261. *Lord Esher, M. R.*, says to this case: "Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit;" and he adds: "The question which the jury must consider is this—Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised? If it goes beyond that then you must find for the plaintiff. If you are not satisfied that it does, then it falls within the allowed limit and there is no libel at all." But he held that in this case there was a complete misdescription of the work with the inevitable conclusion that an imputation was cast upon the characters of the authors. The same views were expressed by Bowen, *L. J.*, and the case was decided accordingly.

The opinions and principles of a controversial writer are open to criticism and ridicule in the same way as any other author, but the privilege does not extend to calumnious remarks on the private character of the individual. Thus it is held libelous for a newspaper to say of the proprietor of another newspaper that he is the venerable apostle of tyranny and oppression and a man whose full-blown baseness and infamy hold him fast to his present connection because they leave him without the power of forming new ones. In this case no justification was pleaded. *Stuart v. Lovell*, 2 Stark. 93.

It is held not libelous for one newspaper to call another the "most vulgar, ignorant, and scurrilous journal ever published in Great Britain," but it is held libelous to make false statements about its low circulation and expressly call the attention of advertisers to that alleged fact. *Heriot v. Stuart*, 1 Esp. 437.

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c. Art criticism.

In respect to an alleged libel by newspaper criticism of the portrait of the king calling it a mere daub and using very strong terms of censure the court in summing up to the jury said, the question is whether the publication is a fair and temperate criticism on the painting, or whether it be made the vehicle of personal malignity towards the plaintiff who was the painter, adding if this be really an honest criticism the defendant is entitled to the verdict. *Thompson v. Shackell*, 1 Moody & M. 137.

In respect to a publication alleged to constitute a libel of an architect in professing to give an account of the principles of a new order of architecture called the Boscotian order, said to have been invented by the plaintiff and setting forth absurd rules as the rules of the order which were represented as collected by observation from certain buildings of which the plaintiff was the architect, the court left it to the jury to say whether the criticism was unfair and intemperate and written with the intention and for the purpose of injuring the plaintiff in his profession by imputing to him that he acts on absurd principles of art. But the court said: "On such works as well as on literary productions any man has a right to express his opinion, and however mistaken in point of taste that opinion may be, or however unfavorable to the merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable, and temperate expression. It may be fairly and reasonably expressed though through the medium of ridicule." *Soane v. Knight*, Moody & M. 74.

d. As to officers and candidates.

In *Harle v. Catherall*, 14 L. T. N. S. 801, *Martin, B.*, said to the jury that he knew no limit to comments on a man who claimed a public office except it were malice. If a person thought fit to publish what he knew to be false in regard to a man, then the privilege of comment in the journal ceased to protect him.

In respect to comment on a candidate for office it is very clearly declared in *Sweeney v. Baker*, 13 W. Va. 184, 31 Am. Rep. 757, that his conduct and actions may be freely commented upon, his acts canvassed and his conduct boldly censured, and that it is not material that such criticism of conduct shall in the estimation of the jury be just. The court declares that the right to criticise the action or conduct of a candidate is a right on the part of the party making the publication to judge himself of the justness of the criticism, and it is said that if he was liable for damages in an action for libel for a publication criticising the conduct

agement of the school. The plaintiff first moved to strike out all the foregoing special defense, except that part contained in the last paragraph, *supra*. This motion the court overruled, and plaintiff duly excepted. Plaintiff filed a reply in the form of a general denial, and, the cause coming on for trial before a jury, defendants objected to the introduction of any evidence by plaintiff, and the court sustained the objection. Plaintiff then took a nonsuit, with leave to set the same aside. The motion to set aside the nonsuit, and to grant a new trial, was duly made, and overruled, and plaintiff excepted. Plaintiff thereupon perfected its appeal to this court.

The questions presented for review arise, (1) on the action of the court in refusing to sustain plaintiff's motion to strike out part of the answer; and (2) on the refusal of the

trial court to permit plaintiff to introduce any evidence in support of its petition. No special damages were alleged, nor was it alleged that patrons of the academy had withdrawn their support, or that any person had since refused to patronize it, on account of the publication.

The right of a corporation to sue for libel or slander against it, in the way of its business or trade, is not questioned. That such a suit might be maintained was held by this court in *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539, 27 Am. Rep. 293. See also *Newell, Defamation*, p. 360. The question, then, is whether the words complained of are actionable *per se*, as containing a defamatory imputation upon the plaintiff, or rather whether or not there was enough in them to warrant the court in submitting them to the jury. In the publication there is no statement or in-

-or action of such a jury, if a jury should hold his criticism unjust, his right of criticism would be a delusion, a mere trap. It is therefore declared that the only limitation of the right of criticism of the action or conduct of a candidate for office in the gift of the people is that the criticism be bona fide. The court further says: "His talent and qualifications, mental and physical, for the office . . . may be freely commented on in publications in a newspaper and though such comments be harsh and unjust no malice will be implied; for these are matters of opinion of which the voters are the only judges; but no one has a right by a publication to impute to such a candidate political crimes, or publish allegations affecting his character falsely." It is consequently held that it is not libelous to call a candidate "a confessed ignoramus" and to say that he "never earned an honest penny or did a stroke of labor in his life," or to call him a "social leper" and say it is a duty to "deodorize" against him as against cholera; unless this is shown to refer to him morally; but it is held libelous to call him a professional gambler, a bully, a blackleg, or a pimp.

It is laid down as in accordance with the decided cases by Earl, Ch. J., in *Turnbull v. Bird*, 2 Fost. & F. 508, that every person has a right to comment on the acts of a public man which concern him as a subject of the realm if he do not make his comments the vehicle of malice or slander, but it is said that if one makes his comments with any misstatement of fact which he must have known to have been a misstatement if he exercised ordinary care, he loses his privilege and his language may become actionable. In this case in respect to a publication assailing the appointment of a Roman Catholic as calendarer of foreign state papers which was based upon his bias to the Jesuits and which imputed that he would not be a safe person to have charge of the documents, reciting the singular disappearance of documents relating to disputed questions between Protestants and Catholics and referring to the fact that the officer had a separate room and a fire-place, it was left to the jury to say whether the writer fairly and honestly put forth the passages complained of especially that alluding to the fire-place and the suggestion of danger that he would destroy the papers.

A newspaper publication that a person appointed judge is a purse-proud aristocrat, a large stockholder in Ohio banks and anxious to put down the United States Bank so his stock will become more profitable, and calling a newspaper which he edits a mud machine and speaking of its insolent abuse of a political party, is held not libelous because

not calculated to degrade him or lessen his standing. But in this case the question of opinions or comments as such is not discussed. *Tappan v. Willson*, 7 Ohio, pt. 1, p. 193.

The lord chief justice in *Seymour v. Butterworth*, 3 Fost. & F. 372, said that it is not disputed that the public conduct of a public man may be discussed with the fullest freedom and that it may be made the subject of hostile criticisms and of hostile animadversions, provided the language of the writer is kept within the limits of an honest intention to discharge a public duty and is not made a means of promulgating slanderous and malicious accusations. In that case where a barrister who was queen's counsel, member of parliament, and also held a judicial office as recorder of an important town, had been censured by the benchers of his inn after inquiry into his conduct, and had himself given the fullest publicity to the matter by speeches and writings attacking the decision as unjust, an article in a legal review severely handling the matter but fairly giving all the facts in the case was left to the jury to determine whether it constituted fair, reasonable, and honest comment, such as for instance in saying that he was rewarded with the recordership to the just dissatisfaction of the bar who thought that better men had been passed over for an unworthy political motive. The court left it to the jury to say whether this meant that the appointment was based on political considerations, or whether it was the result of a corrupt bargain by which he sold his parliamentary independence for the sake of advancement.

A public justification by a superintendent of public schools of his failure to recommend the reappointment of a teacher for drawing which "amounts to nothing more than criticism, most of which is purely professional, and none of which is intrinsically offensive beyond what may result from a failure to accord with defendant's views of plaintiff's disposition and methods of teachings," is not libelous. The court said: "The occasion and an apparent necessity existed here to refer to the plaintiff, and the criticism whether just or unjust was privileged by it." *O'Connor v. Still*, 60 Mich. 175.

A publication by a school committee criticising the prudential committee of a district of which "the most that can be said is that in the view of the committee he had very mistaken conceptions of his duty and adhered to and acted upon them with great pertinacity," is not libelous although it charges a direct and palpable violation of the statute. *Shattuck v. Allen*, 4 Gray, 540.

Where a health official recommended a certain pavement in a public letter it was said by the court

situation that the dancing permitted or practiced at the academy was of an improper character. Words which on the face of them, when falsely published of a party, in connection with his trade or profession, must necessarily injure him with respect thereto, or which directly tend to the prejudice of such person in his trade or business, are actionable in themselves without proof of special damages. *Newell, Defamation*, p. 168, § 1; *Morasse v. Brochu*, 151 Mass. 567, 8 L. R. A. 524; *Price v. Conway*, 184 Pa. 340, 8

L. R. A. 193; *Odgers, Libel & Slander*, 100, and authorities cited; *Williams v. Davenport*, 42 Minn. 393; *Missouri Pac. R. Co. v. Richmond*, 73 Tex. 568, 4 L. R. A. 280; *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105; *Hayes v. Press Co., Limited*, 127 Pa. 642, 5 L. R. A. 643; *Collins v. Dispatch Pub. Co.* 152 Pa. 187.

Measured by the rule thus announced, were the words published of and concerning plaintiff libelous and actionable *per se*? That they were published of and concerning its business

in *Hamilton v. Eno*, 81 N. Y. 116: "Every citizen had a right to discuss the question as publicly as the report had done so. So that the time and mode of the publication of the defendant made the occasion of it thus far privileged. Such an occasion must, however, be used fairly and in good faith, with a view to the public interest and good and without evil or malicious motive." So it was held that a reviewer might expose misrepresentations, combat the reasoning of the report, and show its conclusions ill drawn, and that he might do so with satire and ridicule so long as he directed these missiles at the report and its contents.

The comment "there is something rotten in Denmark," and "more whitewash needed," accompanying the publication of the substance of the proceedings of a town council, was not regarded by the court as either malicious or libelous. *Wallis v. Bazel*, 34 La. Ann. 231.

c. As to clergymen.

A newspaper which in pointing out that a quotation therefrom published as taken from that paper by one of two clergymen, who were in a controversy, has been changed by interpolating offensive and insulting expressions respecting his opponent, declares that the person making such interpolation did so "with a malice which overcame his sense of truth and honesty," is justified in such comment if it is written in the interest of truth without corrupt motive. *Hibbs v. Wilkinson*, 1 Post. & F. 606.

It is said in *Gathercole v. Miall*, 15 Mees. & W. 319, 10 Jur. 387, 7 L. T. 89, 15 L. J. Exch. 179, that a sermon preached to a congregation may undoubtedly be made the subject of a comment, but that you must not put into the mouth of the pastor language that he did not use, or make any comment upon what he did use, or was supposed to use, that does not fairly arise out of the truth. But there was not any sermon in evidence on which the comment could apply in that case.

A parochial charity with a vicar, at the head of it, but not for parochial purposes such as a clothing society or club, is a private matter comment on which must be based in truth, and licentious comment thereon or comment not based in truth is not privileged. *Gathercole v. Miall*, *supra*.

The publication in a newspaper of a letter from a church warden to the incumbent of the church without the latter's consent, in which it is said: "I have observed with pain the church turned into a bookseller's shop during divine service by your errand boy selling books under the pulpit and money being jingled about in giving change, to the annoyance of many of the congregation. Nor can I omit to allude to the desecration of the church by turning a portion of it into a cooking apartment and endangering the sacred edifice," adding a request that these improprieties may cease, on which letter editorial comments are made, was held not to be actionable unless there was excess in the comments. The comment was found to be fair although some of the expressions might have been thought stronger than the limits of fair criticism and comment would allow. The court re-

garded the maintenance of decency and propriety in the public worship and the sanctity of the edifice as a matter of public concern. *Kelly v. Tinning*, L. R. 1 Q. B. 699, 35 L. J. Q. B. 231, 13 Jur. N. S. 940, 13 L. T. N. S. 255, 14 Week. Rep. 51.

A newspaper comment on the conduct of several clergymen at a political meeting as creating an unseemly scene, and stating that the appearance of two of them was consistent with the belief that they had imbibed rather freely of the cup that inebriates and that their condition led one to such conclusion, and that one of them essayed to speak and that persisting in interrupting the meeting they were handed over to officers who had difficulty in protecting them from punishment they deserved, adding that such a proceeding on the part of ministers of the gospel cannot be too highly condemned and that it is to be hoped their superiors will give them such a reprimand as will prevent similar disgraceful occurrences, was held to be fair comment and not to be libelous, although there was not proved to be any ground for supposing that the clergymen were really the worse for liquor, but their conduct might have given rise to the supposition that they were. *Davis v. Duncan*, L. R. 9 C. P. 306, 43 L. J. C. P. 185, 30 L. T. N. S. 464, 22 Week. Rep. 575.

After true statements in a letter to a newspaper respecting an assault by a clergyman upon the church warden in the church a statement that there is surely some law to prevent such conduct, or that endeavors will be used to obtain a sufficient sum of money to induce him to resign, or at any rate that the writer will make a tour and endeavor to find another specimen of humanity like unto him, as it is a pity two places should be troubled with such a man, is held to be fair comment which needs no justification in a plea of the truth of the statements. *Walker v. Brogden*, 19 C. B. N. S. 65, 11 Jur. N. S. 671, 13 L. T. N. S. 495, 13 Week. Rep. 809.

f. As to other public or professional men.

The publication of a letter or a communication of the controller of the navy to the board of admiralty condemning certain plans for converting a wooden line of battle ships into iron-clad turret ships, which had been submitted to the lords of admiralty by a person describing himself as a naval architect, in which letter it is said that the plans "would have no weight whatever from the known antecedents of their author," and intimating that the plans are worthless, is held to be not libelous, and a nonsuit was ordered and sustained by three of the four judges before whom the question was argued. The ground of the decision is that it was a fair criticism upon a matter of public and national importance and therefore privileged. *Henwood v. Harrison*, L. R. 7 C. P. 606, 41 L. J. C. P. 203, 26 L. T. N. S. 933, 20 Week. Rep. 1000.

The court says, in this case in respect to the right of the jury to pass upon the question, "it would be abolishing the law of privileged discussion and deserting the duty of the court to decide upon this as upon any other question of law if we were to

there is no question. It was, at the time of the alleged publication, an institution of learning and education, and prior thereto, as alleged in the petition, in a flourishing condition, in good repute, and well thought of by all of its patrons and good citizens; and we cannot perceive how to publish of it, by implication at least, that it was not worthy of the patronage of the people, and in express terms to say that its administration was harm-

ful to the moral and religious interests of the community, was otherwise than hurtful, being calculated, as it was, to induce the patrons of the school to withdraw their patronage therefrom, and to dissuade others not to patronize it who may have been inclined to do so but for the immoral imputations cast against it by defendants. The charges were hurtful both of plaintiff's standing as an educational institution and in a financial point of view,

hand over the decision of privilege or no privilege to the jury. A jury according to their individual views of religion or policy might hold the church, the army and navy, and parliament itself, to be of no national or general importance, or the liberty of the press to be of less consequence than the feelings of a thin-skinned disputant." The dissenting judge in this case considered that the reflections "the known antecedents of the author" was not in the nature of fair discussion or argumentative controversy, and this reference could hardly be taken to apply otherwise than to the man and not to the proposals made by him, but to the majority of the court it seemed that this reference to the antecedents related merely to his experience and opportunities for forming a valuable opinion on the subject.

A newspaper publication about a well-known advocate of advanced democratic opinions, who was essentially a public man, saying, "We regard him as an enemy of order, we hold him to be a demagogue of the lowest type, half booby and half humbug, a political cheap jack who would be a political sharper if he had brains enough. . . . He defied parliament and the government; . . . he threatened an unprecedented demonstration and political discord,"—was held by verdict of the jury to be justified. *Odger v. Mortimer*, 28 L. T. N. S. 473. *Bovill, Ch. J.*, said, "It is only where the court can say that the jury are clearly wrong that the court should interfere." And again, "The jury in considering their verdict would look at all the circumstances, and the circumstances point to this—that Mr. Odger is essentially a public man. This being so editors of public newspapers may comment in the strongest possible way upon what he says and does in that character. As for the ridiculous complained of, that is often the strongest weapon in the hands of a public writer and if it be used fairly the presumption of malice which would otherwise arise is rebutted and it becomes necessary to give proof of actual malice or of some indirect motive or of a wish to gratify private spite." *Grove, J.* in the same case said the question is this, "Was the alleged libel really a malignant attack on Mr. Odger's private character, or was it a holding up of his principles to derision." *Denman J.*, said: "It was for the jury to say whether the comment went beyond what was fair and right." *Honyman, J.*, was of the same opinion but added: "I only wish to say that I do not wish it in any way to be understood that a newspaper may make its public comments a vehicle for attack on private character."

In case of a newspaper article charging that attorneys got up a case upon false and fabricated evidence, the court in *Woodgate v. Ridout*, 4 Fost. & F. 202, says, that the administration of justice should be made a subject for the exercise of public discussion is a matter of the most essential importance, but those who pass judgment or call upon the public to pass judgment on suitors or witnesses must not give reckless vent to harsh and uncharitable views of the conduct of others, but are bound to exercise fair and honest and impartial judgment upon those whom they hold up to public obloquy.

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Where a priest in a public congregation intimated to his people that a physician by contracting a second marriage after obtaining a divorce was thereby excommunicated and proceeded to impute that this should debar him from employment by the congregation as a physician in the parish and that his employment would prevent his patients from obtaining the ministrations of the priest, this was held to be a slander on the physician in his profession. *Morasse v. Brochu*, 8 L. R. A. 324, 151 Mass. 567. But this is on the assumption that the jury had found the language was used "falsely and with a deliberate purpose and intent of injuring the plaintiff in his profession and for the purpose of gratifying his ill-will towards the plaintiff."

One who advertises to the public a professed discovery for the cure of consumption "challenges criticism, and any one who differs from him and deems his system delusive ought to denounce it with unparing severity; but he has not a right to impute motives unless there is something to justify or excuse that part of the imputation." But if such person by his advertisement aims to excite the fear of his readers with a view to drive them to become his patients, and urges them to put their faith in him, on grounds which he must have known to be fallacious, a newspaper may be justified in calling him an imposter and a scoundrel. *Hunter v. Sharpe*, 4 Fost. & F. 963, 15 L. T. N. S. 421.

Where a newspaper attacked a physician who had made a petition to parliament, charging him with ignorance, *Best, Ch. J.*, charged the jury that if it had not imputed ignorance except as this was deduced from the petition and the publication was only a fair comment on the petition, it was no libel, but otherwise if the attack was without ostensible cause and falsely imputed ignorance. *Dunne v. Anderson*, 8 Bing. 38, *Ryan & M. 287*, 10 J. B. Moore, 407.

In reviewing the cases on the subject it will be seen that, like the main case of *ST. JAMES MILITARY ACADEMY V. GAISER*, the decision in *Jenner v. A'Beckett*, L. R. 7 Q. B. 11, 41 L. J. Q. B. 14, 25 L. T. N. S. 464, 20 Week. Rep. 181, and *Reade v. Sweetzer*, 6 Abb. Pr. N. S. 9, note, have seemed to involve a denial of the right to express opinions or comments even without any misstatement of facts. But the distinction between facts and comments or opinions upon facts was taken in none of these cases. It is not too much to say that where there was any discussion or statement of the distinction between matters of fact and matters of opinion, comment or theory based upon facts, no court has expressly held that comment or opinion on undisputed facts would be an actionable defamation. On the other hand, as shown by the quotations above collected from the opinions, courts have repeatedly declared that there is a distinction between comment and allegations of fact. It seems that any fair deduction from all the above decisions must sustain the right freely to comment and express opinions upon all questions so long as no misstatement of fact or any false imputation of fact is involved. Nothing less than this can at all satisfy the constitutional guaranty of "the free communication of thoughts and opinions" which in the language of the constitution "is one of the invaluable rights of man."

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for some persons, even though not opposed to dancing, might be found who would hesitate to patronize such an institution of learning, where dancing was permitted, if, by reason thereof they might be criticised for patronizing an immoral institution. In *Cooper v. Greeley*, 1 Denio, 358, the rule is thus announced by Jewitt, J.: "It is the duty of the court, in an action for a libel, to understand the publication in the same manner that others would naturally do. The construction which it behooves a court of justice to put on a publication which is alleged to be libelous is to be derived as well from the expression used as from the whole scope and object of the writer." We understand the principle to be in that case correctly announced, to wit, the scope and object of the whole article is to be read and considered together, and such construction put upon the language used as would naturally be given to it; and, when this is done, it seems to us that the article, taken as a whole, is susceptible of no other fair construction than as containing an imputation upon plaintiff's morality, in respect to permitting dancing in its academy, and that its tendency was to injure plaintiff in its standing as an institution of learning and education. Whether the publication complained of, when taken and read altogether, was justifiable upon the ground that dancing is immoral, is a question to be passed upon by a jury, who, under our constitution, are the judges of the law, as well as of the facts, in cases of this character. From a libelous publication malice is implied. *Byam v. Collins*, 111 N. Y. 143, 2 L. R. A. 129; *Bradstreet Co. v. Gill*, 72 Tex. 115, 2 L. R. A. 405; *Ramsey v. Cheek*, 109 N. C. 270; *Mitchell v. Bradstreet Co.* 116 Mo. 226, 20 L. R. A. 188.

It is also contended by plaintiff that as section 14, article 2, State Const., provides "that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact," whether or not the dancing was immoral was a question to be determined upon proper proof by the triors of fact. While it is true that, in case of a prosecution for libel, the jury are the judges of both the law and the fact (*Arnold v. Jewett*, 125 Mo. 241) it has never been understood that it was their duty or their province to pass upon the pleadings in the cause. In *McGinnis v. Knapp*, 109 Mo. 181, a demurrer to the petition was sustained by the court below, upon the ground that it did not state a good cause of action, and upon appeal the judgment of the court was reversed; but nowhere is it intimated in the opinion of this court that the case ought to have gone to the jury upon the question as to whether or not the petition stated a good cause of action. If this contention is correct, the judge of the court is but a mere figurehead, a useless and unnecessary ornament, in the trial of such cases. We are unable to give our assent to this contention.

Our conclusion is that the court did not err in overruling plaintiff's motion to strike out that part of defendant's answer which set up a special defense, but that it committed error in sustaining defendants' objection to the introduction of any testimony under the petition, which stated a good cause of action.

The judgment is reversed, and the cause remanded.

All concur.

WASHINGTON SUPREME COURT.

Thomas S. KRUTZ, *Appt.*,

v.

Eliza J. ROBBINS *et al.*, *Respts.*

(..... Wash.)

1. The larger sum will be held a penalty and not liquidated damages, where the payment of a smaller sum is secured by an agreement to pay the larger.
2. A contract to pay a stipulated sum as damages will be given effect only where the damages provided against are uncertain and not ascertainable by any satisfactory and certain rule of law.
3. A stipulation in a mortgage providing for interest on the principal note secured thereby at the rate of 12 per cent per annum in case of default in payment of the principal, interest, insurance, or taxes, while the note itself provides for 7 per cent only until its ma-

turity is essentially a penalty, and will not be enforced in equity.

(May 15, 1895.)

APPEAL by plaintiff from a judgment of the Superior Court for King County granting him only a part of the relief demanded in an action brought to foreclose a mortgage and collect the amount secured thereby. *Affirmed.*

The facts are stated in the opinion.

Mr. George Fowler for appellant.

Messrs. Greene & Turner, for respondents, John Campbell and wife:

Appellant's note, literally construed and enforced, justifies no other judgment than that rendered.

Cloud v. Rivord, 6 Wash. 555.

The provision of the mortgage for twelve per cent interest upon principal before maturity in case of default is a penalty and unenforceable.

1 Pom. Eq. Jur. § 441.

In equity a provision to pay a higher rate of interest for default in prompt payment is a penalty and unenforceable.

Holles v. Wyse, 2 Vern. 289; *Strode v. Parker*, Id. 316; *Nicholls v. Maynard*, 8 Atk. 520; *Orv*

NOTE.—For liquidated damages, see also *Hathaway v. Lynn* (Wis.) 6 L. R. A. 551, and note; *King Iron Bridge & Mfg. Co. v. St. Louis* (U. S. C. C. R. D. Mo.) 10 L. R. A. 826, and note; *Condon v. Kemper* (Kan.) 18 L. R. A. 671, and note; also *Wilhelm v. Hayes* (Or.) 14 L. R. A. 397.

28 L. R. A.

v. Churchill, 1 H. Bl. 227; *Bonafous v. Rybot*, 3 Burr. 1370; *Seton v. Slade*, 7 Ves. Jr. 273; 8 Bl. Com. 432; *Watts v. Watts*, 11 Mo. 547; *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102; *Weyrich v. Hobelman*, 14 Neb. 432; *Richardson v. Campbell*, 34 Neb. 181; *Waller v. Long*, 6 Munf. 71; 2 Parsons, Notes & Bills, 1st ed. pp. 413, 414; *Adams*, Eq. 6th Am. ed. 108.

The clause in the mortgage by virtue of which it is sought to enforce this penal provision provides that "in case of default of payment of any sums herein covenanted to be paid, or in default of performance of any covenant herein contained, the said first parties agree to pay to said second party or assigns interest at the rate of twelve per cent per annum," etc.

Under the provisions of this mortgage upon default in performance of any covenant contained in the mortgage, whatever its nature it is provided then that the mortgagor shall pay twelve per cent interest upon the principal from the date of the mortgage.

The provision is therefore a penalty not only because it is a larger sum securing the payment of a smaller sum, but for two other reasons.

Where an agreement contains provisions for the performance or nonperformance of several acts of different degrees of importance and then a certain sum is stipulated to be paid upon a violation of any or of all such provision, and the sum will be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be treated as a penalty and not as liquidated damages.

1 Pom. Eq. Jur. § 443.

Whether an agreement provides for the performance or nonperformance of one single act, or of several distinct and separate acts if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete, and when it is only partial, the sum must be regarded as a penalty and not as liquidated damages.

1 Pom. Eq. Jur. § 444; *Snell*, Eq. Lawson's ed. pp. 311-313; 2 Greenl. Ev. 14th ed. § 258; *Berry v. Wisdom*, 8 Ohio St. 241; *First Orthodox Cong. Church Trustees of Middleville v. Walrath*, 27 Mich. 232; *Daily v. Litchfield*, 10 Mich. 29; *Jackson v. Baker*, 2 Edw. Ch. 471, 6 L. ed. 470; *Lampman v. Cochran*, 16 N. Y. 275.

Anders, J., delivered the opinion of the court:

On March 1, 1889, the defendants Robbins borrowed from the plaintiff, Thomas S. Krutz, the sum of \$2,500, for which they gave him their promissory note, payable five years after that date, at the Chemical National Bank in the city of New York, with interest at the rate of 7 per cent per annum, payable semiannually. Coupons for the several semiannual installments of interest were attached to the note, in each of which it was provided that the sum therein named (\$87.50) should draw interest at the rate of 12 per cent per annum after maturity. The note further provided that it should bear interest

after maturity at 12 per cent per annum, and that on failure to pay the interest when due the principal should become due and payable, and might be at once collected. To secure the payment of this note the makers, on said day, executed to the plaintiff a mortgage on certain real estate in A. A. Denny's addition to the city of Seattle; which mortgage contained, among others, the following covenants and agreements: "And the said first parties do hereby covenant and agree that at the delivery hereof they are the lawful owners of the premises above granted, and seised of a good and indefeasible estate of inheritance therein, free from all incumbrances, and that they will warrant and defend the same against the lawful claims of all persons whomsoever. . . . Now, if said first parties shall pay, or cause to be paid, the said sum of money, with interest thereon, according to terms of said note, then these presents shall be void; but if said sum of money, or any interest thereon, is not paid when due and payable, or if any taxes or assessments now or hereafter levied or imposed in said county or territory against said real estate, or upon this mortgage, or the notes secured thereby, are not paid when the same are due and payable, or if default be made in the agreement to keep said property insured as hereinafter set forth, then, in either of these cases, the said principal note, with the interest thereon, shall, and by this indenture does, immediately become due and payable at the option of the second party or assigns, to be at any time thereafter exercised without notice to the first parties. But the legal holder of this mortgage may, at his option, pay said taxes, assessments, or charges for insurance, so due and payable, as the mortgagors or assigns shall neglect or refuse to pay, as herein set forth, and charge them against said first parties; and the amount so charged, together with interest at the rate of twelve per cent per annum, payable semiannually, shall be an additional lien upon the said mortgaged property; and the said mortgagees or assigns may immediately cause this mortgage to be foreclosed, and shall be entitled to the immediate possession of the premises, and the rents, issues, and profits thereof. Said first parties agree to keep the buildings erected or to be erected on said land insured to the amount of \$3,000, to the satisfaction of and for the benefit of the second party or assigns, from this time until said note, and all liens by virtue hereof, are fully paid. It is hereby agreed that, in case of default of payment of any sums herein covenanted to be paid, or in default of performance of any covenant herein contained, the said first parties agree to pay to said second party or assigns interest at the rate of twelve per cent per annum, computed semiannually, on said principal note, from the date thereof to the time when the money shall be actually paid; and any payments made on account of interest shall be credited in said computation, so that the actual amount of interest received shall be and not exceed twelve per cent, computed semiannually as aforesaid." The first two coupons, due September 1, 1889, and March 1, 1890, respectively, were

paid in full at maturity, and thereafter, at irregular intervals, various sums, but in each instance less than the amount due, were paid on account of interest, the last payment having been made on June 28, 1892. The plaintiff paid insurance premiums on two occasions, a part of which was repaid by the mortgagors; and he also paid the taxes on the mortgaged property for the years 1890 and 1891, after the same had become delinquent. The note was not paid at maturity, and in May, 1894, this action was instituted to foreclose the mortgage.

The plaintiff in the action sought to recover interest on the note from its date at the rate of 12 per cent per annum, compounded semiannually, in accordance with the stipulation in the mortgage above set forth. The court, however, awarded him but 7 per cent interest on the note, computed semiannually from date to maturity, and thereafter at the rate of 12 per cent per annum. Interest was also allowed on each coupon at the rate of 12 per cent per annum from maturity, as therein specified. The amount recovered is \$866.83 less than plaintiff conceives himself entitled to, and hence this appeal. The trial court, it will be seen, based its decision as to the rate of interest on the stipulation in the note itself in regard thereto; but appellant contends that the ruling was erroneous, for the reason that it gave no effect whatever to the stipulation in the mortgage providing for interest on the principal note, at the rate of 12 per cent per annum from its date in case of default. He claims that that provision was part of the contract between the parties, and that inasmuch as it is not contrary to law or public policy, and is not immoral, it should be enforced as made. On the other hand, the respondents insist that the provision in the mortgage for a higher rate of interest in default of payment of the principal or interest specified in the note is in the nature of a penalty, and unenforceable in equity. If this provision is a penalty, there can be no doubt that it is unenforceable, for it is a universal rule in equity never to enforce either a penalty or a forfeiture. 2 Story, Eq. Jur. § 1819. But what is a penalty, and what is liquidated damages in a given case, it is not always easy to determine. As the question is one of intention, no single rule can be laid down which will furnish a certain and satisfactory criterion for all cases. In most cases many circumstances must be considered in order to ascertain the real intention of the parties. The courts, however, have deduced from the authorities certain general rules, "each having more or less weight, according to the peculiar circumstances of each case." Among these rules is one which is almost universally recognized and acted on, and which is that, where the payment of a smaller sum is secured by an agreement to pay a larger sum, the larger sum will be held a penalty, and not liquidated damages. *Keeble v. Keeble*, 85 Ala. 552, and cases cited; 1 Pom. Eq. Jur. § 441; *Adams*, Eq. p. 108; 2 Parsons, Notes & Bills, pp. 413, 414; *Ston v. Slade*, 7 Ves. Jr. 265; 3 Bl. Com. 482; *Holles v. Wyse*, 2 Vern. 299; *Strode v. Parker*, Id. 816; *Orr v. Churchill*, 1 H. Bl. 227; 28 L. R. A.

Bonafoos v. Rybol, 8 Burr. 1370; *Parker v. Butcher*, L. R. 3 Eq. 763; *Tiernan v. Hiaman*, 16 Ill. 400; *Watts v. Watts*, 11 Mo. 547; *Mason v. Callender*, 2 Minn. 350 (Gil. 202), 72 Am. Dec. 103; *Richardson v. Campbell*, 84 Neb. 181; *Waller v. Long*, 6 Munf. 71.

In *Alexander v. Troutman*, 1 Ga. 469, this is said to be the settled doctrine. If this case, therefore, falls within the rule stated, the provision in the mortgage for an increased rate of interest in case of default in the payment of principal or specified interest, the trial court was right in refusing to enforce it. While, in construing contracts, due weight will be given to the language used, still courts of equity will not be absolutely controlled by the words employed, when the enforcement of such contract will cause an unconscionable hardship or otherwise work an injustice. *Keeble v. Keeble*, *supra*. A penalty has been defined to be an agreement to pay a greater sum to secure the payment of a less sum (*Henry v. Thompson*, Minor (Ala.) 209), and it seems to us that this case clearly falls within that definition and the rule above stated. The additional rate of interest is essentially a penalty, although not designated as such. It could not have been intended as compensation for the use of the principal before maturity, for the reason that 7 per cent interest was agreed on as the rate of compensation. It could not have been intended as compensation for failure to pay the interest when due, because it is neither proportioned to the amount of interest nor to the length of time the debtor is in default. The provision for 5 per cent extra interest must therefore be considered as a provision to secure the prompt payment of 7 per cent interest on the principal debt, and also taxes, insurance, and principal when due. The learned counsel for the appellant cite a large number of cases in support of the proposition that whether a debtor shall pay any interest or a higher or lower rate of interest may be made by agreement of parties to depend upon his prompt payment of the principal at maturity. But most of them are cases where the contract provided for no interest, if the principal should be paid at maturity, but contained a provision for interest, if payment was not so made. Whether such a contract would be enforced was the question to be determined in the following cases cited by appellant: *Rumsey v. Matthews*, 1 Bibb, 243; *Gully v. Remy*, 1 Blackf. 69; *Horner v. Hunt*, Id. 214; *Hackenberg v. Shaw*, 11 Ind. 392; *Satterwhite v. McKie*, Harp. L. 397; *Wakefield v. Beckley*, 8 McCord, L. 480; *McNairy v. Bell*, 1 Yerg. 502, 24 Am. Dec. 454; *Parvin v. Hoopes*, 1 Morris (Iowa) 294; *Horn v. Nash*, 1 Iowa, 204, 63 Am. Dec. 437; *Fisher v. Anderson*, 25 Iowa, 28, 95 Am. Dec. 761; *Alexander v. Troutman*, 1 Ga. 469; *Rogers v. Sample*, 33 Miss. 810, 69 Am. Dec. 349; *Reeves v. Stipp*, 91 Ill. 609; *Parker v. Plymell*, 23 Kan. 402; *Masn v. Casserly*, 67 Cal. 127.

For various reasons, some of which are not very satisfactory, these several courts held such a contract valid and enforceable. In some of them the decisions were based on the

action that the contract in controversy was equivalent to an agreement for a specified rate of interest, with a provision that the interest would be remitted if the principal was paid at maturity (see *Reeves v. Stipp*, *Rumsey v. Matthews*, and *Satterwhite v. McKie*, *supra*); and in all of them the conclusion reached was deemed to be in accordance with the real intention of the parties as gathered from the whole agreement. So, in this case, the court ascertained and gave effect to the primary and principal agreement, and refused to enforce the superadded condition, because such condition was, in effect, a penalty. We think, however, that the above cases are distinguishable from the case at bar in many particulars.

Appellant also cites *Daggett v. Pratt*, 15 Mass. 177, and *Wilkerson v. Daniels*, 1 G. Greene, 180, both of which hold that, where a rate of interest before maturity is specified, and the contract provides for a higher rate if payment be not made at maturity, such higher rate is recoverable as upon the contract. The first of these cases is a law case, and the question of penalty does not seem to have been presented or considered; and in the second the decision appears to have proceeded on the theory that the contract to pay the higher rate of interest depended on a condition permitted by law. That argument would seem to be fallacious, for the reason that it assumes that any contract not prohibited by law is enforceable, whereas the rule is that equity will not enforce a penalty even if it be not prohibited by law. But it would appear that that case, as an authority upon the point decided, is weakened, if not destroyed, by the subsequent case of *Conrad v. Gibbon*, 29 Iowa, 120. But, whether that be true or not, it seems to us that that case is contrary to the rule generally recognized by courts of equity. And, besides, in this case there are

several contingencies or conditions which were not in that, and which appear to be penal in their nature. For instance, in the case at bar, the higher rate of interest is provided, not only for default in payment of the principal, but for default in the payment of interest or insurance or taxes. Moreover, the consequence is the same whether the least important or the most important of these stipulations is violated, viz., the payment of a higher rate of interest on the principal from date; and this is a further reason why these provisions for an increased rate of interest should in this case be considered a penalty. 1 Pom. Eq. 441-444; 2 Greenl. Ev. § 353; *Berry v. Wisdom*, 3 Ohio St. 241; *First Orthodox Cong. Church Trustees of Middleville v. Walrath*, 27 Mich. 232; *Daily v. Litchfield*, 10 Mich. 29; *Jackson v. Baker*, 2 Edw. Ch. 471, 6 L. ed. 470; *Lampman v. Cochran*, 16 N. Y. 275; *Alexander v. Troutman*, *supra*. It may be said to be a general rule that the only cases in which the courts will give effect to a contract to pay a stipulated sum as damages are those where the damages provided against are uncertain, and not ascertainable by any satisfactory and certain rule of law. *Mason v. Callender*, *supra*; 2 Greenl. Ev. § 259. The case of *Galsworthy v. Strutt*, 1 Exch. 659, cited by appellant, is one of the numerous cases which might be cited illustrative of this principle. For the non-payment of money the law awards interest as damages, and hence there is no difficulty in ascertaining the damages in this case, and it therefore does not fall within the rule just cited.

We think the judgment of the trial court gave appellant all he was entitled to, and it must therefore be affirmed, and it is so ordered.

Hoyt, Ch. J., and Dunbar, Scott, and Gordon, JJ., concur.

INDIANA SUPREME COURT.

Greenberry WALKER *et al.*, *Appts.*,
v.

Thomas JAMESON.

(.....Ind.....)

A municipal contract for the removal of garbage giving the contractor an exclusive right to remove it at a certain price per pound, payable by the persons who produce the garbage, is simply a sanitary regulation which cannot be considered as in the nature of a confiscation or an attempt to create a monopoly.

(McCabe, J., dissents.)

(March 1, 1895.)

APPEAL by defendants from a judgment of the Circuit Court for Marion County in favor of plaintiff in an action brought to enjoin defendants from interfering with or re-

NOTE.—See note on monopolies in contracts for removal of garbage with case of *Smiley v. MacDonald* (Neb.) 27 L. R. A. 540.
29 L. R. A.

moving garbage from the city of Indianapolis. *Affirmed.*

The facts are stated in the opinions.

Messrs. J. E. McCullough and H. N. Spaan, for appellants:

Broad and all prevailing as police power is, it must be remembered that there are some things which do not fall within the police power of the state even.

This power is to be distinguished from the right of eminent domain.

18 Am. & Eng. Encyclop. Law, pp. 744-746, and authorities there cited; 1 Dill. Mun. Corp. § 14.

Whatever power the city has, whether it be police power or what, it is the power that is delegated to it by law of the state.

Louisville Natural Gas Co. v. State, 21 L. R. A. 734, 135 Ind. 49; 18 Am. & Eng. Encyclop. Law, 746; 1 Dill. Mun. Corp. § 141.

Now if the state desired to confer all of its police power upon a city touching upon any subject, without restriction or limitation, it would take a very short law to do it. But the

state does not undertake to do that, at least the state of Indiana does not, and particularly the charter of this city which governs this case does not.

The question is, Does the extreme exercise of power attempted fall within the powers conferred upon the city, and if so, does it fall within the powers conferred upon the board of public works, as those powers are now conferred either by law or by ordinance pursuant to law?

There is no law of the state, and no ordinance of the city, making any provision for collecting payment off of the householder whose garbage is removed.

Where contracts for public work or service of any kind are required to be let pursuant to advertisement, to the lowest bidder, there is some law of force of which the bidder has assurance that payment for the service he is undertaking to render, and for the whole of it, can be enforced at law.

Messrs. John F. Carson and C. W. Thompson also for appellants.

Messrs. Miller, Winter & Elam for appellees.

Dailey, J., delivered the opinion of the court:

On July 12, 1893, the city of Indianapolis, by its board of public works, by contract (a copy of which is in the complaint) clothed James H. Woodward with the exclusive right and obligation to remove the garbage from the premises of all persons in said city, and to transport the same through the streets thereof to the crematory. On August 18, 1893, with the written consent of the city, said Woodward assigned the contract to the appellee Jameson. The circuit court, at the suit of Jameson, after due notice and hearing on complaint and affidavits, enjoined appellants from interfering with or removing such garbage. By this appeal, appellants attack the ruling of the circuit court granting that injunction.

The general ordinance of the city (No. 5, 1893) designed to effectuate the contract is set out in the complaint. The contract makes it the duty of the contractor to remove all the garbage. The ordinance requires the householder to place the garbage in proper receptacles convenient for removal, and forbids any person other than the contractor to interfere with or remove the same. The ordinance is expressly authorized by section 23 of the charter (Acts 1891, pp. 143-145), wherein it is provided that the common council shall have the power to enact ordinances "to prevent the deposit of any unwholesome substances, either on private or public property, compel its removal to designated points, and to require slops, garbage, ashes, waste or other material to be removed to designated points, or to require the occupants of premises to place them conveniently for removal." In strict pursuance of this expressly authorized power, the ordinance in question was passed. Section 59 of the city charter (Acts 1891, pp. 167-169 *et seq.*) expressly authorizes the board of public works "to remove all dead animals, garbage, filth, ashes, dirt, rubbish or other

offal from such city, either by contract or otherwise." Accordingly, the common council having authority to pass the ordinance providing for the collection and storage, in proper receptacles, of the garbage, and the board of public works having authority to remove the same, the ordinance was passed, and the contract was made, each supplementing the other, to carry out the common duty imposed on the two bodies for the protection of the public health, in the prompt and efficient removal of all garbage in an inoffensive manner. The contract was let to the lowest bidder, as section 61 of the charter provides. It fixes the price for removal by the contractor at .249—practically one fourth—of a cent per pound, this being the maximum; permits the contractor to collect the same from the householder, the party producing the garbage; and expressly exempts the city from any liability in the premises. Appellants contend that this contract is invalid for several reasons: First, the contention is that the contract is invalid because the board of public works had no authority to make it. The first reason given in support of this claim is that the provision for payment by the householder for the removal of his garbage is an "assessment" against him or his property, and, as the charter does not confer the power to make an assessment of this kind, therefore it cannot be made. If the premises were correct, the conclusion would necessarily follow. The infirmity is in the assumption that this contract provides for an assessment, either upon person or property. An assessment is a charge laid upon individual property because the property upon which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys in common with others as a citizen. *Elliott, Roads & Streets*, 370. When the legislature so declares, a lien in the amount fixed fastens upon the property as against the owner and all who acquire rights subsequent to the time it attaches. *Id.* 432. An assessment is levied only upon the property benefited. It has been uniformly restricted to the means for paying those local burdens arising by reason of the wants of small communities. The general meaning of the word "assessment" is authoritative imposition. *Welty, Assessments*, pp. 2, 3.

In this case there is nothing of the kind. No householder is required to have garbage removed or pay for its removal. Every householder may destroy all his garbage on his own premises, taking care not to create a nuisance in so doing. If he does not destroy all, he may reduce it to a minimum. This ordinance and contract simply provides that, if he does produce garbage which has to be carted through the streets, the city or its agent, the contractor shall do the work at his expense. Whatever else it may be, it is certainly not an assessment. It has not a single element of an assessment, for the reasons—First, that, except by the voluntary act of the householder, nothing is to be paid at all; second, no definite amount in any event is to be paid; third, nothing is made a charge upon the property. The whole ar-

rangement is simply a provision by the ordinance—First, that garbage shall be collected and carted through the streets only by the licensed agent of the city; second, that parties producing the garbage needing to be thus carted away shall place the same in proper vessels, convenient for the removal by such agent; and, third, that such agent shall charge not exceeding the price named for removing the same. It is no more an assessment than is the provision of the ordinance fixing the rate of payment for gas or water, or street-car fare, as authorized by section 59 of the city charter, or the numerous provisions of section 28, specifying that the common council may require things done by the parties, and, if not so done, have the city do them at their expense, as taking down dangerous buildings, removing snow from the walks, etc. It cannot be said that the charter does not expressly authorize the fixing of prices for removal of garbage, because the same section which confers upon the board the power "to remove all dead animals, garbage, filth, ashes, dirt, rubbish or other offal from such city, either by contract or otherwise," impliedly authorizes the fixing of a price therefor. That is the very essence of the power to contract. The appellant's learned counsel says: "But the charter never gave the board of public works power to contract for removal of garbage on behalf of any one, except on behalf of the municipal corporation. Had it undertaken to confer upon them the power to fix prices which should be paid by citizens for its removal, then it would have said so in express terms, just as it did with reference to water, gas, etc. The fact that it did not do so is evidence . . . that it contemplated or conferred no such power." It is within the general power of a government to preserve and promote the public welfare, even at the expense of private rights. 18 Am. & Eng. Encyclop. Law, pp. 739, 740. Police power is defined in *New Orleans Gas-Light Co. v. Hart*, 40 La. Ann. 474, where it is said: "It is the right of the state functionaries to prescribe regulations for the good order, peace, protection, comfort, and convenience of the community, which do not encroach on the like power vested in congress by the Federal Constitution." In *Com. v. Alger*, 7 Cush. 53, the court lays down the rule that "rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." In *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 149, 62 Am. Dec. 625, it is said: "By this general police power of the state, persons and property are subjected to all kinds of restraints and diligence in order to secure general comfort, health, and prosperity of the state." In *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 192, 23 Am. Rep. 71, the court says: "The police power of the state is coextensive with self-protection, and is applicably termed the 'law of 28 L. R. A.

overruling necessity.' It is the inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society." *Hale v. Lawrence*, 21 N. J. L. 714, 47 Am. Dec. 190; *Tiedeman*, Pol. Powers, § 1. It is said in 18 Am. & Eng. Encyclop. Law, pp. 744, 745, that a law which might be invalid as an exercise of the right to tax for revenue might be sustainable where its purpose was the promotion of the general public health or morals. In exercising the power of taxation, no discriminations are to be made, while in the exercise of police power, the state is ordinarily to be governed only by considerations of what is for the public welfare. It rests solely within legislative discretion, inside the limits fixed by the constitution, to determine when public safety or welfare requires its exercise. This must be determined by recognized principles. "Courts are authorized to interfere and declare a statute unconstitutional only when it conflicts with the constitution. With the wisdom, policy, or necessity of such an enactment they have nothing to do." *Id.* 746.

It resolves itself solely into a question of power, and not of mere reasonableness. We recognize the rule that a municipal corporation has no power to treat a thing as a nuisance which cannot be one; but it is equally well settled that it has the power to treat as a nuisance a thing that, from its character, location, and surroundings, may or does become such. In doubtful cases where a thing may or may not be a nuisance depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question. *Baumgartner v. Hasty*, 100 Ind. 577, 578, 50 Am. Rep. 830. In 15 Am. & Eng. Encyclop. Law, 1178, it is said: "Municipal corporations are usually given authority to pass ordinances providing for the preservation of public health. This is one of the police powers of the state, and there can be no doubt that the sovereignty has the right to delegate this power to municipal authorities." In *Beach on Public Corporations* (vol. 2, § 995) it is said: "A by-law of a city prohibiting any person not duly licensed by its authorities from removing the house dirt and offal from the city is not in restraint of trade, but reasonable and valid, on the ground that, in the interest of public health, a city is justified in providing for some general system for removing offensive substances from the streets by persons engaged by the city, and responsible for the work, at such times as they are directed to attend to it." So, *Dillon on Municipal Corporations* (sec. 369) is as follows: "Our municipal corporations are usually invested with power to preserve the health and safety of the inhabitants. This is, indeed, one of the purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of corporations to ordain. It will be useful to illustrate the

subject by reference to some of the adjudged cases. An ordinance of a city prohibiting, under a penalty, any person not duly licensed therefor by the city authorities from removing or carrying through any of the streets of the city any house dirt, refuse, offal, or filth, is not improperly in restraint of trade, and is reasonable and valid. Such a by-law is not in the nature of a monopoly, but is founded on a wise regard for the public health. It was conceded that the city could regulate the number and kind of horses and carts to be employed by strangers or unlicensed persons, but practically it was considered that the main object of the city could be better accomplished by employing men over whom they have entire control, night and day, who are at hand, and able, from habit, to do the work in the best way and at the proper time." It has often been held to be reasonable to grant to one or more the exclusive right to remove the carcasses of dead animals and other offal of a city. *Vandine, Petitioner*, 6 Pick. 187, 17 Am. Dec. 351; Cooley, Const. Lim. 6th ed. p. 739; Tiedeman, Pol. Powers, p. 316; Dill. Mun. Corp. §§ 141, 142. In the case of *Boehm v. Baltimore* (1883) 61 Md. 259, it was held that the city, under the power to preserve the health and safety of its inhabitants, had the undoubted right to pass ordinances creating boards of health, appointing health commissioners with other subordinate officers, regulating the removal of house dirt, night soil, refuse, offal, and filth by persons licensed to perform such work, and providing for the prohibition, abatement, and suppression of whatever was intrinsically and inevitably a nuisance. The case of *Vandine Petitioner*, *supra*, is in point here. It directly adjudges that a by-law of the city of Boston prohibiting any one not licensed by the city from removing house dirt and offal from the city is valid. On the trial the court instructed the jury that the subject of regulation was one on which it was proper for the city to legislate, it having reference to the public convenience and the health of the inhabitants; . . . that it was the duty of the city to remove from the streets and houses all nuisances which might generate disease or be prejudicial to the comfort of the inhabitants, and it was both reasonable and proper that it should be in their discretion to contract with persons to perform the work, so that it might be done on a general system. If it were found, on experiment, that the duty would not be thoroughly and faithfully performed, or would be attended with more expense to the city, if individuals should remove these substances in their own carts and upon their own account, it was competent for the city government to enact a by-law which should subject all such persons to the vigilance of that government, and which should require them to be first licensed. The jury were further instructed that so far as, by virtue of the general laws of the commonwealth, the city council had power to make by-laws for governing the city, these regulations were binding on all persons actually resident within its limits, either for business or pleasure, and whether inhabitants or strangers; that the object of

the by-law being to secure to the city the regular and effectual removal, by public authority, of all sources of nuisance which are collected and accumulated in the houses in the city, by not suffering individuals under no obligation of trust to interfere in the same, it amounted to the prohibition of a nuisance, and that, so far as it affected trade, it was not a restraint, but only a regulation, of it. The defendant excepted to these instructions, and, on appeal, urged chiefly that the by-law was void, being in restraint of trade; also, that it created a monopoly, and that the city had no right to say it should be removed only by a person having a license. In ruling on this question, the court upheld the instructions of the trial court, and said: "The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard any expenses which are deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times, and in such manner, as would best accommodate them. Every one will see that, if this business were thus managed, there would be continual moving nuisances at all times, and in all the streets of the city, breaking up the streets by their weight, and poisoning the air with their effluvia. . . . It seems to us . . . that the city authority has judged well in this matter. They prefer to employ men over whom they have entire control by night and by day, whose services may be always had, and who will be able, from habit, to do this work in the best possible way and time. Practically, we think the main object of the city government will be better accomplished by the arrangement they have adopted, than by relying upon the labor of others, against whom the government would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in small loads, which will not injure the pavements nor annoy the inhabitants. We are satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city."

In view of the great weight of authorities, we are of the opinion that the contract and ordinance assailed are both within the long-settled and clearly recognized lines of police power, which is as broad as the power of taxation, and, being simply a sanitary regulation, they cannot be considered as in the nature of confiscation or an attempt to create a monopoly. The provision for the removal of the garbage at the expense of the property holder is an extreme exercise of this power, but is an incident of its existence. It is a familiar rule that if the power is conferred upon a municipal corporation by the laws of the state, and the law is silent as to the mode of doing such act, the corporate authorities are necessarily clothed with a reasonable discretion to determine the manner in which such act shall be done; all the reasonable methods of executing such power are inferred. *Louisville Natural Gas Co. v. State*,

185 Ind. 49, 21 L. R. A. 784; Thornton, Mun. Law, § 8108, *note* 3, and cases cited. The right of removal, by contract or otherwise, being vested in the city, it was for the common council to determine whether the work should be paid for out of the city treasury, or by the person producing the garbage, and their action is not subject to review here. It may be that the hotel and restaurant keepers will lose money on their garbage under the workings of this contract, where they before derived a revenue; but if, under this plan, the sources of contagion and disease will be more speedily and effectively removed, the city was empowered to make this contract. It may be that the common council thought it unjust that the householders who produced a small amount of garbage should be taxed to assist in removing the large accumulations of hotels and restaurants, but we have nothing to do with the motives that prompted the act in question. We find no error in the record.

The judgment is affirmed.

McCabe, J., dissenting:

I cannot concur in all the reasoning in the foregoing opinion, though I do not dissent from the general conclusion reached. I am unable to concur in so much of the opinion as holds that persons whose business creates the large quantities of slops and offal, and which is of large value, are liable to have the same taken from them and destroyed without compensation. I do not think it within the power of the legislature or the city to confiscate the private property of the citizen, and destroy it, except upon necessity. I do not think there is any necessity to do so with such large quantities of offal and slops until its owners have refused to comply with reasonable regulations for the removal thereof by such owners.

A petition for rehearing was subsequently filed in response to which on March 1, 1893, the following opinion was filed:

Per Curiam:

The question whether or not the appellee could recover from the citizen the contract price, or any other sum, for the removal of garbage, is not involved in this case. The right of the appellee to recover in this action does not depend upon the liability of the citizen to pay for the removal of his garbage. Any expression or reasoning in the opinion that there is such liability was not necessary to the determination of this cause. It will be time to decide that question when it arises, if ever, between the appellee and the citizen in an action to recover for the removal of such garbage. If it were admitted that the garbage producers are not bound by the terms of the contract, and cannot be compelled to pay for the removal of the garbage, such fact would not be available as a defense to this action by appellants. No one, unless it be the appellee, could take advantage of such fact. For all that appears in the record, he may be willing to comply with the terms of the contract, even if the persons on whom he has agreed to rely for payment are not bound thereby, and nothing can be collected from them. If so, he has the same right to recover in this action against the appellants as if he were to be paid out of the general fund of the city, or could compel payment by the citizen. The appellee, by this action, does not seek to avoid the contract, but to protect the rights he claims under it. We adhere to our opinion that the judgment of the court below should be affirmed.

Petition for a rehearing is overruled.

KANSAS SUPREME COURT.

John F. TAYLOR, *Plff. in Err.*,
v.

Joseph BLEAKLEY.

(.....Kan.....)

*1. The legislature, within the terms of the Constitution, may adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary to prevent intimidation, fraud, bribery, or other corrupt practices, provided that the voting be by ballot, and that the person casting the vote may do so in absolute secrecy.

2. The following provision of section 25, chap. 78, Session Laws 1893, "if a

* Headnotes by HORTON, Ch. J.

NOTE.—How far the right to vote is absolute, is the question considered in a *note* to *State v. Blake* (N. J.) 25 L. R. A. 430.

As to statutory requirement of marking ballots in squares or designated places, see *note* to *Bowers v. Smith* (Mo.) 16 L. R. A. 754; also *Ellis v. May* (Mich.) 25 L. R. A. 325.

28 L. R. A.

voter . . . fails to mark the ballot as required by other section of this Act . . . his ballot shall not be counted for such office," construed in connection with the other sections of that Act, is mandatory.

3. Under the provisions of sections 22 and 25 of chapter 78, *Session Laws 1893*, commonly known as the "Australian Ballot Law," ballots not marked with a cross (X), substantially in or upon the designated square or place, should not be counted.

(April 6, 1893.)

ERROR to the District Court for Leavenworth County to review a judgment in favor of plaintiff in an election contest to determine the right to the office of treasurer of the County of Leavenworth. *Affirmed.*

Statement by Horton, Ch. J.:

At the general election in the fall of 1893, Joseph Bleakley was the Republican candidate for the office of county treasurer of Leavenworth county, and John F. Taylor the

Democratic candidate for that office. From the canvass made by the county clerk and commissioners of the returns of the election for the office, it appeared that Bleakley and Taylor had an equal number of votes, and a higher number of votes than any other person. The commissioners proceeded to determine by lot which of those two persons should be elected. Lots were drawn, which resulted in awarding the certificate of election to Taylor. Thereupon Bleakley instituted proceedings in contest, before a contest court duly organized for that purpose, and composed of *Probate Judge Hawn and Judges H. W. Ide and T. A. Hurd*, and the county clerk, as clerk of that court. The election was the first one held in Leavenworth county under chapter 78 of the Session Laws of 1893, commonly known as the "Australian Ballot Law," and the contest court, in counting the ballots, construed that law. Before the official ballots were counted by the contest court, arguments were made before the court regarding the proper interpretation of said chapter 78.

The first decision of the contest court concerning the law was announced by Hon. H. W. Ide. It was as follows: "It is difficult to lay down many rules in advance by which it shall be determined whether disputed ballots should be counted or not. But two or three general principles seem to me to be so clear that I have no hesitancy in giving my assent at this time. The present election law provides a new system of voting, calculated to secure privacy, personal independence, and freedom from party or individual surveillance, and, in this respect, tends to promote an independent and free exercise of the elective franchise. It provides that all the tickets shall be printed on one sheet of paper, and the ticket of each party shall be in a column by itself, with a proper heading, including its political character. At the end of each name a space is provided for in the shape of a square, within which the voter is to indicate his choice of candidates by making a mark in the shape of a X, and the making of any mark on his ballot by which his ticket can be identified is especially prohibited. The principal questions discussed by counsel, which we are asked to decide, are: May the mark prescribed by the statute be in any other place than in the square at the left of the candidate's name, or in any other style or form than the cross described by the statute? In my opinion, this mark must be substantially where the statute says it shall be. It will not be valid to put it at the head of the ticket, nor at the right of the candidate's name, nor above or below it, or across its face. Yet I do not think it must be all within the square, but some portion of it must be. If it is all outside of the square, although only by a small distance, it cannot be counted. As to the form of the mark required by law, some little allowance must be made for the want of practice with a pen or pencil, and carelessness or haste of the voter, or for poor sight, due to age, and to the trembling hand of enfeebled nerves, but the mark must conform substantially to that designated in the law. Difficulty may and

probably will be encountered when we come to the inspection of the ballots, in determining whether a ballot is or is not in its proper place, or is in the proper form. But this is a difficulty inherent in the very nature of the case, and cannot be arrived at by general rules, but each case will have to be determined by itself, under the principles herein enunciated."

After a part of the official ballots were examined by the contest court, it appears that there was a rehearing allowed concerning the construction of the law, and "thereupon the court decided that it would go back to the beginning of the count in the contest, and go over all of said ballots according to a different rule from that heretofore governing them, which was done." And the count then proceeded, with the result that the contest court decided that John F. Taylor was duly elected on the 7th of November, 1893, as treasurer of Leavenworth county. The entire number of official ballots cast at the election were disposed of by the contest court as follows:

Counted for Bleakley without objection	2,057
Counted for Bleakley against Taylor's objection	685
Counted for Taylor without objection	2,198
Counted for Taylor against Bleakley's objection	579
Ballots objected to, but not counted for either party	24
Ballots not indicating a vote for either party	1,206

Total 6,757

By the count of that court, according to the rule of construction finally adopted, Bleakley received 2,752 votes, and Taylor 2,775 votes, a plurality of 23 votes for the latter. Bleakley prosecuted his petition in error to the district court, which reversed the ruling of the contest court, and decided that Bleakley was duly elected treasurer of Leavenworth county on the 7th of November, 1893. The district judge (Hon. L. A. Myers), at the time of rendering judgment in favor of Bleakley against Taylor, handed down the following opinion: "I have given a careful consideration, and, I trust, due weight, to the many authorities cited, as well as to the very able and exhaustive arguments of counsel in this case. I have endeavored to fully consider the rights of the voter, as well as the rights of the parties to this contention. Fully appreciating the great interests at stake, it is a relief to know, as stated by counsel, that, no matter what the result here, the supreme court will be called upon to give its unerring judgment upon the points involved. There can be no question but that our Australian ballot law was copied bodily, with but few immaterial alterations, from the Iowa law passed a year earlier. The supreme court of that state, in a well-considered opinion [*Whittam v. Zahorki*, 59 N. W. Rep. 57], has given its interpretation of that law. I believe that interpretation is the right one. To hold otherwise would, in my judgment, defeat the main purpose of the law itself. And this view is, as appears to me, upheld, in the main, by the weight of decisions in other states. Our own supreme court, in *Boyd v. Mills*, 53 Kan. 594, 25 L. R. A. 486, while holding that a mistake on

the part of the officer furnishing the ballots should not operate to the prejudice of the honest voter, go further, and say they do not decide that any of the provisions of the law may be disregarded, or that any officer may escape liability to punishment for violating any of its provisions. Our supreme court, following an unbroken line of decisions, draws a marked distinction between a disregard of the law on the part of the voter, and an honest mistake on the part of an election officer. Construing the different sections of the act prescribing the form of ballot to be prepared and furnished, the directions to be printed on such ballot for the guidance of the voter, 'that he shall make a cross-mark in the square to the left of the name of the candidate for whom he wishes to vote,' together with the plain provision in section 22 that the voter, 'on receipt of his ballot, shall prepare the same by making in the appropriate margin or place a cross to the left of the name of the candidate of his choice,' I can come to no other conclusion than that the law means that the cross must be made substantially in or upon the square. The further provision in section 25 that, 'if the voter fails to mark the ballot, as required by other sections of this act, his ballot shall not be counted,' makes this requirement mandatory. As to the other points raised: First. I think the law is constitutional, notwithstanding the forcible and ingenious argument of counsel for the contestee. Second. The official ballots put in evidence fully prove, if proof were necessary, that the contestor was regularly nominated, and that his name was properly on the ballots. Third. The act of a judge of the election in writing his name, instead of his initials, upon the ballot, would not invalidate such ballot, unless done at the request of the voter, or as an identifying or distinguishing mark. Fourth. Ballots voted at one precinct which had been prepared for another would not be void, where the same had been prepared and furnished by the proper officer by mistake, and without collusion or fraud. In arriving at these conclusions, I am not unmindful of the high character and great ability of the gentlemen composing the contest court; and, from their earlier rulings, I venture to believe that, if they had had the Iowa decision before them, they would have concurred in the views here expressed. The judgment of the contest court is reversed."

Section 14 of said chapter 78, Sess. Laws 1893, reads, in part: "The party appellation or title shall be printed in capital letters, not less than one fourth of an inch in height, and immediately below such party appellation or title shall be printed the following statement: Electors will make a cross-mark thus, (X) in the square at the left of the name of the candidate for whom they wish to vote." Section 15 has the following: "For all elections to which this act applies the county clerks in their respective counties shall have charge of the printing of the ballots for all general elections, and shall furnish them to the judges of such elections."

The official ballots furnished to the voters of Leavenworth county at the November elec-

tion for 1893 had the following words plainly printed at the top of each ballot: "Electors will make a cross-mark, thus, (X) in the square at the left of the name of the candidate for whom they wish to vote." At the left of the name of each candidate appointed on the official ballot was a square □ for the electors to mark a cross, thus, (X) therein.

The first part of section 22 is as follows: "On receipt of his ballot, the vote shall forthwith, and without leaving the inclosed place, retire alone to one of the voting booths so provided, and shall prepare his ballot by making in the appropriate margin or place a cross (X) to the left of the name of the candidate of his choice for each office to be filled, or by writing in the name of the candidate of his choice in a blank space on said ticket, making a cross (X) to the left thereof." The first part of section 25 reads: "If a voter marks more names than there are persons to be elected to an office, or fails to mark the ballot as required by other section of this act, or if for any reason it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office." Section 28 reads, in part, thus: "Any voter who may declare upon oath that he cannot read the English language, or that by reason of any physical disability, he is unable to mark his ballot, shall, upon request, be assisted in marking his ballot by two of the election officers of different political parties, to be selected from the judges and clerks of the precinct in which they are to act, to be designated by the judges of election of each precinct at the opening of the polls. Such officer shall mark the ballot as directed by the voter and shall thereafter give no information regarding the same."

Taylor excepted to the rulings of the court, and brings the case here.

Messrs. Robert Crozier, Fenlon & Fenlon, L. B. Wheat, S. E. Wheat, and J. H. Atwood, for plaintiff in error.

Messrs. Lucien Baker, W. A. Porter, and William C. Hook, for defendant in error.

Participation in the elective franchise is a privilege, rather than a right, and it is granted or denied upon grounds of general policy.

Cooley, Const. Lim. § 589; *Blair v. Ridgely*, 41 Mo. 63, 97 Am. Dec. 248.

Whittam v. Zahorik (Iowa) 59 N. W. Rep. 57, says: "It is within the power of the general assembly to prescribe regulations which the voter must follow in preparing his ballot, and those provided for in the statute under consideration are reasonable, and abundant provision is made to enable the voter to know and follow them. We conclude that a ballot which is not marked with a cross or crosses made substantially thus, "X," and placed substantially within the circle or square or squares printed at the places designated, should not be counted.

Parvin v. Winberg, 15 L. R. A. 775, 130 Ind. 561; *Bechtel v. Albin*, 134 Ind. 193; *Sego v. Stoddard*, 22 L. R. A. 468, 186 Ind. 297; *Re Vote Marks*, 17 R. I. 812; *Re Ballot Marks*, 18 R. I. —; U. S. Gen. Dig. 1893, p. 2235; *Lindstrom v. Manistee County Canvassers*, 19

L. R. A. 171, 94 Mich. 467; *State v. Russell*, 15 L. R. A. 740, 84 Neb. 116; *Fields v. Osborne*, 19 L. R. 551, 60 Conn. 544; *Boyd v. Mills*, 25 L. R. A. 486, 53 Kan. 594; *State v. Hagen*, (Iowa) Sept. 29, 1894; *Curran v. Olayton*, 86 Me. 42.

Horton, C. J., delivered the opinion of the court:

The contention in this case is over the construction of the following provision of section 25, chapter 78, *Sess. Laws 1893*: "If a voter . . . fails to mark the ballot as required by other section of this act . . . his ballot shall not be counted for such office,"—in connection with the other sections of that act. The contest court found that Taylor had received 2,775 votes, and Bleakley, 2,752, giving Taylor a majority of twenty-three votes. There were sufficient ballots counted by the contest court for Taylor, after deducting similar ballots counted for Bleakley, where the cross (X) or mark of the voter was entirely outside of the designated square or place at the left of his name, to change the result declared by that court. The district court ruled that the requirement of section 25 was mandatory, and therefore refused to count the ballots in which the cross (X) or the mark of the voter was entirely outside of the designated place. This ruling is complained of.

It is insisted that the provision is directory only, and that, if the purpose of the voter can be ascertained with reasonable certainty from the ballot cast by him, effect should be given to it. Unquestionably, prior to the passage of chapter 78 by the Legislature of 1893, the rule that the intent of the voter, as evidenced by his ballot, is controlling in the count thereof, was, by a long course of judicial determination, firmly imbedded in the jurisprudence of this state. *Jones v. State*, 1 Kan. 278; *Gilleland v. Schuyler*, 9 Kan. 589; *Wilds v. State Board of Canvassers*, 50 Kan. 147. But the legislature of 1893 adopted what is known as the "Australian Ballot System." The enactment of that statute was designed to inaugurate an important departure from the mode of voting and counting votes which had existed in this state prior to its passage. If the legislature intended to say that a ballot which had failed to accord with certain specifically enumerated requirements on the part of the voter could not be counted, the purpose of the legislature, irrespective of all considerations as to the intent or effect of such failure, if not unconstitutional, cannot be disregarded by courts. If the statute is harsh in its terms, the remedy is with the legislature. Our statute was taken almost bodily from the Iowa law. The supreme court of that state has recently passed upon the pivotal question involved in this case. *Whittam v. Zahorik* (Iowa) 59 N. W. Rep. 57. That court ruled "that ballots not marked with a cross in any circle or square should not be counted." That decision was followed in *State v. Hagen* (Iowa) 60 N. W. Rep. 108. See also, the following cases: *Lindstrom v. Manistee County Canvassers*, 94 Mich. 467, 19 L. R. A. 171; *State v. Russell*, 84 Neb. 28 L. R. A.

116, 15 L. R. A. 740; *Parvin v. Wimberg*, 130 Ind. 561, 15 L. R. A. 775; *Curran v. Clayton*, 86 Me. 42; *Bechtel v. Albin*, 134 Ind. 193; *Sego v. Stoddard*, 136 Ind. 297, 22 L. R. A. 463; *Re Vote Marks*, 17 R. I. 812; *Re Ballot Marks*, 18 R. I. —; *Fields v. Osborne*, 60 Conn. 544, 19 L. R. A. 551. In *Parvin v. Wimberg*, *supra*, it is observed: "If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts, whose duty it is to enforce the law as they find it, must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not; for such a statute is mandatory, and the court cannot enter into the question of its policy. In this instance it has declared that the mode by which the elector shall express his choice shall be by stamping certain designated squares on the ballot. There is nothing unreasonable in the requirement, and it is simple and easily understood. Furthermore, if he is illiterate or is in doubt the law makes ample provision for his aid. If he does not choose to indicate his choice in the manner prescribed by law, he cannot complain if his ballot is not counted. *Kirk v. Rhoads*, 46 Cal. 399. If we hold this statute to be directory only, and not mandatory, we are left entirely without any fixed rule by which the officers of election are to be guided in counting the ballots." In *Curran v. Clayton*, *supra*, it was decided that under the statute of Maine giving the voter a clear opportunity to designate by a cross-mark (X) his choice of candidates, the place and method of marking the ballot being regulated and defined in the statute, ballots defectively and illegally marked should be rejected. The provision of chapter 78, requiring the voter to make a cross-mark (X) to the left of the name of the candidate of his choice for the office to be filled, was construed by the house of representatives of the state at its late session. In the contest brought by *W. M. Glenn v. C. E. Wightman*, claiming to have been legally elected representative from Greeley county, a written report was filed by the election committee. From that report we take the following excerpt: "After a very careful consideration of the 'Australian Ballot Law,' and an exhaustive examination of the authorities of this and other states construing its provisions, your committee has reached the unanimous conclusion that none of the ballots [those in dispute] should have been counted for either candidate. The great innovation upon the prior law made by the Australian law is that the intention of the voter shall be ascertained by an application to the ballot of the directions contained in the statute, and the provisions of our statute directing the manner in which the voter shall express his choice are mandatory. Another object of the law is to prevent the putting upon the ballot by the voter, or any other person, any mark, save and except the cross in the proper space, which will designate that ballot from any other ballot cast. Should the door be open to permit the counting of ballots containing any other than the marks

permitted by the statute, it would enable persons who had bargained for votes to agree upon a distinguishing mark whereby it could be determined, by a mere inspection of the ballot, whether or not the voter had carried out his part of the contract, thereby thwarting one of the main objects of the law." The report of the election committee was adopted by the house without dissent, the membership of which contained over forty persons who were members of the Legislature of 1893 which enacted chapter 78. In *Boyd v. Mills*, 53 Kan. 594, 25 L. R. A. 486, where all the ballots used by the voters of one township were printed on colored paper instead of white, this court ruled that the ballots were properly counted, but remarked, "They were furnished by the judges to the voters, and were the only ballots furnished to or used by any voter at the voting place, and therefore the color of the ballots was not sufficient to prevent the counting thereof," and added: "The secrecy of the ballot has been in no wise impaired. The voters themselves have manifested no disposition to disregard the law, and it may be fairly inferred that the use of the colored ballots was an honest mistake on the part of the judges of the election. Had a part of the ballots been white, and a part colored, so as to afford some grounds for identification of the votes cast by the individual electors, a different question would be presented. In considering the statute, we are to keep steadily in mind the evident purpose of the legislature in its enactment. It is plain that among the most prominent ends sought to be attained was that of absolute secrecy. Any mark or distinguishing feature on the ballots which would enable a person other than the voter himself to identify the ballot, and find out how the elector had voted, was intended to be strictly prohibited. By this decision we do not intend to say that any of the provisions of the law may be disregarded, or that any officer may escape liability to punishment for violating any of its provisions."

As sustaining the final ruling of the contest court, our attention is called to *Coleman v. Gernet*, 14 Pa. Co. Ct. Rep. 578; *Johnson v. Casnovia Village Canvassers*, 101 Mich. 187; *State v. Russell*, 84 Neb. 116, 15 L. R. A. 740; *Spurgin v. Thompson*, 87 Neb. 89. The *Coleman Case* was decided by an inferior court, but follows the decision of *Woodward v. Sarsons*, L. R. 10 C. P. 783. In that case the statute referred to differs from ours. Lord Coleridge, in the opinion, said: "The second section enacts, as to what the voter shall do, that 'the voter, having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in an inclosed box.' This is all that is said in the body of the act about what the voter shall do with the ballot paper. That which is absolute, therefore, is that the voter shall mark his paper secretly. How he shall mark it is in the directory part of the statute." The cases of *State v. Russell*, and *Spurgin v. Thompson*, *supra*, were decided by the supreme court of Nebraska. The statute of that state does not provide, if the ballot is not marked as required, it shall not be

counted. That statute has the provision that "when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, that it shall be the duty of the judges of election to count such part." Post, J., in referring to that provision, observed: "It may be, as contended by respondents' counsel, that the proviso in the last section was intended to apply only to ballots otherwise regular, but on which the voter has failed, through negligence, illiteracy, or other cause, to clearly express his intention as to every office named thereon. The inference is strong, however, from the language of the several sections to which reference has been made, that the legislature, by declaring a limited number of provisions to be mandatory, and a compliance therewith essential to a legal ballot, intended the other provisions as directory only." *Johnson v. Casnovia Village Canvassers*, *supra*, gives some support to the rule adopted by the contest court in finally counting the ballots, but even that case differs from this. In that case the official ballot contained the name of but one candidate for each office. A number of ballots voted were not marked in any manner. The court ruled that, in the absence of names of opposing candidates on the ballot, those referred to should be counted. An examination of the various decisions construing the Australian ballot law, adopted by so many states of the Union, shows that the current and great weight of authority in this country supports the construction adopted by the Iowa and Maine courts.

It is next insisted, if the provisions of sections 23 and 25, referred to, are mandatory, that the statute is in conflict with section 1, article 4, of the Constitution, which ordains that "all elections by the people shall be by ballot, and all elections by the legislature shall be *viva voce*." It is conceded that the word "ballot" means "a bit of paper having printed or written thereon the designation of an office, and the name of a person to fill it, and that the person casting it has a right to do so in absolute secrecy." The cardinal features of chapter 78 are two: First, an arrangement for polling by which compulsory secrecy of voting is secured; second, an official ballot, containing the names of all candidates, printed and distributed under official authority. The act compels a vote by ballot, and absolute secrecy. The marking of the vote in seclusion, and in such a uniform way as not to be readily used for identification, reaches effectively a great class of evils, including violence, intimidation, bribery, and corrupt practices, dictation by employers or organizations, the fear of ridicule and dislike, or of social or commercial injury,—all coercive and improper influence, of every sort, depending on a knowledge of the voter's political action. Voting according to a bargain or understanding is especially aimed at. No man has ever placed his money corruptly without satisfying himself that the vote was cast according to the agreement, or, in a phrase which has become only too common in elections, without proof that "the goods were delivered;" and when there is to be no proof by any distinguishing mark, sign, or otherwise, but the word of the

bribe taker (who may have received thrice the sum to vote for the briber's opponent), it is idle to place any trust in such a use of money. Wigmore, *Australian Ballot System*, 52. A ballot ought to be cast by the voter intelligently and thoughtfully. If so cast, there is no trouble in complying with the provisions of chapter 78. If a person is illiterate or physically disabled, he may have assistants to mark his ballot. No one is disfranchised by the act, nor are the provisions concerning the marking of the ballot difficult to understand. The legislature, within the terms of the constitution, may adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary to prevent intimidation, bribery, and fraud, provided the voting be by ballot, and the person casting the vote may do so in secrecy. *Ourran v. Clayton*, *Whittam v. Zahorik*, and *Parcin v. Wimberg*, and *Boyd v. Mills*, *supra*; *Blair v. Ridgely*, 41

Mo. 63, 97 Am. Dec. 248. We do not think that the provisions of chapter 78, referred to, even if mandatory, conflict in any way with the constitution.

Finally, it is insisted that the district court, after reaching the conclusion it did concerning the counting of the ballots, should have sent the case back to the contest court for a new trial, and not rendered final judgment. The case as presented to this court, is upon admitted facts. The ballots in dispute are truly copied in the record. The case is before us in the nature of an agreed statement of facts. This court is able, from the examination of the admitted facts, to direct the judgment. There appears no necessity for reconvening the contest court. *The counting of the ballots by the District Court is approved, and the judgment of that court affirmed.*

All the Justices concur.

MARYLAND COURT OF APPEALS.

BALTIMORE & OHIO R. CO., *Appl.*,

v.

Richard W. CAIN.

(.....Md.....)

The arrest of a disorderly passenger without a warrant by an officer who was waiting at the depot for that purpose in response to a telegram from the conductor who pointed out the passenger as the party to be arrested, is not unlawful because made without a warrant and for an offense not committed within the view of the officer.

(March 26, 1896.)

A PPEAL by defendant from a judgment of the Circuit Court for Howard County in favor of plaintiff in an action brought to recover damages for alleged false imprisonment. *Reversed.*

The facts are stated in the opinion.

Messrs. John E. Cowen, W. Irvine Cross, and George Dobbin Penniman, for appellant:

To constitute the injury of false imprisonment there are two points requisite: (1) the detention of the person; and (2) the unlawfulness of such detention.

8 Chitty's Bl. *128.

Nothing appearing to the contrary, it must be presumed that the arrest was lawfully made.

Kane v. State, 70 Md. 551.

To hold a corporation liable for a tortious act committed by its agent, the act must be

done by its express precedent authority or be ratified and adopted by it, and the power to do the tortious act cannot be implied in the agent.

Where the master, under the circumstances, would not himself have power to order the arrest, no such authority can be implied in the agent.

Poulton v. London & S. W. R. Co. L. R. 2 Q. B. 584.

In this case the railroad company had no power to order Cain's arrest without a warrant, and the authority in the agent to order such an arrest, and thereby incidentally bind the company for the consequences, cannot be implied.

Carter v. House Mach. Co. 51 Md. 290, 34 Am. Rep. 811.

The conductor did not commit any overt acts as against Cair until he was arrested in the Washington depot, and if Cain was then drunk and disorderly his arrest was warranted by his condition and conduct and there was no liability for this arrest on the part of the railroad company.

Taaffe v. Stevin, 11 Mo. App. 514.

Messrs. John G. Rogers and J. S. Newman also for appellant.

Messrs. Alexander Kilgour and Joseph D. McGuire for appellee.

McSherry, J., delivered the opinion of the court:

This is an action of trespass for false imprisonment. The declaration alleges, in substance, that the plaintiff was a passenger upon one of the cars of the defendant; that he was received as such passenger at Washington Grove station, for the purpose of being carried from that place to Washington city, and that it thereupon became the duty of the defendant to carry the plaintiff safely to his destination; yet the defendant did not carry the plaintiff safely to Washington, but instead thereof, when the car conveying the plaintiff reached the depot of the defendant

NOTE.—For master's liability on account of a wrongful arrest by his servant, see *Mulligan v. New York & R. B. R. Co.* (N. Y.) 14 L. R. A. 791, and *note*; *Palmer v. Manhattan R. Co.* (N. Y.) 16 L. R. A. 136.

For arrest without warrant, see *State v. Hunter*, (N. C.) 6 L. R. A. 520, and *note*; *Burroughs v. Eastman* (Mich.) 24 L. R. A. 850; *Cabell v. Arnold* (Tex.) 22 L. R. A. 87.

*8 L. R. A.

in said city, the defendant, by its agents and servants, assaulted and beat the plaintiff, and forced him to go from said car and depot into the public street, and gave him into the custody of a police officer, who took him to a police station, and caused the plaintiff to be there imprisoned, without any probable cause, for the space of two hours, whereby he was greatly bruised, hurt, and injured. The defendant pleaded not guilty. During the progress of the trial, which resulted in a verdict and judgment for the plaintiff, four exceptions were reserved, and the defendant then took a pending appeal.

There is, as might be expected, and as is usual in cases of this character, some diametrically conflicting testimony respecting a portion of the material facts; but only so much of this as is necessary to give apprehension of the legal principles involved need be alluded to or stated. It is not disputed by either side that early on Sunday morning, August 21, 1893, the plaintiff and three companions drove to a camp meeting held at Washington Grove, in Montgomery county, and that, shortly after reaching the ground, they, together with several others, went to the railroad station near by, and the four, namely, the plaintiff and three others by the name of Watkins, took passage on the cars of the defendant for the city of Washington, in the District of Columbia. They entered the ladies' car, and from this point the conflicting statements of the witnesses begin. According to the plaintiff's evidence, these four parties demeaned themselves in the car with perfect propriety until the conductor charged one of them (Robert Watkins) with smoking. Watkins denied the accusation, and some words followed, whereupon the conductor threatened to put Watkins off the train. The plaintiff then told the conductor that he (the conductor) would go off too if he put Watkins off for nothing. After further words, the conductor said he would have the party arrested when they got to Washington, and, just as the plaintiff stepped off the train in the depot at Washington, he was arrested by a police officer, to whom the conductor, then standing by and pointing to the plaintiff and the elder Watkins, said, "These are the men." They were taken to the police station, and after having given their watches and effects as bail, and after having been in custody fifteen or twenty minutes, they were released. The conductor appeared against them at the station house. The plaintiff himself testified that "the police fined them five dollars apiece, and he left his watch as security, and afterwards produced the money and got the watch." Upon the part of the defendant it was proved by a number of witnesses, some of whom were passengers on the same train of cars, that the conduct of the plaintiff and his three companions was most disgraceful, shocking, and disorderly from the time they reached the camp-meeting ground until they arrived in Washington. They were drunk before boarding the train, and, as stated by one of the witnesses, "It was not decent for them to be where there were ladies;" and when they were remonstrated with, and requested to desist from using profane lan-

guage in the presence of ladies, they all, including the plaintiff, in loud and boisterous tones, replied by saying, "God damn the ladies." The defendant further proved that, after these men entered the ladies' car, they cursed and swore and drank liquor openly, and that one of them was smoking; that the conductor expostulated with them, and urged them to be quiet or to go into the smoking car, where they could drink and smoke as much as they pleased; that they said they had paid their fares, and would ride where it suited them. The conductor again appealed to them to be orderly, or he would be obliged to put them off the car; whereupon the plaintiff replied: "If you put him off [meaning Watkins, who was smoking], you will have to go too." It was further proved that numerous complaints were made by ladies and gentlemen about the conduct of these four men, and that one lady left the car, and went into the forward car. Afterwards other ladies who got on the train at other stations were put in the forward car, because it was not fit for them to enter the one where the men were. The conductor did not undertake to put them off, because he did not believe himself able to cope with these four intoxicated and lawless men. Just before the train arrived in Washington, the plaintiff was still behaving in a disorderly manner, and using profane language, in the hearing of the passengers on the same car. There were between fifty and sixty passengers on the train, most of whom were on their way to church in Washington. Finding himself unable to control these men or to suppress their disorder, and feeling powerless to eject them because of their threatened resistance, the conductor telegraphed from Forest Grove to Washington for an officer to arrest them, and, when the train drew up in the depot in that city, the policeman was there, and the conductor pointed out to him the plaintiff; and the officer then and there arrested the plaintiff, and took him to the station house. With these facts before the jury, there were two prayers presented by the plaintiff, both of which were granted; and there were nine presented by the defendant, all of which, except the sixth, were rejected. The view we take of the case dispenses with a separate consideration of each of these prayers, inasmuch as the defendant's fifth prayer raises the crucial inquiry contained in the record; and what we shall say in discussing that prayer will, with a few brief additional observations, dispose of most, if not all, of the others. The fifth prayer maintains that, if the plaintiff was riotous and disorderly, the conductor had the right to eject him; that, if the conductor was unable to do this by reason of the threat of resistance, then the conductor was justified in requesting the first police officer whom he could find to arrest the plaintiff; and it proceeds: "If the jury further find that the police officer at the Washington depot was the first police officer the conductor saw, and that the conductor used due diligence in procuring a police officer, and that the conductor directed the police officer to arrest the plaintiff for said disorderly conduct, that the de-

fendant is not liable for this arrest, and the verdict of the jury must be for the defendant." From this prayer, considered in connection with the evidence to which allusion has been made, it is obvious at a glance that the predominant and controlling question before us involves the legality of the conceded arrest made in the city of Washington. Under the undisputed proof, that arrest was made without a warrant having been first procured. It was not made for an alleged felony, nor for a misdemeanor or breach of the peace, committed within view of the officer who took the plaintiff into custody, but, if the evidence of the defendant's witnesses be credited, it was made for a flagrant breach of the peace, which began at Washington Grove, and continued into Washington city, on the morning train of the defendant, and was made at the instance of the conductor, the very moment he reached a place where he could deliver these intoxicated offenders into the custody of a police officer. Was the arrest so made illegal?

It is settled that an officer has the right to arrest without a warrant for any crime committed within his view. It was his duty to do so at the common law, and this is still the law (*Roddy v. Finnegan*, 43 Md. 504; *Phillips v. Trull*, 11 Johns. 486; *Derecourt v. Corbishley*, 5 El. & Bl. 189); and in cases of felony he may arrest upon information, without warrant, where he has reasonable cause. *Rez v. Birnie*, 1 Moody & R. 160; *Rohan v. Savin*, 5 Cush. 281. And so any person, though not an officer, in whose view a felony is committed, may arrest the offender. *Ruloff v. People*, 45 N. Y. 218. But the right of a person not an officer to make an arrest is not confined to cases of felony, for he may take into custody, without a warrant, one who in his presence is guilty of an affray or a breach of the peace. *Knot v. Gay*, 1 Root, 66. "It seems agreed that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace." 1 Russel, Crimes, 272; 1 Archbold, Crim. Pr. & Pl. 82; 1 Hawk. P. C. chap. 63, §§ 11, 17; 2 Hale, P. C. 90; East, P. C. 806; *Timothy v. Simpson*, 1 Crompt. M. & R. 757. The case last cited was one of trespass for assault and false imprisonment, and taking the plaintiff to a police station. Plea, that the defendant was possessed of a dwelling house, and the plaintiff entered the same, and then and there insulted, abused, and ill treated the defendant and his servants, and greatly disturbed them in the peaceable enjoyment thereof, in breach of the peace; whereupon the defendant requested the plaintiff to cease his disturbance, and to depart from and out of the house, which the plaintiff refused to do; that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a policeman, and requested the policeman to take the plaintiff into his custody, to be dealt with according to law, and the policeman gently laid his hands on the plaintiff, and took him into custody. It appeared in

evidence that the plaintiff entered the defendant's shop to purchase an article, when a dispute arose between the plaintiff and the defendant's shopman; that plaintiff refused on request to go out of the shop; the shopman endeavored to turn him out, and an affray ensued between them; that the defendant came into the shop during the affray, which continued for a short time after he came in; that the defendant then requested the plaintiff to leave the shop quietly, but, he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station house. Parke, B., in the course of his lucid opinion, said: "It is unquestionable that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable." Then, after quoting from Hawk. P. C. the same passage we have transcribed from 1 Russell, Crimes, the learned baron went on: "And pleas founded upon this rule, and signed by Mr. Justice Butler, are to be found in 9 Wentworth on Pleadings, 344, 345. And De Grey, Ch. J., on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace officer. And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but while he shows a disposition to renew it, by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, while those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and during the affray the constable may not merely on his own view, but on the information and complaint of another, arrest the offender; and, of course, the person so complaining is justified in giving the charge to the constable. Hale, P. C. 86. . . . It is clear upon the facts that there was a defense on the ground of the defendant's right to arrest for a breach of the peace in his presence." See also *Grant v. Moser*, 5 Mann. & G. 127; *Simmons v. Millingen*, 2 C. B. 534; *Webster v. Watts*, 11 Q. B. 311; *Cohen v. Huskisson*, 2 Mee. & W. 477; *Shaw v. Chairtille*, 3 Car. & K. 21; *Burns v. Erben*, 40 N. Y. 466; *Smith v. Donnelly*, 66 Ill. 464; *Tiedeman Pol. Powers*, 84; *State v. Sims*, 16 S. C. 486, a case strikingly apposite. In *Burns v. Erben*, *supra*, it was held that, "as a general principle, no person can be arrested or taken into custody without a warrant. But, if a felony or a breach of the peace has in fact been committed by the person arrested, the arrest may be justified by any person,

without warrant, whether there was time to procure a warrant or not; but, if an innocent person be arrested upon suspicion by a private individual, such individual is not excused unless such offense has, in fact, been committed, and there was reasonable ground to suspect the person arrested. *Hale*, P. C. 72; 1 Chitty, Crim. L. 15; *Holley v. Mir*, 8 Wend. 353, 20 Am. Dec. 703.

Now, if it be true that the plaintiff was guilty of the reprehensible and disorderly conduct attributed to him by the witnesses, he was incontestably engaged in a flagrant and an outrageous breach of the peace, as pronounced as if there had been an actual affray during the whole time he was in the defendant's car; and it was clearly lawful, under these conditions, for the conductor to expel him and his drunken companions from the train if he had a sufficient force to overcome their threatened resistance, or else to arrest them all without warrant, and then deliver them to the first peace officer he could procure within a reasonable time. If this were not so, then, as said by *Lord Chief Justice Denman* in *Webster v. Watts*, *supra*, "the peace of all the world would be in jeopardy." And it would be in jeopardy, because if, in such and similar instances, no arrest could be lawfully made without a warrant, the culprit, "if transient and unknown, would escape altogether," before a warrant could be obtained (*Mitchell v. Lemon*, 84 Md. 181), and there would soon cease to be any order or any security or protection afforded the public on swiftly moving railroad trains, or even elsewhere, unless a peace officer were constantly present. The delay necessarily incident to obtaining a warrant would be in many, if not in most, cases of this and a kindred character equivalent to an absolute immunity from arrest and punishment; and, should the name of the offender be unknown, he, most probably, would never be apprehended if once suffered to depart. The law is not so impotent and ineffective as that. Being physically unable to expel these alleged riotous persons from the train, the conductor telegraphed for a peace officer, and without delay, and while the plaintiff was still drunk, caused his arrest the instant the officer thus summoned came in view of the plaintiff. If, then, any bystander could, in the language of *Baron Parke*, "for the sake of the preservation of the peace, . . . restrain the liberty of him whom he sees breaking" the peace, the act of the conductor in telegraphing for the policeman, and within a short space of time thereafter handing the plaintiff over to the officer, was in no respect different from a formal arrest of the plaintiff by the conductor, in the midst of the riot and disorder, and the prompt delivery of him afterwards to the officer. If the plaintiff was not in fact arrested by the conductor because of the presence of superior resisting force, that fact cannot make the subsequent act of the conductor in pointing out the plaintiff to the officer wrongful or illegal. The charge, according to the plaintiff's own testimony, was sustained. A fine was imposed, and he paid it. The accusation was therefore well founded and what was

28 L. R. A.

done by the conductor, if the facts testified to by the defendant's witnesses be credited, was undeniably lawful, under all the circumstances. If this be so, then there is obviously no cause of action against the defendant, because no wrong has been done to the plaintiff. This is the theory of the defendant's fifth prayer. That prayer, being correct in principle and proper in form, ought to have been granted. For the same reasons, the second, third, fourth, and seventh prayers should have been granted.

The eighth was properly rejected. It makes the right to arrest depend on the fact that, while on the train, the plaintiff was charged by the conductor with being disorderly, whereas the right to arrest depended on the fact that the plaintiff was in reality disorderly. His having been charged by the conductor with being disorderly is quite a different thing from his having been in fact disorderly. The ninth prayer was properly rejected. It failed to submit to the jury that the arrest was made for the alleged breach of the peace. Though the arrest had been made without an assigned cause, the prayer exonerated the defendant.

The plaintiff's first prayer ought to have been rejected. Its fallacy lies in the postulate that an arrest for a breach of the peace, committed out of the view of a peace officer, necessarily could not be legally made without a warrant.

The second prayer of the plaintiff related to the measure of damages, and was correct.

The ruling in the first exception is affirmed. Though the evidence objected to had been inadmissible, the same fact was subsequently proved in an unobjectionable way by Officer Howe. Consequently, no injury was done, and without injury there can be no reversible error.

At the conclusion of the plaintiff's case, the defendant offered two prayers, asking the court below to withdraw the case from the jury. They were rejected, and this ruling is the one complained of in the second exception. We find no error in this. If the plaintiff had been guilty of no breach of the peace, his arrest at the instance of the conductor was unlawful; and having been made in the defendant's depot, while the plaintiff, a passenger, was still entitled to be protected by the defendant against assaults and injuries by the defendant's own employes, if wrongfully made, by or at the request of the defendant's own servants, while they were in and about the performance of their prescribed duties, the master would be liable. There was some evidence before the jury that the arrest had been made without a warrant, and therefore the second prayer was properly rejected. One of these prayers was again presented at the close of the case, and was again rejected, and we think properly refused.

The remaining exception relates to the refusal of the court below to submit special interrogatories to the jury, under Act 1894, chap. 185. We have had occasion to consider that act during the present term of this court, and need not refer again to its provisions. The interrogatories propounded by the de-

fendant were presented before the arguments to the jury began, and therefore at a seasonable time; and the third, fourth, and fifth, submitting material questions of fact which the defendant, under the statute, had the right to require the jury to pass on and respond to, should have gone to the jury for specific answers. There was error in refusing this request. The other questions submitted were immaterial.

For the error, then, in rejecting the defendant's second, third, fourth, fifth, and seventh prayers, and in granting the plaintiff's first instruction, and for the error in refusing to submit the third, fourth, and fifth special interrogatories to the jury, the judgment must be reversed, and a new trial will be awarded.

Judgment reversed, with costs above and below, and new trial awarded.

CALIFORNIA SUPREME COURT, (Department 1).

UNION INSURANCE CO., *Appt.*,

v.

AMERICAN FIRE INSURANCE CO.,
Resp't.

(.....Cal.....)

1. A known usage of trade forms a part of a contract made in that trade.
2. An agreement to issue a policy of reinsurance in the usual form and for the usual premium, made after the property was destroyed, of which fact both parties were ignorant, will not become operative by relating back to the beginning of the original insurance but will be deemed to commence at the date of the contract.

(May 23, 1895.)

A PPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendant in an action brought to recover the amount alleged to be due upon an alleged reinsurance contract. *Affirmed.*

The facts are stated in the commissioner's opinion.

Mr. Carter P. Pomeroy for appellant.

Messrs. Van Ness & Redman, for respondent:

The plaintiff and defendant were engaged in the same line of business, and hence familiar with the usages and customs thereof, and bound thereby.

Greenwich Ins. Co. v. Waterman, 6 U. S. App. 549, 54 Fed. Rep. 839.

There being no express agreement as to the period during which the reinsurance should continue, it would seem that a common custom, fixing such time, would, in the absence of specific arrangement, determine the right of the one and the obligation of the other.

Brown v. Howard, 1 Cal. 423; *Taylor v. Castle*, 42 Cal. 867; *Auserais v. Naglee*, 74 Cal. 60. The agreement to reinsure, without specification of the time, was, in effect, to reinsure as from the time of the acceptance of the application.

May, Ins. § 9; New York Bowery F. Ins. Co. v. New York F. Ins. Co. 17 Wend. 362.

Simple insurance, *prima facie*, implies the existence of the thing insured at the date of the contract.

Phillips, Ins. § 925.

NOTE.—For effect of reinsurance generally, see *Faneuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co. (Mass.)* 10 L. R. A. 423, and *note*.
23 L. R. A.

In marine policies the intention to cover past as well as future losses is to be imputed when the insurance is for a stated voyage, or between certain dates, the earliest of which is past at the time of making the contract, or when the circumstances surrounding the negotiations between the parties are such that this intention may be inferred.

Mercantile Mut. Ins. Co. v. Folsom, 85 U. S. 18 Wall. 237, 21 L. ed. 827.

A like intention may be imputed in a case of fire or life insurance, when the agreement is to cover between dates antecedent and subsequent to that upon which the contract is made.

Hallock v. Commercial Ins. Co. 26 N. J. L. 268; *Philadelphia L. Ins. Co. v. American Life & Health Ins. Co.* 28 Pa. 65.

But unless the intention to cover previous loss be evinced by stipulation, or is to be gathered from the circumstances surrounding the making of the agreement, it will not be imputed.

Hammond v. Allen, 2 Sumn. 387; *Duncan v. New York Mut. Ins. Co.* 20 L. R. A. 356, 183 N. Y. 88.

Searls, C., filed the following opinion:

This action was brought to enforce a contract of reinsurance entered into by the parties hereto on the 6th day of June, 1889. The cause was tried by the court without a jury upon the amended complaint and answer thereto, and upon an agreed statement of facts. Written findings were filed, and judgment entered thereon in favor of defendant, from which judgment plaintiff within sixty days next after the rendition thereof appealed. The agreed statement of facts upon which the cause was tried, after stating that the plaintiff, on May 24, 1889, insured certain property of the Seattle Lumber & Commercial Company in the sum of \$4,000 against loss or damage by fire, contains the following: "(3) That subsequent to the said insurance of the said property, and on, to wit, June 6, 1889, and between 3:15 and 4 P. M., the said property so insured as aforesaid was destroyed by fire, by reason of which said destruction of said property the said Seattle Lumber & Commercial Company lost and was damaged in a sum in excess of four thousand dollars. (4) That on said June 6, 1889, but subsequent to the destruction of said property as aforesaid, the plaintiff notified defendant, at the office of defendant in the city and county of San Francisco, Cali-

fornia, of its said insurance upon said property, and requested of and from defendant reinsurance thereon in the sum of one thousand dollars; whereupon defendant agreed to and did reinsure plaintiff thereon in said sum, and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually chargeable upon risks of the character assumed. That at the time of said application and agreement neither plaintiff nor defendant knew of the prior destruction of said property." The question presented under the pleadings and stipulated facts is simply this: Did the defendant, under its agreement of reinsurance, contract to indemnify plaintiff against loss and liability for and during its original contract of insurance, or was the undertaking of defendant to indemnify plaintiff against such loss as might thereafter occur? "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event." Civ. Code, § 2527. "A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance." Civ. Code, § 2616. "A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage." Civ. Code, § 2648. "When an insurer finds it prudent or convenient to protect himself from loss by reason of any liability he has assumed under a policy, he may contract with another to relieve him from that liability, and take it upon himself. This is to reinsure; and by the contract the reinsurer, except as to the matter of premium, which may be more or less than that paid on the original policy, as the parties may agree, undertakes, with reference to the first insurer, what the first insurer undertakes with reference to the insured, and subject to like rights, duties, and obligations." May, Ins. 3d ed. § 9. Section 2531, Civil Code, provides that "any contingent or unknown event, whether past or future, which may damify a person having an insurable interest, or create a liability against him, may be insured against." Section 2587 provides, among other things, that: "A policy of insurance must specify: (1) The parties between whom the contract is made. . . . (5) The risks insured against; and, (6) the period during which the insurance is to continue." In the present case, as will be seen by the agreed statement, no policy in fact issued, and the theory urged by appellant is that the reinsurance was for and during the entire term of the original insurance, and covered any unknown loss which might have occurred within said term, prior to the application for and granting of the reinsurance. Respondent, on the other hand, claims that the undertaking of the defendant was to indemnify plaintiff against such loss and liability as might occur from and after the granting of the reinsurance. The contract, according to the stipulation, was that "defendant agreed to and did reinsure plaintiff in said sum (\$1,000), and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually charge-

able upon risks of the character assumed." The general rule is that a policy, if delivered, takes effect from its date, unless it be otherwise stated, or unless there is evidence of a contrary intent. If the premium be paid, and the policy be not delivered till afterwards, the policy takes effect by relation as of its date, even though a loss intervenes. May, Ins. 400; *Ruse v. Mutual Ben. L. Ins. Co.* 28 N. Y. 516; *Whitaker v. Farmers Union Ins. Co.* 29 Barb. 312; *Lightbody v. North American Ins. Co.* 28 Wend. 18; *Davenport v. Peoria Marine & Fire Ins. Co.* 17 Iowa, 276. It is said: "The circumstances and intent of the parties are to control." May, Ins. § 240. The same author, continuing, adds: "And where the policy was in fact a reinsurance, and was for a year, but specifying no time when the year was to begin, it was held that it began from the date of the prior policy, though that was some months prior to the issue of the latter policy;" citing as authority the case of *Philadelphia L. Ins. Co. v. American Life & Health Ins. Co.*, 23 Pa. 65. Referring to the case cited, it appears that on the 24th of February, 1851, the American Life & Health Insurance Company insured the life of one Maxwell Nusbaum for \$2,500 for one year, with the privilege of another year. On the 31st day of May, 1851, the insurers obtained an insurance of \$1,000 of their risk from the Philadelphia Life Insurance Company for the term of one year, but the time when the year was to begin or end was not stated. It appeared that Nusbaum had gone to California, and had lost his life at a fire in San Francisco, May 4, 1851, which fact was unknown to the parties in Philadelphia, where the insurance was had, when the second policy issued. The court, in holding the reinsurer liable, placed its decision upon the circumstances that, while the policy of reinsurance was for one year, and did not state the date at which the risk was to commence, yet, as the reinsurers charged one whole year's premium, while the original policy had then only say nine months remaining, it indicated an intention to reinsure from the date of the original policy. Lawrie, J., said: "The contract and the circumstances express themselves in seeming contradiction of each other, and our duty is to make them harmonize by construction. We cannot alter the facts to suit an inference drawn from the mere words of the policy, but we must suit the inference to the facts. Without the circumstances, we would draw one inference as to the intention of the parties; with them, we must draw a different one. The fact that the reinsurance was for one year, on a risk running for one year from the 24th of February, and in consideration of a proportional share of the premium as from that date, settles the question, and starts the year of the reinsurance from that date." In the present case we find no circumstance indicating the mutual intention of the parties to give to their contract a retrospective effect. The stipulated facts show that at all the times mentioned it was the custom among fire insurance companies doing business upon the Pacific coast granting reinsurance to other fire insurance com-

panies to charge and collect premiums as and from the date of reinsurance, and to write their policies so as to cover the reinsured company from the date upon which the reinsurance would be granted. Both plaintiff and defendant were fire insurance companies doing business in San Francisco, and may be presumed to be familiar with these customs, and, in the absence of a showing to the contrary, to have contracted with reference to them. Indeed, plaintiff alleges in effect that its contract with defendant was subject to the customs in vogue and understood by insurance men, when it avers that defendant "did agree to and did reinsure plaintiff thereon in said sum, and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually chargeable upon risks of the character assumed." Where there is a known usage of trade, persons carrying on that trade are held to have contracted in reference to the usage (unless the contrary appears), and the usage forms a part of the contract. *Brown v. Howard*, 1 Cal. 423; *Taylor v. Castle*, 42 Cal. 387; *Auserais v. Nagles*, 74 Cal. 60.

Without pursuing the authorities further, we are of opinion:

1. Where the exact time of the commencement and termination of the risks are specified in the policy, or, if no policy has been written, in the contract, such specification governs.

2. Where no time has been expressly indicated, the circumstances of the case will be considered for the purpose of determining it.

3. If there are no circumstances indicating the intention of the parties, and no time is specified in the contract, the risk will be deemed to have commenced at the date of the contract.

4. In the case last mentioned, if before the contract of insurance is made the property has ceased to exist, although unknown to the parties, the risk never attaches.

In consonance with these views of the law, we are of opinion the judgment appealed from should be affirmed.

We concur: **Britt, C.; Haynes, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT

William J. ATWELL

v.

Edward J. JENKINS.

(.....Mass.....)

1. An attorney is not subject to an action for money received by the one sending him the money in response to a telegram from his client but who was not a party to any contract between the attorney and client under which he retained the money.

2. The insanity of a client who telegraphed for money to be sent to his attorney gives the person sending it without knowledge that he is insane no right of action against the attorney for the money, where the latter has received it in payment for services.

(April 2, 1896.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover back money which plaintiff had advanced to defendant, which rulings resulted in a verdict in defendant's favor. *Overruled.*

On May 9, 1891, one Hoes, a resident of Chicago, was arrested in Boston. He was brought before the municipal court and his bail fixed at \$300. He sent the following telegram to the plaintiff:

"Boston, Mass., May 9, 1891. To W. J. Atwell, 218 La Salle Street, Chicago, Ill. De-

posit two hundred and fifty dollars for me at once. Borrow on bonds if you do not have it. After your deposit, make check to Schaffer, and telegraph at once four hundred dollars to Hon. Edward J. Jenkins, my attorney, 28 School st., Boston. Am in trouble. Don't fail. Hoes." Plaintiff in response to the telegram sent \$400, of his own money, through the telegraph company to defendant as directed in the telegram. On receipt of the money defendant became bail for Hoes and he was released from arrest. It subsequently appeared that at the time of his arrest Hoes was insane and continued in that condition until his death. The prosecution upon which he was arrested was not pressed, because of his insanity, and the bail was released. Plaintiff asked of defendant certain interrogatories, which together with the answers, were as follows: "Interrogatory 1. Did you receive from the plaintiff, on or about May 8, 1891, the sum of \$400, which was sent to you by him through the hands of the Western Union Telegraph Company? *Answer.* Yes. Int. 2. If you answer the first interrogatory in the affirmative, will you state what said money was sent to you and received by you for? *A.* I received \$100 as a retaining fee, which Hoes agreed to pay and did pay me for such retainer. The rest I received at first as security for securing bail for him,—the bail being that sum; and afterwards he stated to me that he desired to have the case fixed up so that there would be no imprisonment or no publicity of the matter, and offered and agreed that if I would secure both results he would pay me the \$300 which had been deposited for the security of bail, in addition to the \$100 which he paid me as a retainer. This I agreed to

NOTE.—In connection with the above case and authorities therein cited on the validity of contracts with insane persons, see *note* to *Howard v. Howard* (Ky.) 1 L. R. A. 610.

As to validity of deed made by insane person, see *Riley v. Carter* (Md.) 19 L. R. A. 480, and *note*.
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See also 33 L. R. A. 670; 40 L. R. A. 250.

undertake to do." Plaintiff attempted to contradict defendant's statement as to his agreement with Hoes in reference to the \$300, and offered evidence to show that his services were not worth more than \$50 or \$60.

Further facts appear in the opinion.

Mr. Chester W. Church for plaintiff.
Mr. Peter J. Casey for defendant.

Holmes, J., delivered the opinion of the court:

This is an action to recover \$400 put into the defendant's hands by the plaintiff through the Western Union Telegraph Company under the following circumstances: One Hoes, an inhabitant of Chicago, committed an offense here, and was arrested. It seems to have been for his interest to keep the matter private. He retained the defendant, who, on receipt of the above-mentioned money, recognized as surety for him, and obtained his release from arrest. Afterwards a *nolle prosequi* was entered by reason of the insanity of Hoes. When arrested, Hoes telegraphed to the plaintiff: "Telegraph at once four hundred dollars to Hon. Edward J. Jenkins, my attorney. . . . Am in trouble. Don't fail." The plaintiff thereupon sent the money.

It hardly needs to be said that this transaction made no contract between the plaintiff and the defendant. The plaintiff's advance was to Hoes. When the money was received by Jenkins it was received by Hoes, as between them and the plaintiff; and, if the defendant kept it, that was by some arrangement between him and Hoes, with which the plaintiff had nothing to do.

But there was evidence that Hoes was insane at the time, and the plaintiff claims a right to recover on that ground. This must mean that he had a right to avoid his contract on the ground of the other party's insanity, and to demand his money wherever he could find it, unless the defendant, to whose hands it was traced, stood as a purchaser for value, or had changed his position, which fact the plaintiff had a right to deny and did controvert in this case, except as to \$50 or \$60. We presume that the argument is that, if Hoes had become sane, and had affirmed his dealings with the defendant, the plaintiff still would have had the right to prove that the defendant had no contract with Hoes, and was not a purchaser for value; and that, on the other hand, if Hoes had avoided his contract, his right to the money would be subject to the plaintiff's paramount right to the same fund, always supposing that the plaintiff had the right to avoid his contract also. *Buller v. Harrison*, Cowp. 565, 568; *Cox v. Prentice*, 3 Maule & S. 344.

But the question is whether the plaintiff had the right supposed. In *Holt v. Ward*, 2 Strange, 937, it was held on great con-

sideration that a person of full age, contracting with an infant was bound absolutely, although the infant had a right to avoid her contract. The decision was on demurrer to a plea of the plaintiff's infancy, not alleging that the defendant was ignorant of the fact when he made the contract, but seems to have been made without regard to whether the defendant knew or not. This case is accepted without dispute as the law. *Thompson v. Hamilton*, 12 Pick. 425, 429, 23 Am. Dec. 619; *Warwick v. Bruce*, 2 Maule & S. 205; *Bruce v. Warwick*, 6 Taunt. 118; *Monaghan v. Agricultural F. Ins. Co. of Watertown, N. Y.* 53 Mich. 238, 243; *Hunt v. Peake*, 5 Cow. 475, 15 Am. Dec. 475; *Cannon v. Alabury*, 1 A. K. Marsh. 76, 10 Am. Dec. 709; *Johnson v. Rockwell*, 12 Ind. 76, 81; *Field v. Herrick*, 101 Ill. 110; 2 Kent, Com. 18th ed. 78, 236; *Leake*, Cont. 8d ed. 476. The analogy between insane persons and infants is not perfect, but has prevailed in this matter. *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; *Harmon v. Harmon*, 51 Fed. Rep. 113; *Bishop*, Cont. 2d ed. § 973; *Clark*, Cont. 268. An insane person like Hoes, if he was insane,—not a raving madman, or an idiot,—is capable of an act, even if his act be voidable. The promise of an insane man is not absolutely void. *Carrier v. Sears*, 4 Allen, 388, 337, 81 Am. Dec. 707; *Bullard v. Moor*, 158 Mass. 418, 424. So that it cannot be argued that the contract was formally defective and void because only one party had done the necessary overt act. A voidable promise is a sufficient consideration. *Plympton v. Dunn*, 148 Mass. 523, 527. If a person unwittingly dealing with an insane man were given the right to avoid his contract when he found out the fact, it would be on grounds of policy and fairness, and, of course, it would be possible to read in a condition or personal exception to that effect. But there seems to be no more reason to do it in this case than when a man has contracted with an infant. The general rule is that a man takes the risk of facts which he deems material, unless he expressly stipulates for them in his contract, or unless he is misled by a fraudulent misrepresentation. See *Ring v. Phoenix Assur. Co.* 145 Mass. 426, 429.

The right to avoid is for the personal protection of the insane, and those who deal with them have been held to have no corresponding rights in all the cases which we have seen. Upon these considerations, and in view of the decisions cited, we are of opinion that the plaintiff cannot repudiate his contract with Hoes. So long as that contract stands, at least, he cannot maintain an action against the defendant. Other defenses need not be considered. We express no opinion as to the law in case of a bilateral contract wholly unexecuted on both sides.

Exceptions overruled.

KANSAS SUPREME COURT.

MISSOURI PACIFIC R. CO., *Pff. in Err.*,
v.
William HACKETT.

(4 Kan. 316.)

- *1. The case of *Union Street R. Co. v. Stone*, 4 Kan. 83, cited and followed.
- *2. The city of Ottawa duly passed an ordinance requiring the Missouri Pacific Railroad Company to maintain good and sufficient gates on Main street on each side of its track, and within thirty feet therefrom, and to keep the same securely closed while its trains were crossing the street. The company neglected to erect any gates. Plaintiff's horses, without his fault, became frightened and ran along Main street against a moving freight train then crossing the street on the defendant's railway, and were injured thereby. Held, that the railroad company was negligent in failing to maintain the gates; that such negligence contributed to the plaintiff's injury; and that the plaintiff is entitled to recover the amount of damages the stipulation of the parties in this case fixes as the measure of his recovery.

(November 10, 1894.)

ERROR to the District Court for Franklin County to review a judgment in favor of plaintiff in an action brought to recover damages for the loss of horses, which was alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by Allen, J.:

William Hackett brought suit against the Missouri Pacific Railway Company before a justice of the peace of Franklin county to recover damages for injuries sustained by a team of horses and a wagon while running away on main street, in Ottawa. The justice rendered judgment for the plaintiff. The defendant appealed to the district court, where the case was tried to the court on an agreed statement of fact, which is as follows:

"It is hereby stipulated and agreed between the parties to this action that a trial by jury be waived in this case, and the case be submitted to the court for determination, and that the following facts shall be taken and considered by the court as proven, and shall constitute all the evidence in said case:

"(1) That the Missouri Pacific Railway Company is now, and has been for ten years last past, a railway company existing under and by virtue of the law of Kansas, and is the owner of a line of railway extending from Osawatimie, Kansas, westerly to the west line of the state of Kansas, and running through the city of Ottawa, in Franklin county, Kansas, and was operating the same with its locomotive engines and trains of cars on the 8th day of October, 1889; and that said

railway crosses Main street at its intersection with First street, in said city of Ottawa; and that Ottawa is a city of the second class.

"(2) On the 8th day of October, 1889, William Hackett, plaintiff, was the owner of a team of horses and a wagon; and on said day said team of horses were harnessed and hitched to said wagon on Main street, in the city of Ottawa, Kansas (Franklin county), at a point about 100 feet south from the crossing of Main street with the Missouri Pacific Railway Company tracks. That said horses at said time, being so harnessed and hitched to said wagon, were then tied with halters, the halter of one of said horses being tied in a ring in the sidewalk on the east side of said street, and the halter of the other horse being tied in a ring in a cellar door, which forms a part of said sidewalk, and which door was seven feet long from east to west, and three feet wide from north to south, said ring being about the middle of said door next to the curb. The cellar door was attached to the sidewalk by means of two strap hinges, one about a foot from the east end of the door, and one about a foot from the west end of the door. The strap hinge at the east end was broken, and the hinge at the west end was broken, by the horses when they pulled back. Said horses were so tied to the ring in the sidewalk and cellar door by the person in charge of them about ten o'clock A. M. of said day, and said driver went away and left them so fastened. About 2 o'clock P. M. of said day, while one of the defendant's freight trains was passing along said track and crossing Main street; the plaintiff's said horses became frightened by reason of another team of horses being backed against them, and by reason of such fright said horses of plaintiff pulled back, and the halter tied in the ring in the sidewalk broke, while the horse with its halter tied in the ring in the cellar door pulled the door off, and out in the street, by backing the wagon two thirds of the way across Main street, dragging the door after them. Then the halter strap slipped out of the ring in the door, and left the door in the street. Then said horses ran north on Main street, and while so excited by such fright, and in their fright, ran against the moving freight train on defendant's track, at a point about the middle of Main street where it crosses said railroad track. And that said horses were so badly frightened that, when they came to the train, they jumped against it, striking the car next to the caboose; and, by reason of the collision between the horses and said car, the horses were thrown down, and each was so badly injured that they were worthless, and had to be killed. And that the wagon attached to said horses was also badly damaged. That said horses were not frightened by reason of the passage of defendant's engine and train of cars.

"(3) That on the 10th day of December, 1886, the mayor and councilmen of the city of Ottawa passed an ordinance known as 'Ordinance No. 105,' entitled 'An ordinance regulating the crossing of Main and Locust

*Headnotes by ALLEN, J.

NOTE.—As to denial of liability for want of statutory precautions on the ground that these could not have prevented the injury, see *note* to *Sowles v. Moore* (Vt.) 21 L. R. A. *723.

28 L. R. A.

streets by railroads,' which ordinance is in words and figures following:

"Section 1. It shall be the duty of each and every company or corporation owning or controlling or operating a line of railroad across Main and Locust streets in the city of Ottawa, Kansas, to erect good and sufficient gates on said streets on each side of such railway track and within thirty feet therefrom, and to employ suitable persons to operate the same; such gates shall be kept open at all times except when trains of cars or engines are crossing said streets on said track, at which time such gates shall be securely closed; provided such railway company shall not be required to operate such gate across Locust street except at such times and for such length of time as the mayor and council shall direct. The said gates shall be of such dimensions and so constructed as when closed to fence the said railroad across said streets. The said gates shall be constructed upon said streets as not to unnecessarily obstruct the same.

"Sec. 2. Every railroad company or corporation which shall on or after the first day of May, 1887, operate any line of railroad across Main and Locust streets in this city without having complied with the requirements of this ordinance shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars; and any engineer, conductor, or any other employé of such railway company or corporation who shall run or operate or assist in running or operating any train of cars or engines across Main or Locust streets in this city in violation of this ordinance shall upon conviction thereof, be fined in any sum not exceeding one hundred dollars."

"This said ordinance was published in book form on the 10th day of May, 1887, and was in force at all times mentioned herein.

"(4) On the said 8th day of October, 1889, the defendant was operating its said road across Main and Locust streets, in the city of Ottawa, Kansas, without first having erected and without maintaining good and sufficient gates across said Main street on each side of said track, and within thirty feet therefrom, as required by said ordinance.

"(5) That the freight train on defendant's road which plaintiff's horses collided with at the time was not running to exceed four miles per hour, the train being about to cross the track of the Atlanta, Toledo & Santa Fé Railroad had checked up, and was about coming to a full stop, and did stop within about two rods from the point of said collision.

"(6) It is agreed, if that plaintiff is entitled to recover on the foregoing facts, that his damages were the sum of two hundred and sixty dollars. It is further agreed that the person in charge of the team had that forenoon driven across the defendant's railroad track at the crossing of Main street, and knew that there were no gates on either side of the railroad track where it crosses Main street, in the city of Ottawa."

On these facts, the district court rendered judgment for the plaintiff.

38 L. R. A.

Mr. W. A. Johnson, for plaintiff in error.

The killing of the horses in this case arose wholly from the condition of the horses and not from a failure of the railway company to construct gates at the crossing of main street on the sides of the railway track. Therefore the failure to construct and maintain gates was not the proximate cause of the collision between the train of cars and horses.

Higgins v. Boston, 148 Mass. 484; *Spaulding v. Winslow*, 74 Me. 528; *Moulton v. Sanford*, 51 Me. 127; *Perkins v. Fayette*, 68 Me. 152; *Moss v. Burlington*, 60 Iowa, 438, 46 Am. Rep. 82.

A party cannot recover upon mere proof of his injury and of the defendant's breach of a statute or ordinance. The plaintiff must prove that the breach of regulations was the proximate cause of his damage. And therefore noncompliance with a statutory requirement, however stringent, affords no ground of action, if compliance therewith would not have prevented the injury.

Shearm. & Redf. Neg. § 27; Cleveland v. Chicago & N. W. R. Co. 35 Iowa, 220; *Jackson v. Chicago & N. W. R. Co.* 36 Iowa, 451; *Illinois Cent. R. Co. v. Phelps*, 29 Ill. 447.

The breach of duty must be the proximate cause of the damages.

Shearm. & Redf. Neg. § 26; Chicago & A. R. Co. v. McDaniels, 68 Ill. 122; *Indianapolis & St. L. R. Co. v. Blackman*, 63 Ill. 117; *Atchison, T. & S. F. R. Co. v. Morgan*, 31 Kan. 79; *Chicago, K. & N. R. Co. v. Hotz*, 47 Kan. 627; *Jones, Neg. Mun. Corp. § 9; Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. 7 Wall. 44, 19 L. ed. 65; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070.

The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred.

Shearm. & Redf. Neg. § 26; 19 Am. & Eng. Encyclop. Law, p. 301; 16 Am. & Eng. Encyclop. Law, 436; *Mayne, Damages*, 15; *Addison, Torts*, § 10.

The collision between Hackett's horses and the train of cars was the mere result of the running away of the team and not a cause producing the result.

Marble v. Worcester, 4 Gray, 395; *Davis v. Dudley*, 4 Allen, 557; *Jackson v. Bellevue*, 30 Wis. 250.

Messrs. Waggener, Martin & Orr also for plaintiff in error.

Messrs. H. P. Welsh and C. A. Smart, for defendant in error:

The conduct of the plaintiff at the time of the injury to the defendant's property was negligence *per se*.

Atchison, T. & S. F. R. Co. v. Townsend, 39 Kan. 115; *Missouri Pac. R. Co. v. Pierce*, 33 Kan. 61; *Loneragan v. Illinois Cent. R. Co.* 17 L. R. A. 254, 257, 87 Iowa, 755, 759; *Dahlstrom v. St. Louis, I. M. & S. R. Co.* 108 Mo. 525; *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47.

The damage to the defendant was the direct result of plaintiff's unlawful act.

Topeka v. Tuttle, 5 Kan. 311; *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 375, 15 Am. Rep. 362; *Griggs v. Fleckenstein*, 14 Minn. 61, 100 Am. Dec. 199.

All the consequences which actually resulted in this case from the running away of defendant's team might reasonably have been expected to occur by the running away of any team, under similar circumstances, in the principal business street of a town, and the running away of the defendant's team was the efficient cause of the injury to plaintiff's horse, because it put in operation the force which was the immediate and direct cause of the injury.

2 Greenl. Ev. §§ 256, 268, 268a; 8 Parsons, Cont. pp. 179, 180.

The fact that some one, other than the defendant, was negligent, and that his negligence co-operating with that of plaintiff's caused the injury, does not relieve the plaintiff, even though without the agency of both causes the injury would not have occurred.

Griggs v. Fleckenstein, *supra*; *Oil Creek & A. R. Co. v. Keighron*, 74 Pa. 316.

If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered too remote.

Louisiana Mut. Ins. Co. v. Tweed, 74 U. S. 7 Wall. 44, 19 L. ed. 65; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Howard F. Ins. Co. v. Norwich & N. Y. Transp. Co.* 70 U. S. 12 Wall. 199, 20 L. ed. 379; *Payne v. Smith*, 4 Dana, 497.

The fact that the team was running away can furnish no possible defense in this case.

Allen v. Hancock, 16 Vt. 230; *Winship v. Enfield*, 42 N. H. 197; *Baldwin v. Greenwood's Turnp. Co.* 40 Conn. 238, 16 Am. Rep. 38; *Ring v. Cohoes*, 77 N. Y. 83, 83 Am. Rep. 574; *Hull v. Kansas*, 54 Mo. 601, 14 Am. Rep. 487; *Hey v. Philadelphia*, 81 Pa. 44, 23 Am. Rep. 733; *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Sherwood v. Hamilton*, 37 U. C. Q. B. 410; *Basett v. St. Joseph*, 53 Mo. 295, 14 Am. Rep. 446; *Aurora v. Pulfer*, 56 Ill. 275; *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567; *Kennedy v. New York*, 73 N. Y. 365, 29 Am. Rep. 169; *White v. Conly*, 14 Lea, 51, 52 Am. Rep. 154.

Allen, J., delivered the opinion of the court:

The contention that damages cannot be recovered for injuries received by a runaway team of horses coming in collision with an unlawful obstruction in the street has some support in the authorities cited in the brief for the plaintiff in error. We have recently considered this subject in the case of *Union Street R. Co. v. Stone* (just decided) 54 Kan. 83, and have followed what we deem to be the weight both of authority and of reason, and hold that the right to recover is not precluded by the fact that the team was frightened and beyond the control of any person. The decision in that case disposes of the question mainly argued in this. It remains only to consider whether the failure of the railroad company to erect a gate, as required by the ordinance of the city of Ottawa, was the proximate cause of the injury to the plaintiff's team

and wagon. It is claimed that the plaintiff was negligent in leaving his team hitched to the sidewalk on Main street, and within about 100 feet from the railroad track, for four hours. The agreed statement of facts shows that the team was not frightened by the passing train. In the absence of any other facts, we cannot hold that there is an affirmative showing of negligence on the part of the plaintiff. It appears that the horses were frightened by reason of another team being backed against them. This might have been negligently done by the person in charge of the other team. It might also have happened without any negligence on his part.

We cannot assume negligence; it must be shown. We, then, have the case of a frightened team of horses, loose on Main street, in charge of no one. The defendant's train of cars was passing along the railroad track across Main street. The ordinance of the city required that, during the passage of trains, access to the track should be closed by a good and sufficient gate, not more than thirty feet from the track; that the gate should be of such dimensions and so constructed as to fence the railroad across the street. The railroad company had a right to operate its trains, but it rested under the duty of having a closed gate to prevent access to the track when it would be dangerous for teams to pass. It is contended that the team would have been injured even though the defendant had complied with the ordinance. We do not think this can be assumed. The ordinance requires gates for the purpose of a substantial obstruction to the passage of persons, teams, etc., not for the mere purpose of giving warning. If a flagman had been required merely to warn persons about to cross the track of danger, there might be great force in the contention that a failure to place one there could not have occasioned loss to the plaintiff. It is true that, so far as notice and warning are concerned, the presence of a train of freight cars is more easily seen than a gate would have been; but we cannot presume that a collision with a substantial gate placed across the street would have utterly ruined the plaintiff's horses, as did that with the moving cars; nor can we assume that the horses would have broken through a substantial gate, and struck the cars with such force as to have still sustained the injuries they did in fact receive. The common observation of mankind shows that a collision by a runaway team of horses with a gate will ordinarily result in less injury than the plaintiff's team sustained in this instance, and less than would ordinarily be sustained by running headlong against a moving freight train. It was the duty of the railroad company to interpose a gate between its train of cars and the frightened team. This it failed to do. It violated a positive requirement of law, made for the protection of the lives and property of the people using the street. In this the company was culpably negligent. The injury to the plaintiff's property would not have happened in the manner it did happen if the defendant company had obeyed the law. It is probable that the team would have sustained some injury if there had been

a gate across the street, but we are not required to speculate as to how much that injury would have been. We are relieved of all difficulty as to the measure of damages in this case by the agreement that the plain-

tiff is entitled to recover \$260, if anything. *The judgment of the District Court is affirmed.*
All the Justices concur.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *Appts.*,

Charles W. GARDNER, *Resp't.*

(144 N. Y. 112.)

1. The offense of attempting to commit the crime of extortion may be committed by threats which do not actually inspire fear in the intended victim, even if the latter is in fact acting as a decoy of the police.

2. Requiring a defendant in a criminal case to stand up or sit down in the presence of the jury at any particular time is within the discretion of the trial judge involving no constitutional right.

3. Compelling the defendant in a criminal case to stand up for the purpose of identification does not violate the constitutional provision against compelling one to be a witness against himself.

4. A person charged with extortion who is proved to have been much in the company of the alleged victim is entitled to show that he was acting under the directions of officers of the society for the prevention of crime to obtain the confidence and good will of such person in order to secure an affidavit for use in another case.

(December 11, 1894.)

A PPEAL by the People from a judgment of the General Term of the Supreme Court,

NOTE.—*Right to compel accused to exhibit himself for identification.*

I. Cases denying the right.

II. Cases asserting the right.

III. Comparison of cases.

IV. Waiver of the constitutional exemption.

V. The English rule.

The Constitution of the United States provides that no person shall be compelled in any criminal case to be a witness against himself, and provisions in effect that no accused person shall be compelled to give evidence, or be a witness, or testify, against himself are to be found in the constitutions of nearly every state in the Union.

Whether these provisions apply to the exhibition of the person of the accused for the purpose of identification is a question which has given rise to a hopeless conflict of authority each side of which is supported by a respectable line of apparently well-considered cases.

I. Cases denying the right.

In *State v. Jacobs* (1858) 50 N. C. 269, which is the earliest and a leading case on this side of the controversy, it was held that the court, upon the trial of a person indicted as a free negro for carrying arms, has no right to compel the defendant to exhibit himself against his consent to the jury for the purpose of enabling them to decide as to his status as a free negro under the statute, as it would be in effect compelling him to furnish evidence against himself.

So in *Blackwell v. State* (1881) 67 Ga. 76, 44 Am. Rep. 717, it was held to be error for the court on a prosecution for murder to require the prisoner to stand up before the jury and make proof of his person that a witness then testifying might be enabled by inspection to testify as to the character and extent of the amputation of his right leg, where there was evidence previously given of tracks at the scene of the murder apparently made by a left foot and the knee of a right leg, as the defendant is thus required to give evidence against himself.

And in *Stokes v. State* (1875) 5 Baxt. 619, 30 Am. Rep. 72, the bringing of a pan of mud into court on a trial for murder which was proved by a witness to be about as soft as the mud in which the witness saw a track at the scene of the murder, and placing it directly in front of the jury, and the requesting

by the attorney-general of the prisoner to put his foot in the mud, was held to be erroneous and improper as constituting an effort to make the prisoner make evidence against himself and a sufficient ground for reversal though the request was not complied with, and that the error was not corrected by the judge afterwards telling the jury that the prisoner's refusal to put his foot in the mud was not to be taken as evidence against him.

So in *Rice v. Rice* (1891) 11 L. R. A. 591, 47 N. J. Eq. 559, it was held that a master taking testimony in a suit in chancery for divorce on the ground of adultery has no power to order the defendant who is present under an order of the court to appear as a witness, but who has not yet taken the stand, to disclose her features by removing her veil so that she may be identified by a witness who is under examination. Reversing 19 Atl. Rep. 738.

But it was said in that case that to require witnesses under examination to expose their faces to view is common usage in every court which seems not to be open to question.

The same rule has been applied to evidence of compulsory examinations had before the trial.

Thus in *Day v. State* (1879) 68 Ga. 667, it was held that evidence on a prosecution for burglary that the witness placed the defendant's foot by force in certain tracks found near the place where the burglary was committed, and that the defendant's shoe fitted the track, is inadmissible within the prohibition of the Georgia constitution against compelling a person to give evidence tending in any manner to criminate himself.

And in *People v. McCoy* (1873) 45 How. Pr. 216, it was held that the forcible examination of a prisoner charged with being the mother of a bastard child and with murdering it immediately after it was born, by physicians upon an order of the coroner for the purpose of obtaining evidence that she had been pregnant and had been delivered of a child within two or three weeks previous thereto violates the constitutional prohibition against compelling any person in a criminal case to be a witness against himself.

And in *People v. Wolcott* (1883) 51 Mich. 612, the boots of the suspected person were measured to see if they corresponded with tracks found at the scene of the larceny, and evidence that the defendant appeared to be excited while his boots were being measured was held to be inadmissible, but

First Department, reversing a judgment of the Court of General Sessions of the Peace for the City and County of New York which convicted defendant of the crime of extortion. *Modified so as to permit a new trial.*

The facts are stated in the opinion.

Mr. Henry B. B. Stapler, with Mr. John R. Fellows, for appellants:

An act done with intent to commit a crime and tending, but failing to effect its commission, is an attempt to commit that crime.

Penal Code, § 84.

An attempt is an intent to do a particular thing which the law, either common or statutory, has declared to be a crime, coupled with an act toward the doing sufficient both in magnitude and proximity to the fact intended to be taken cognizance of by law.

1 Bishop, Crim. L. 8th ed. 738.

The question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design.

People v. Moran, 10 L. R. A. 109, 123 N. Y. 257.

The action of the complaining witnesses in

this class of cases is not open to criticism when, thus driven by fear to invoke the protection which the law guarantees them, they co-operate with the officers of the law in fixing upon such extortioners the evidences of their guilty intents and their acts in attempted accomplishment of their unlawful purposes.

People v. Noelke, 94 N. Y. 142, 46 Am. Rep. 138.

The impossibility of the perpetration of the crime intended to be committed did not render him less guilty of the crime he attempted to commit, where the defendant had done all in his power to make his criminal intent effectual.

Reg. v. Brown, L. R. 24 Q. B. Div. 358; *Reg. v. King*, 66 L. T. N. S. 300; *Rea v. Scofield*, Cal. 397; *Queen v. Goodall*, 2 Cox, C. C. 41; *Reg. v. Ransford*, 18 Cox, C. C. 9; *Reg. v. Banks*, 12 Cox, C. C. 393; *Reg. v. Jarman*, 14 Cox, C. C. 112; *Reg. v. Roebuck*, Dears. & B. C. C. 24; *Reg. v. Eagleton*, Dears. C. C. 515; *Reg. v. Francis*, 12 Cox, C. C. 613; *Reg. v. Ball*, Car. & M. 249; *Reg. v. Hensler*, 11 Cox, C. C. 570; *People v. Stiles*, 75 Cal. 570; *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22; *Com. v. Jacobs*, 9 Allen, 274; *State v. Wil-*

the question of the right to measure his boots for the purpose of identifying him as the thief does not appear to have been raised.

So the application of the constitutional prohibition has been asserted in several cases which were decided upon other grounds.

Thus in *People v. Mead* (1893) 50 Mich. 223, in which the court declined to reverse a judgment of conviction because the defendant while testifying in his own behalf had been required to measure a shoe which at the instance of the prosecution he had put on without objection, and give evidence of the measurement for the purpose of determining whether the tracks found at the scene of the crime were his, it was said that had there been any objection to his trying on the shoe, the court would have had no authority to require it, and even the simple matter of measurement he might have declined had he seen fit.

And in *Emery's Case* (1871) 107 Mass. 181, 9 Am. Rep. 22, while the question of identification was not involved the court stated a rule broadly enough to include it by saying that the constitutional provision protects a person from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction.

And that the prohibition would apply generally to one testifying as a witness as well as to the defendant himself, is held in *Counselman v. Hitchcock* (1891) 142 U. S. 547, 35 L. ed. 1110, 8 Intern. Com. Rep. 816, although this did not involve any identification of the person.

This line of cases is based upon the theory that the constitutional prohibition applies to self crimination by acts as well as by words.

Thus in *Blackwell v. State* (1881) 67 Ga. 76, 44 Am. Rep. 717, it was said that "a witness cannot be compelled to criminate himself by acts or words."

And in *People v. McCoy* (1873) 45 How. Pr. 216, it was said that "they might as well have sworn the prisoner and compelled her by threats to testify that she had been pregnant, and had been delivered of a child, as to have compelled her by threats to allow them to look into her person with the aid of a speculum to ascertain whether she had been pregnant and been recently delivered of a child."

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So in the dissenting opinion in *State v. Ah Chuey* (1879) 14 Nev. 79, 33 Am. Rep. 530, it was said that the intent of the constitutional provision was that the accused, if such should be his wish, should not only have the right to close his mouth, but that he might fold his arms as well.

In that opinion a distinction is drawn between constitutional provisions prohibiting the compelling a person to give evidence against himself or to be a witness against himself and those providing that no person shall be compelled to testify against himself, the latter being said to afford less protection than either of the others.

II. Cases asserting the right.

On the other hand, the rule is laid down in *State v. Ah Chuey* (1879) 14 Nev. 79, 33 Am. Rep. 530, which is a leading case among those asserting the right, that the constitutional provision that no person shall be compelled to be a witness against himself is construed to mean that no one shall be required to testify against himself.

And the general rule was laid down that "no evidence of physical facts can, upon any established principle of law, or upon any substantial reason, be held to come within the letter or spirit of the constitution." *Ibid.*

And in *Garvin v. State* (1876) 62 Miss. 207, it was said that proof of physical facts which may be brought to the attention of the jury by ocular demonstration may be made without other testimony than the profert of the person.

Thus in *State v. Ah Chuey*, *supra*, it was held in accordance with this rule that it is not compelling the defendant in a criminal case to be a witness against himself to require him against his objection to exhibit his arm to the jury so as to show certain tattoo marks thereon for the purpose of establishing his identity as the person who committed the crime.

And in *Garvin v. State*, *supra*, it was held that one who is indicted as a colored person may be proved to be such by profert of his person before the jury without the testimony of witnesses, where they are satisfied from their inspection that he is colored.

So in *State v. Prudhomme* (1873) 25 La. Ann. 539, it was held that compelling a prisoner on trial for murder to take his feet from under a chair where

son, 30 Conn. 500; *Kunkle v. State*, 33 Ind. 220; *Com. v. McDonald*, 5 Cush. 365; *People v. Jones*, 46 Mich. 441; *State v. Beal*, 37 Ohio St. 103, 41 Am. Rep. 490; *Clark v. State*, 86 Tenn. 611; *People v. Bush*, 4 Hill, 133; *People v. Lawton*, 56 Barb. 126; *McDermott v. People*, 5 Park. Crim. Rep. 104; *Mackesey v. People*, 6 Park. Crim. Rep. 114.

Whenever the law makes one step toward the accomplishment of an unlawful object, with the intent or purpose of accomplishing it criminally, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance.

Com. v. Jacobs, *Com. v. McDonald*, *People v. Jones*, *State v. Wilson*, and *State v. Beal*, *supra*; *Rogers v. Com.* 5 Serg. & R. 463; *Hamilton v. State*, and *People v. Bush*, *supra*; *Bishop*, Crim. L. 7th ed. § 741; *Whart. Crim. L.* § 186.

There was no error in the exclusion of certain of the evidence, as to the fact that instruc-

tions had been given the defendant by the society for the prevention of crime.

Kerrains v. People, 60 N. Y. 221, 14 Am. Rep. 158.

The testimony, if admitted, would have been simply corroborative and cumulative.

Where it is apparent and obvious that the supposed error did not and could not affect the result, nor work either injury or injustice to the party accused, we think it does not call for a reversal of the conviction.

Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286; *City Bank of Brooklyn v. Dearborn*, 20 N. Y. 246; *Forrest v. Forrest*, 25 N. Y. 510; *Smith v. Paton*, 81 N. Y. 86; *State v. Ford*, 3 Strobb. L. 517, *note*; *Ree v. Ball*, Russ. & R. C. C. 182; *King v. Tinkler*, 1 East, P. C. 354; *Horford v. Wilson*, 1 Taunt. 12; *Doe v. Tyler*, 6 Bing. 561; *De Rutzen v. Farr*, 4 Ad. & El. 53; *Nathan v. Buckland*, 2 J. B. Moore, 153; *Stiles v. Telford*, 10 Wend. 389; *Page v. Ellsworth*, 44 Barb. 640; *People v. McCann*, 16 N. Y. 61, 69 Am. Dec. 642; *Marchy v. Shultz*, 29 N. Y. 856; *People v. Bransby*, 32 N. Y. 525; *People v. Gonzalez*, 35 N. Y. 59.

There was no error in the action of the trial justice in compelling the defendant to rise for

he had put them to enable a witness who saw tracks of the murderer to state how they corresponded with the prisoner's feet is not improper or requiring him to give evidence against himself in violation of the constitutional prohibition.

And an order of the court directing the defendant in a criminal action to stand up for identification before the jury by a witness then giving testimony who had previously referred to him in his testimony as "this young man" was held not to be improper and not to require the defendant to give evidence against himself within the meaning of the constitutional prohibition in *People v. Golden-son* (1893) 76 Cal. 323.

And an answer by a witness of "that man," pointing to the defendant, made to a question as to who the person was who had taken the package from him for the larceny of which the defendant was on trial, was held not to be subject to exception, the witness having previously testified as to the taking, in *Com. v. Whitman* (1876) 121 Mass. 361.

So in *White v. State* (1893) 74 Ala. 31, it was held that the jury may look at the dress and general appearance of the defendant on a prosecution charging that a white man and a negro woman lived together in a state of adultery or fornication, who is personally present in court, in connection with the other evidence in the case, to determine whether he is of the male or female sex.

And personal inspection by the jury on the trial of an action for freedom by a slave to determine whether the plaintiff has less than one fourth African blood and is therefore entitled to freedom, or has that proportion or more and is therefore *prima facie* a slave, was held to be proper and admissible, in *Gentry v. McMinis* (1896) 3 Dana, 336; the highest and best evidence that can be given being said to be that addressed to the senses.

So profert of the person of the man was held to be proper on the trial of an indictment for miscegenation under Alabama Code, section 4613, charging that a negro man and a white woman did intermarry or live in adultery or fornication with each other, in order that the jury might determine by inspection whether he was a negro within the statutory definition as charged in the indictment, where there had been a severance as to the man, and the woman alone was on trial, in *Linton v. State* (1899) 88 Ala. 216.

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A request to a prosecuting witness on a trial for rape to look about the room and see if she could point out the man who committed the crime, and her answer, "That is the black rascal," pointing to the prisoner, were held not to be subject to the objection that the prisoner was thereby compelled to give evidence against himself, in *State v. Johnson* (1872) 67 N. C. 55.

Or to the objection that the state thereby took advantage of the defendant's presence under his right to "confront his accusers" to compel him to give evidence against himself, as the state is entitled to have him present for identification as well as for punishment. *Ibid.*

This rule also, like the opposing one, has been held to apply to evidence of compulsory examinations and exhibitions had before the trial.

Thus in *Walker v. State* (1879) 7 Tex. App. 240, 32 Am. Rep. 396, it was held that evidence on a trial for murder that the examining magistrate had compelled the prisoner to make his footprints in ashes and sand in the justice's office, and that they corresponded with footprints found at the scene of the crime, is admissible and not subject to the objection that the defendant himself was compelled to make it in contravention of the constitutional prohibition against compelling one accused of crime to give evidence against himself.

And testimony of a witness for the state, upon the trial of an indictment for assault with intent to kill, that under direction of the sheriff he applied the boot taken from the foot of the defendant at the time of his arrest to tracks found near the scene of the crime and found them to correspond, was held to be admissible as an item of circumstantial evidence but not sufficient of itself to sustain a conviction, in *Meyers v. State* (1893) 14 Tex. App. 35.

So in *State v. Graham* (1876) 74 N. C. 646, 21 Am. Rep. 493, it was held that an officer who has arrested a prisoner charged with a crime has a right to take off the boots or shoes of the prisoner and compare them with tracks found at the scene of the crime, and where the prisoner upon being required to place his foot in one of such tracks does so the officer may properly testify as to the result of the comparison thus made.

And evidence as to the condition of the defendant's hand upon a trial for murder was held to be

the purpose of affording a witness who had seen the defendant when in a standing position an opportunity of determining whether he recognized the defendant as the person she had so seen.

Story, Const. Law, § 1788; *State v. Ah Chuey*, 14 Nev. 81, 33 Am. Rep. 530; *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 498; *State v. Garrett*, 71 N. C. 85, 17 Am. Rep. 1; *State v. Johnson*, 67 N. C. 58; *State v. Prudhomme*, 25 La. Ann. 523; *Johnson v. Com.* 115 Pa. 869; *Hoag's Case*, 5 City Hall Rec. 124; Burrill, Circumstantial Ev. pp. 635-638. 650; *Rice v. Rice* 11 L. R. A. 591, 47 N. J. Eq. 560.

Mr. John W. Goff, with Mr. Frank Moss, for respondent:

Whenever motive is material, evidence to show the motive to be either bad, good, or excusable, from necessity, is relevant.

People v. Wood, 81 Park. Crim. Rep. 681; *Kerrains v. People*, 60 N. Y. 221, 14 Am. Rep. 158; *People v. Odell*, 14 N. Y. Week. Dig. 403; *Donohue v. People*, 56 N. Y. 208; *People v. Farrell*, 81 Cal. 576; *People v. Quick*, 51 Mich. 547; 5 Am. & Eng. Encyclop. Law, p. 787, citing *Viocci v. Viocci*, 26 Eng. L. & Eq. 604,

admissible when at a coroner's inquest upon the body of the person alleged to have been murdered it was proven that the defendant who was taken in custody upon suspicion had said that deceased was accidentally burned to death, and that she, the defendant, had burned her hand in trying to put the fire out, when the coroner ordered her to unwrap and show her hand, which she did, in *State v. Garrett* (1874) 71 N. C. 85, 17 Am. Rep. 1.

And the boots and socks of a prisoner charged with murder, taken from his person at the time of his arrest in the course of the usual search of his person upon his arrival at the jail, were held to be admissible in evidence at the trial for the purpose of identifying him as the person who committed the crime by comparison with tracks found at the scene of the crime and not subject to the objection that they were obtained by unreasonable search or that he was thereby compelled to give evidence against himself, in *State v. Nordstrom* (1893) 7 Wash. 506.

So, as in the opposing line of cases, the doctrine has been asserted in cases turning upon other points.

Thus in *Warlick v. White* (1877) 78 N. C. 175, holding it to be competent to exhibit a child to the jury on an issue as to whether it was of mixed blood it was said that if a person indicted for a crime should persist in wearing a mask, it can scarcely be doubted that a court would order the mask to be removed so that a witness of the crime might be able to identify him as the criminal.

And in *Re Jessup's Estate* (1899) 6 L. R. A. 594, 81 Cal. 408, holding that pictures taken by photography of the putative father of an alleged illegitimate child are admissible in evidence in a proceeding to establish heirship for the purpose of showing resemblance between them, the court said that they would be entitled to much less weight as evidence than proof of the persons themselves, and even that would not go far toward establishing relationship, since a marked similarity between strangers and great dissimilarity between kindred are matters of almost daily observation.

So in *Johnson v. Com.* (1887) 115 Pa. 369 (set forth *infra* under heading, *Waiver of the constitutional exemption*, holding that the prisoner had waived his rights by failure to object), the court said that, assuming that objection had been duly taken, it was not prepared to say that it would have been

625; *Latham v. Latham*, 30 Gratt. 307; *Cass v. Cass*, 39 N. J. Eq. 148.

Error was committed by the trial court in compelling the defendant, against his objections, to be stood up in court that a witness might identify him.

A defendant in a criminal case shall not be compelled to be a witness against himself.

N. Y. Const. art. 1, § 6; U. S. Const. Amend. 5.

It may be argued that compelling the defendant to stand up for inspection is different from compelling him to expose a certain portion of his person for inspection. The difference is only in degree.

Constitutional safeguards cannot be pared down by degrees, for the manifest intent of the one in question is as broad as the mischief it was desired to guard against.

Counselman v. Hitchcock, 142 U. S. 447-586, 35 L. ed. 1110-1122; *Boyd v. United States*, 116 U. S. 635, 29 L. ed. 753.

Owing to the increase in the number of cases where threats were made that unless money was paid the person would be accused of having committed an unnatural crime, it was decreed by the judges that this threat was

of any avail to the prisoner or that it could have been regarded as a violation of the constitutional prohibition against compelling the accused to give evidence against himself as "he was not asked much less compelled" to give evidence against himself.

And in *State v. Morris* (1881) 84 N. C. 758, which was a prosecution for murder, tracks at the scene of the crime were measured and the measurements applied to the boots of the prisoner against his objection, but the objection was based and the case turned on the question whether the measurement and comparison could lawfully be made in his absence without notice.

The doctrine of this line of cases is reduced to the general rule in *State v. Nordstrom* (1893) 7 Wash. 506, that an accused person cannot be compelled to exhibit those portions of his body which are usually covered for the purpose of securing his identification or in other ways affording evidence against him.

And *State v. Ah Chuey* (1879) 14 Nev. 73, 33 Am. Rep. 530, is therein referred to as holding that exposure is prohibited only where decency would be infringed.

And in *State v. Ah Chuey*, *supra*, it was said that whether or not requiring a defendant to exhibit himself to the jury for the purpose of identification was erroneous depends upon the questions, Was he compelled to exhibit himself in such a manner as to unjustly or improperly prejudice his case before the jury? Did the act in question have a tendency to degrade, humiliate, insult, or disgrace him? and, Did the judge by the act in question convey to the jury the idea that he believed him to be guilty of the offense charged against him?

The doctrine denying the application of the constitutional prohibition is based upon the theory that the reasons for its enactment are not applicable to evidence of this character.

Thus in *State v. Ah Chuey*, *supra*, it is said that the reason for the constitutional prohibition against compelling a person to be a witness against himself is that it was believed that he might, by the flattery of hope or suspicion of fear be induced to tell a falsehood, and that such reason is not applicable to the examination of the person of the defendant for marks and scars, as that in the very nature of things could not lead to falsehood.

of such a heinous character, fraught with such horrible consequences to the accused, and calculated to produce such terror, that it was a putting in fear, and constituted robbery.

Jackson's Case, 1 East, P. C. Addenda, XXI.; *Rea v. Fuller*, MS. Bailey, J., and R. R. 408; *Donnelly's Case*, 2 East, P. C. p. 715; 2 Russell, Crimes, 9th ed. 129; *Long v. State*, 12 Ga. 293.

Extortion signifies, in an enlarged sense, any oppression under color of right. In a stricter sense, it signifies the taking of money by an officer by color of office.

People v. Whaley, 6 Cow. 662.

The attributes of robbery are violence, force, or fear.

The attribute of extortion is force of fear induced by a threat.

Fear in criminal law, is dread, consciousness of approaching danger.

1 Bouvier, Law Dict. 577; *Donnelly's Case*, 2 East, P. C. 718; 2 Russell, Crimes, 71; *King v. Southerton*, 6 East, 127.

On the evidence in this case, how can it be contended that Amos was induced through fear to promise the defendant money? Was the free operation of her will suspended? Clearly not, for, as an active and willing agent

of the police, she had been exercising her will and ingenuity for over a month to entice the defendant into her snare.

Forcible examination of the person is unconstitutional.

People v. McCoy, 45 How. Pr. 216; *State v. Jacobs*, 50 N. C. 259; *Blackwell v. State*, 67 Ga. 76, 44 Am. Rep. 717; *Day v. State*, 63 Ga. 669; *Stokes v. State*, 5 Baxt. 619, 80 Am. Rep. 72; *State v. Johnson*, 67 N. C. 55; *People v. Mead*, 50 Mich. 228.

The defendant was indicted for attempt at extortion. The evidence showed, if anything, an attempt at compounding; but there is absolutely nothing in the evidence to show that a threat to accuse of a crime was made by the defendant.

Extortion, as defined in the penal code, was, as a substantive crime, unknown at common law. Its constituent elements were recognized as robbery.

Robbery was defined as "the felonious taking of money or goods of any value from the person of another, or in his presence against his will, by violence or putting in fear."

2 East, P. C. 707; 4 Bl. Com. 242; 2 Bishop, Crim. L. 7th ed. § 1157.

Extortion, at common law, was a misde-

And in *State v. Graham* (1876) 74 N. C. 646, 21 Am. Rep. 493, it was said that such reasons do not apply to compelling the defendant to place his foot in a track made by the guilty party and testifying as to the result of the comparison, as no fears or hopes of the prisoner could produce a resemblance between the tracks.

III. Comparison of cases.

No independent comparison or criticism of the cases is attempted or intended, all designed to be shown under this heading is what appears in the cases themselves with reference principally to the apparent conflict between the North Carolina cases.

State v. Ah Chuey (1879) 14 Nev. 79, 38 Am. Rep. 630, which is the leading case affirming the right, disapproves *State v. Jacobs* (1858) 50 N. C. 259, which is the leading case denying it, the court saying that it is a noticeable fact that in none of the subsequent cases in North Carolina in which that case was cited have the courts sanctioned or in any manner approved of the reasoning upon which the decision was based.

It is to be observed, however, that *State v. Ah Chuey*, *supra*, was decided by a divided court a strong dissenting opinion having been given, and while all the subsequent North Carolina cases uphold the opposite rule, *State v. Jacobs*, *supra*, was nowhere expressly overruled and many of them distinguish it, which if not an approval is certainly not a denial of the doctrine therein asserted.

Thus *State v. Woodruff* (1872) 67 N. C. 38, involving the question of the right to exhibit the child to the jury in a bastardy case, distinguishes *State v. Jacobs*, *supra*, upon the ground that in that case the prisoner was ordered to stand up and exhibit himself to the jury while the record showed nothing of the kind in the case at bar.

And *State v. Johnson* (1872) 67 N. C. 55, distinguishes *State v. Jacobs*, *supra*, upon the ground that in that case the prisoner was required to exhibit himself that the jury might determine his blood or race, which was a matter to be proved by witnesses who knew the facts, the court saying that in that case it would have been competent for witnesses who knew him to point to him as being the identical person of whom they were speaking.

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And *State v. Garrett* (1874) 71 N. C. 85, 17 Am. Rep. 1, distinguishes *State v. Jacobs*, *supra*, upon the ground that in that case the prisoner himself on trial was compelled to exhibit himself to the jury that they might see that he was within the prohibited degree of color thus forcing him to become a witness against himself, while in the case at bar it was not the prisoner but the witnesses who were called to prove what they saw upon inspecting the prisoner's hand though the inspection was obtained by intimidation.

IV. Waiver of the constitutional exemption.

An accused person waives his constitutional exemption from being compelled to exhibit himself when he makes the required exhibition without objection.

Thus a prisoner charged with murder who is directed by the district attorney to stand up and repeat sentences used by the person who committed the murder for the purpose of affording a witness then on the stand an opportunity of seeing him and hearing his voice to enable him to testify as to whether he was or was not the same person, waives his right to claim that he was thereby compelled to give evidence against himself, where he complies with such direction without objection either on his part or upon the part of his counsel, and the action of the court in permitting it furnishes no basis for review upon appeal. *Johnson v. Com.* (1887) 115 Pa. 806.

And a defendant on a trial for murder who at the instance of the state stands up before the jury and places a broad-brimmed hat on his head and a handkerchief over his face, whereupon a witness testifies that that was exactly the way he looked on the night of the murder, cannot object on appeal that he was thereby required to testify against himself in violation of the constitutional provision, where no compulsion was used and he made no objection, and for all that appears he not only consented to it but may have been desirous of the test. *Gallaher v. State* (1889) 28 Tex. App. 247.

So, when on a trial for murder the evidence tends to show that the murderer at the time of the murder had worn a certain pair of rubber boots, and the defendant goes upon the stand and testifies that he cannot get them on, and, at the request of

meanor, and was defined "to consist in any officer's unlawfully taking, by color of his office, from any man any money or thing of value that is not due him or more than is due or before it is due."

Bl. Com. 141; 1 Hawk. P. C. 419; *Com v. Bayley*, 7 Pick. 279; *Runnells v. Fletcher*, 15 Mass. 525.

Earl, J., delivered the opinion of the court:

The defendant was indicted and upon his trial convicted of an attempt to commit the crime of extortion in the city of New York, on the 4th day of December, 1892, by attempting to obtain \$150 from Catharine Amos by threatening to accuse her of keeping a house of prostitution. The following are the sections of the Penal Code under which he was convicted: Section 552: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." Section 553: "Fear, such as will constitute extortion, may be induced by a threat" (among other things) "to accuse a person of any crime." Section 84: "An act done with intent to commit a crime, and

tending but failing to effect its commission, is an attempt to commit that crime." Section 685: "A person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court, in its discretion, discharges the jury and directs the defendant to be tried for the crime itself."

Catharine Amos, who was the principal witness for the people, testified that for nine years she had been the keeper of a house of prostitution in the city of New York, and that the defendant, in December, 1892, came to her and agreed with her that if she would pay certain sums of money to him, and especially the sum of \$150, he would not accuse her of the crime, and that from October 19, 1892, to December 4, 1892, she had been acting as a decoy of the police and trying to induce the defendant to receive money from her under such circumstances as would render him guilty of a crime and enable the police to arrest and convict him of it.

The evidence tended to show the existence of every element constituting the crime of extortion, except that Mrs. Amos in paying the money exacted by the defendant was not actuated by fear.

his counsel, makes apparently extraordinary efforts to do so before the jury, permitting a shoemaker to measure the boots and the prisoner's foot and testify that feet of that size could wear the boots, and permitting other persons in the presence of the jury to put on the boots, after which the shoemaker measured their feet and found them as large as the defendant's, is not erroneous, or subject to the objection that defendant was thereby compelled to give evidence against himself, but legitimate and proper after the exhibition made by the defendant in his apparent efforts to get them on, by way of cross-examination and rebuttal. *State v. Nordstrom* (1898) 7 Wash. 506.

And in *People v. Mead* (1888) 50 Mich. 223, it was held that a ruling of the court on a trial for burglary and larceny requiring the defendant while giving evidence in his own behalf to measure a shoe which at the instance of the prosecution he had put on without objection, for the purpose of determining whether the tracks found at the scene of the crime were his own, was a harmless error for which a reversal would not be made, as the simple measurement and declaration of the result might have been done by any one else as well as by himself.

So voluntary submission to an inspection before trial is a waiver of objection to evidence of the facts ascertained thereby on the ground that it violates the prisoner's constitutional exemption.

Thus, the testimony of physicians who examined a person charged with rape, while in jail, as to his physical condition, who voluntarily submitted thereto after being informed that the physicians came and were acting at the instance of the district attorney, is admissible where the testimony with reference to the rape tended to show that the prosecutrix thereby became inoculated with a venereal disease, the defendant having denied the commission of the deed. *People v. Glover* (1888) 71 Mich. 808.

And an examination by a physician of the defendant in a prosecution for burglary made in jail before trial for the purpose of identifying him as the culprit who had been caught by the face and neck while engaged in making the entry cannot be said to be compulsory so as to render evidence concerning it inadmissible though the sheriff ac-

companied the physician, where it does not appear that he did or said anything with respect to it, or that the defendant was compelled to submit to it. *State v. Struble* (1887) 71 Iowa, 11.

V. The English rule.

Though England has no written constitution and consequently no constitutional prohibition against compelling an accused to give evidence against himself, the rule that such compulsion shall not be allowed has been repeatedly declared with reference to ordinary testimony and in matters not relating to identification.

With relation to inspection of the person for the purpose of identification, however, the English cases seem to agree with that line of American cases holding that the prohibition extends only to compelling the accused to testify.

Thus, a witness in a criminal action may be directly asked whether a person in court to whom his attention is then directed is the one of whom he had spoken in order to identify him with other persons charged in the same indictment with the one on trial where he had previously given a description of such person. *Watson's Case* (1817) 3 Stark. 116.

And a person indicted with others for a criminal offense but against whom the bill has been thrown out, who remains in custody under another charge, may be placed at the bar to be identified as one who was in company with the others. *Rex v. Deering* (1831) 5 Car. & P. 165.

So in *Atty-Gen. v. Fadden* (1815) 1 Price, 403, it was held that a defendant in an information who is in prison may, in case of a question as to the identity of the person, be brought up on habeas corpus at his own expense to be present at the trial, where he claims that the crime was committed by a person who had assumed his name.

And in *Reg. v. Blackburn* (1858) 6 Cox, C. C. 333, a witness who testified that he had seen the prisoner at a particular spot on the morning after the murder and that he had since seen a number of men in gaol and pointed out one, was asked, "Who did you point him out as being?" and the question with the answer that it was the prisoner was sustained, but the only question raised was as to the form of the question.

F. H. B.

It is urged on behalf of the defendant that the fact that his threats did not inspire fear inducing any action on the part of Mrs. Amos, an element essential to constitute the completed crime of extortion renders it impossible to sustain an indictment and conviction for the lesser crime of an attempt at extortion, and so a majority of the judges constituting the general term held. We are of opinion that those learned judges fell into error.

The threat of the defendant was plainly an act done with intent to commit the crime of extortion, and it tended, but failed to effect its commission, and therefore the act was plainly within the statute an attempt to commit the crime. The condition of Mrs. Amos' mind was unknown to the defendant. If it had been such as he supposed the crime could have been and probably would have been consummated. His guilt was just as great as if he had actually succeeded in his purpose. His wicked motive was the same, and he had brought himself fully and precisely within the letter and policy of the law. This crime as defined in the statute depends upon the mind and intent of the wrongdoer, and not on the effect or result upon the person sought to be coerced. As said in *People v. Moran*, 123 N. Y. 254, 10 L. R. A. 109, where the defendant was convicted of an attempt to commit the crime of larceny by thrusting his hand into the pocket of a woman which was not shown to contain anything, "the question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. . . . An attempt is made when an opportunity occurs and the intending perpetrator has done some act tending to accomplish his purpose, although he is baffled by an unexpected obstacle or condition." In *Com. v. Jacobs*, 9 Allen, 274, the defendant was convicted of soliciting a person to leave the commonwealth for the purpose of enlisting in military service elsewhere, although such person was not fit to become a soldier, and there it was said: "Whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance." It is now the established law, both in England and in this country, that the crime of attempting to commit larceny may be committed, although there was no property to steal, and thus the full crime of larceny could not have been committed. *Reg. v. Brown*, L. R. 24 Q. B. Div. 357; *Reg. v. Ring*, 66 L. T. N. S. 800; *Com. v. McDonald*, 5 Cush. 365; *People v. Jones*, 46 Mich. 441; *State v. Wilson*, 35 Conn. 500; *Clark v. State*, 86 Tenn. 511; *State v. Beal*, 87 Ohio St. 108, 28 L. R. A.

41 Am. Rep. 490; *Rogers v. Com.* 5 Serg. & R. 463; *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22.

In *Rez v. Holden*, Russ. & R. C. C. 154, it was held, on an indictment under a statute against passing or disposing of forged bank notes, with intent to defraud, that it was no defense that those to whom the notes were passed knew them to be forged, and, therefore, could not be defrauded. In *Reg. v. Goodchild*, 2 Car. & K. 294, and *Queen v. Goodall*, 2 Cox, C. C. 41, it was held, under a statute making it a felony to administer poison or use any instrument with intent to procure the miscarriage of any woman, that the crime could be committed in a case where the woman was not pregnant. It has been held in several cases that there may be a conviction of an attempt to obtain property by false pretenses although the person from whom the attempt was made knew at the time that the pretenses were false, and could not therefore be deceived. *Reg. v. Hensler*, 11 Cox, C. C. 570; *Reg. v. Banks*, 12 Cox, C. C. 398; *Reg. v. Francis*, Id. 618; *Reg. v. Ransford*, 13 Cox, C. C. 9; *Reg. v. Jarman*, 14 Cox, C. C. 112; *Reg. v. Bagleton*, Dears. C. C. 515; *Reg. v. Roebuck*, Dears. & B. C. C. 24; *Reg. v. Ball*, Car. & M. 249; *People v. Stites*, 75 Cal. 570; *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22; *People v. Bush*, 4 Hill, 132; *People v. Lawton*, 56 Barb. 126; *McDermott v. People*, 5 Park. Crim. Rep. 104; *Mackesey v. People*, 6 Park. Crim. Rep. 114. And to the same effect are the text-books on criminal law. 1 Bishop, Crim. L. §§ 728 *et seq.*

So far as I can discover there is absolutely no authority upholding the contention of the learned counsel for the defendant, that because the defendant did not inspire fear in the mind of Mrs. Amos by his threats, and thus could not have been guilty of the completed crime of extortion, therefore he cannot be convicted of attempting to commit the crime. That contention is, as I believe, also without any foundation in principle or reason.

Therefore, upon the facts alleged in the indictment and appearing upon the trial, the defendant could be convicted of an attempt to commit the crime of extortion, and the general term, in reversing the judgment, should not, therefore, have refused to grant a new trial and have discharged the defendant.

Our attention has been called on behalf of the defendant to many other exceptions taken by his counsel during the progress of the trial, which, it is claimed, point out errors. We have examined all of them, but do not deem it important to call particular attention to but two.

Upon the trial it was proved that defendant and Mrs. Amos were together upon certain occasions having a material bearing upon the case, and a witness was called to identify the defendant as the person who was in her company at one of the times and places referred to. The witness was asked: "Do you know Mr. Gardner?" *Answer*: "I do not." Q. "Would you know him if you saw him?" A. "Yes sir." Then the court directed the

defendant to stand up. The defendant's counsel objected to his standing up, or that he should be compelled to stand up or to testify against himself. The court replied: "The prisoner will rise; stand him up." And then, against the objection of his counsel, the defendant was forcibly compelled to stand up, and then he was identified by the witness. It is now claimed on his behalf that this action on the part of recorder violated his constitutional rights by compelling him to be a witness against himself. N. Y. Const. art. 1, § 6; U. S. Const. Amend. 5. We do not think that the defendant's constitutional right was violated or that he was compelled, within the meaning of the constitutional provisions referred to, to give evidence against himself. He was bound to be in court and in the presence of the jury, the recorder and the witnesses who might be there. The recorder, the jurors and the witnesses had the right to see him, and he had the right to see them. It was necessary that he should be identified as the person named in the indictment and charged with the crime. His mere standing up did not identify him with the alleged crime, and did not disclose any act connected with the crime. There was nothing on his person or in his appearance that in any way connected him with the crime, or furnished any evidence whatever of his guilt. Suppose he had come into court with his face veiled, could not the recorder compel him to remove the veil that his face might be seen? Could he not compel him to remove his hat: to stand or sit in the prisoners' dock? In the examination of the witness could not the district attorney have pointed to the defendant and asked the witness whether he was the person he had seen with Mrs. Amos? Instead of compelling the defendant to stand up, could not the recorder have directed the witness to go to the place where he was and look at him with the view of identifying him? If all these things could be done without violating the rights of the prisoner, how is it possible to say that he was harmed, or that his constitutional right was invaded by compelling him to stand up for the purpose of identification? For the orderly conduct of a criminal court it is requisite that the trial judge should have the power to say what place the prisoner shall occupy in the court-room, and whether at any time he shall stand or sit, and be covered or uncovered; and he must have the power at all times to keep the prisoner within sight of the court, the jury, the counsel and the witnesses. The history of the constitutional provision referred to clearly demonstrates that it was not intended to reach a case like this. Story, Const. Lim. § 1788; 1 Stephen, Hist. Crim. L. 440. The main purpose of the provision was to prohibit the compulsory oral examination of the prisoners before trial, or upon trial for the purpose of extorting unwilling confessions or declarations implicating them in crime. It could reach further only in exceptional and peculiar cases coming within the spirit and purpose of the inhibition. A murderer may be forcibly taken before his dying victim for identification, and the dying declarations

of his victim may then be proved upon his trial for his identification. A thief may be forcibly examined and the stolen property may be taken from his person and brought into court for his identification. A prisoner's person may be examined for marks and bruises, and then they may be proved upon his trial to establish his guilt; and it would be stretching the constitutional inhibition too far to make it cover such cases and cases like this, and the inhibition thus applied would greatly embarrass the administration of justice. In *Rice v. Rice*, 47 N. J. Eq. 559, 11 L. R. A. 591, Beasley, Ch. J., said: "That every court of judicature, as an indispensable attribute, is possessed of the power to require every person who is present as a party, or who is a witness under examination, to disclose his or her face to the court or to the jury, if there be one, would not seem in any degree questionable. Without such exposure there would be no certainty who the person really was who assumed to act as party or witness. To order such persons to expose their faces to view is common usage in every court, and thus far the practice seems not to be open to any question." Our attention is called to authorities bearing more or less upon the question we are now considering, and we find that they are not all harmonious. In *State v. Jacobs*, 50 N. C. 259, it was held that a judge has no right to compel a defendant in a criminal prosecution to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free negro. There the defendant was indicted as a free negro for carrying arms, and it became necessary for the prosecution to show that he was a negro, and in the state a man was held to be a negro who had as much as one sixteenth part of African blood in his veins. There the defendant was compelled to stand up that the jury might see whether he was a negro or not, and to determine that fact from their own observation. Thus there was a sense in which it could be said that the defendant was compelled to furnish evidence against himself upon a vital issue to be tried, and so that case is distinguishable from this. But no authority was cited to uphold that decision, and we entertain no doubt that it was erroneous. The judge writing the opinion said: "Admitting that the state has a right to compel his presence at the trial, it does not follow that he is bound to stand or sit within view of the jury." Can this observation be correct? Certainly, in this state it cannot be maintained that a prisoner, when on trial, could not be compelled to stand or sit in view of the jury. It is the right of the prisoner to be in the presence and view of the jury, and it is the right of the prosecution to have him in the view of the presiding judge and jury and the counsel engaged in the trial. And whether at any particular time he should stand up or sit down in the presence of the jury must be a matter resting in the discretion of the trial judge, and in no sense can it be said that by the exercise of such discretion his constitutional right is involved.

In the case of *State v. Johnson*, 67 N.

C. 55, the defendant was on trial for rape, and on the trial the prosecutrix was asked by the prosecuting attorney to look around the court-room and see if she could identify the guilty party, and she pointed to the prisoner and said, "That is the black rascal." It was insisted that this was to make the prisoner furnish evidence against himself; that he had the right to be there and confront his accusers, and that for the state to take advantage of his presence to have him pointed out and identified placed him in the dilemma of either abandoning his constitutional right to be present, or of affording the means of his conviction by its exercise. The court held, against this contention, that no error was committed. Suppose in that case the court had placed the prisoner where he would have been conspicuously in view of the court, the jury and the witnesses, and the prosecutrix had then identified him? Would his constitutional right have been invaded? And if he had been compelled to stand up would he have been compelled, within the meaning of the constitution, to give evidence against himself? We think not. We are, therefore, of opinion that no error was committed in the case in compelling the defendant to stand up for identification.

It appeared upon the trial by the witnesses for the prosecution that, prior to the time of the alleged offense, the defendant was much in the company of Mrs. Amos; that he visited her at her house; that she visited him at his house; that he frequently rode with her through the streets of New York, and visited saloons and drank wine with her. These facts were proved, on the part of the prosecution, to show his relations with Mrs. Amos and his motives, and as links in the chain showing the commission of the alleged crime. The defendant offered to show, by himself and other witnesses, that in his relations with Mrs. Amos he was acting under the directions of officers of the Society for the Prevention of Crime, for the purpose of gaining her confidence and good will, and securing from her an affidavit which could be used for the arrest of a former agent of that society who was

supposed to be engaged in extorting money from keepers of houses of prostitution by threats of prosecution, and the recorder excluded the evidence. It is now claimed that in such exclusion error was committed. We think the evidence should have been received. The defendant should have been permitted to prove that he acted under the general instructions of the Society for the Prevention of Crime, whose agent he was, and that he reported his acts to its officers and followed their directions. Such proof would have had a tendency to put an innocent aspect upon his acts which would otherwise seem to be a part of the scheme to commit the crime with which he was charged. It is claimed on behalf of the people that the exclusion of this evidence was not harmful to the defendant, as the facts were nevertheless proved. We have carefully read all the evidence, and we are not satisfied that the defendant did not suffer harm from the rulings complained of. The recorder had laid down the law by these rulings, and the defendant did not have the benefit of the evidence offered in the submission of the case to the jury. The case went to the jury with the rulings of the recorder during the progress of the trial that that kind of evidence was incompetent and illegal.

Other things transpired during the progress of the trial to which our attention has been called, which, though not presenting legal errors which would call for a reversal of the judgment of conviction, were yet of such a character that they may have been harmful, and probably were harmful to the defendant. We will not comment upon them, as they may not and probably will not appear upon another trial.

On account of the error above pointed out, while the general term should have reversed the judgment below, it should also have granted a new trial.

Our conclusion, therefore, is that *the order of the General Term should be so modified as simply to reverse the judgment of conviction and to grant a new trial.*

All concur.

ALABAMA SUPREME COURT.

O'BEAR JEWELRY CO. *et al.*, Appts.,

v.

S. VOLFER *et al.*

(.....Ala.....)

1. The property of an insolvent corporation is not a trust fund for the benefit of creditors in any sense other than that when a chancery court takes possession of it upon some general principle of equity jurisdiction wholly independent of any idea that the property con-

stitutes a trust fund, it will be administered for the equal benefit of creditors.

2. A single bill in equity by creditors of an insolvent corporation cannot be sustained to reach unpaid stock subscriptions, to recover funds transferred by it to preferred creditors and to administer an assignment by the corporation for the benefit of creditors.

(April 24, 1895.)

A PPEAL by defendants from a decree of the Birmingham City Court overruling a demurrer to a bill which sought to collect the assets of an insolvent corporation as a trust fund for creditors. *Reversed.*

The facts are stated in the opinion.

Messrs. Ward & John and Dickinson & Kerr, for appellants.

NOTE.—In connection with the present case in its repudiation of the idea that the assets of an insolvent corporation are held as a "trust" fund in any real meaning of that term, see *Hospes v. Northwestern Mfg. & Car Co.* (Minn.) 15 L. R. A. 470; also some cases cited in *note* to *Boulton Carbon Co. v. Mills* (Iowa) 5 L. R. A. 649.

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Messrs. John Vary and Arnold & Evans, for appellees:

The bill embraces two or more distinct subjects. It contains several distinct grounds of suits in equity.

1 Dan. Ch. Pr. p. 834, *note 1*; *American Refrigerating & Constr. Co. v. Linn*, 93 Ala. 610; 8 Brickell's Dig. pp. 888 et seq.; 15 Am. & Eng. Encyclop. Law, p. 947.

There is a misjoinder of parties and of matter.

Dan. Ch. Pr. p. 835; *Walt, Fraud. Conv.* § 135.

The bill charges a tort, and mingles tort with a simple trust, as well as a matter where assumpsit would lie. This may not be.

Seals v. Pfeiffer, 77 Ala. 281; *West v. West*, 90 Ala. 462; *Rapier v. Gulf City Paper Co.* 69 Ala. 476.

As an insolvent natural person might, the insolvent corporation could prefer a creditor by a debt in money or profits.

Goodyear Rubber Co. v. George D. Scott Co. 96 Ala. 489.

The property of a corporation is a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved, and all its affairs wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among stockholders. It is also true, in the case of a natural person, that any conveyance of the property of the debtor without authority of law and in fraud of existing creditors is void.

Hoespes v. Northwestern Mfg. & Car Co. 15 L. R. A. 470, 48 Minn. 174; *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587, 29 L. ed. 235; *Clark v. Bever*, 189 U. S. 96, 85 L. ed. 88.

McClellan, J., delivered the opinion of the court:

The present bill is filed by Volfer & Co. and others, as judgment creditors of the O'Bear Jewelry Company, a corporation. Said corporation, R. D. Johnston, the Alabama National Bank, G. S. O'Bear, Jr., W. G. O'Bear, F. C. O'Bear, and W. B. Copeland are made parties defendant. It is made to appear by the bill that the O'Bears and Copeland organized said corporation with a proposed or nominal capital of \$25,000, divided into 250 shares of \$100 each. Of these, G. S. O'Bear subscribed for eighty shares, or \$8,000, to be paid by transferring to the corporation a certain stock of jewelry, store fixtures, etc. W. G. O'Bear subscribed for thirty shares, or \$3,000, to be paid by transferring to the corporation a lot of miscellaneous jewelry, a list of which was, according to the report of the commissioners, in their hands. Mrs. F. C. O'Bear subscribed for twenty shares, or \$2,000, with the privilege of paying for the same by delivering to the company certain gold watches (28) and diamond rings (8). And W. B. Copeland subscribed for twenty shares, to be paid in money. The corporation organized in February, 1888, and a report was made to the probate judge's office, setting forth that said subscribers for stock had made the transfers of property and the cash payments as provided for in the terms of their respective subscriptions. The bill avers that said Copeland did not and has never paid the \$2,000 subscribed

by him, but still owes the same; that the stock of goods, etc., which was paid to and accepted by the commissioners in satisfaction of G. S. O'Bear's subscription of \$8,000 was not worth more than \$4,000, was fraudulently accepted in full payment, and that said G. S. still owes the balance of \$4,000; that the lot of jewelry with which W. G. O'Bear was to pay his subscription of \$3,000, and which was so accepted, was worth only \$1,000, and hence that W. G. still owes the balance of \$2,000; that Mrs. F. C. O'Bear did not pay the amount subscribed by her, either in property or money, and still owes the same. Said G. S. O'Bear and W. B. Copeland were the commissioners appointed by the probate judge to open books of subscription to the capital of said corporation; and the bill charges "that the pretense and representation that said W. B. Copeland had paid his subscription in cash, and that Mrs. F. C. O'Bear had paid her subscription by the transfer of watches and three diamond rings, when in truth no such payments were made, and the excessive valuation of the property transferred by G. S. and W. G. O'Bear, was knowingly and intentionally made by collusion and agreement among said incorporators, and constituted fraud upon persons who might become creditors of said corporation." The corporation upon organization commenced and continued business until December, 1888, or January, 1889, when most of its stock of goods was destroyed by fire, and since then it has not carried on its business. While carrying on its business, the corporation bought large quantities of merchandise, and at the time of the fire had on hand goods amounting in value to many thousand dollars, which were insured to a large amount, and it was agreed that the insurance companies should pay the corporation the sum of \$7,000 on account of said loss. At the time of said fire the corporation was indebted to complainants in the several sums stated in the bill, and to divers other persons, including the Alabama National Bank, to which it owed \$2,500, and was then and ever since has been confessedly insolvent, the bulk of its assets after the fire consisting of the sums owing it by the insurance companies. The bill further avers "that for the purpose of preventing complainants and other creditors of said corporation from subjecting said insurance money to the payment of their debts, and to save the same, or as much thereof as possible, to said incorporators, said company assigned and transferred the policies of insurance held by it to the Alabama National Bank before the dispute which had arisen between it and said insurance companies had been settled, and complainants charge that for said transfer there was no consideration except that said corporation was indebted to said bank in the sum of twenty-five hundred dollars, as aforesaid, and that said bank received in cash on account of said policies a sum not less than seven thousand dollars; and, after appropriating to itself a sufficiency to pay the debt due said bank, it paid over the balance, amounting to the sum of forty-five hundred dollars, to the persons who composed said corporation, or to some of them, or for their personal account." The bill further avers: "Complainants are advised that said [insurance] money, as well

as all the other property of said corporation, was a trust fund, and, after said fire and the insolvency of said corporation, belonged to said corporation in trust for the payment of the debts thereof, and that the collection thereof and the payment by said bank of the proceeds to or on account of the individual corporators was a misapplication of said funds, for which said bank, which (as your orators charge) knew the insolvent condition of said corporation, as well as the said individual corporators, was and is liable to the creditors of said corporation." It is further shown that on September 4, 1889, said corporation appeared in court, and confessed judgment in favor of said bank for \$1,075 on a complaint then filed, and immediately after the confession and registration of this judgment, the jewelry company executed a general assignment to R. D. Johnston for the benefit of its creditors; and it is charged that said confession of judgment and assignment were parts of one and the same transaction, and should be so decreed and administered; and that said assignee took possession of the property of said corporation, converted the same into money, and out of such proceeds paid said judgment to the bank, and still has a small sum in his hands.

The theory upon which complainants seek relief is thus set forth in the bill: "Complainants are advised that the entire assets of said corporation constitute a trust fund for creditors, and that all persons who in any wise knowingly participate in the unlawful appropriation of said trust fund, or any part thereof, will be required in equity to restore the same; that the subscribers to said capital stock will be compelled to pay the differences between their respective subscriptions, and the actual, reasonable value of the property transferred by them in pretended payment thereof, and that such subscribers as have made no payment or transfer of property will be required full payment to make; that said confession of judgment will be held a part and parcel of said general assignment, and said Alabama National Bank will be required to pay the sum received by it in payment thereof, as aforesaid, for the benefit of creditors, and that said bank will be further required to account for the proceeds of the insurance policies received by it as aforesaid, and to restore so much thereof as said bank paid to the individuals composing said corporation or for their use." The prayer is that a receiver of the property and effects of the O'Bear Jewelry Company be appointed, and authorized to receive the moneys and effects thereof to which it may be decreed entitled under the allegations of the bill; that said subscribers to the capital stock of said corporation be required to pay to the court the amounts which they respectively subscribed, less the actual reasonable value of such property as they transferred to said corporation; that said Alabama National Bank be required to pay into court or to the receiver to be appointed the amount received by it on account of said judgment, as also the sum received by it as the proceeds of the policies of insurance over and above the debt owing it; and that the said assignee, R. D. Johnston, be required to file in court his accounts as such assignee; and to pay into court or to the receiver all

moneys in his hands, and to turn over all property and effects of said corporation; and, finally, that all the assets thus brought together be administered for the equal benefit of the creditors of said corporation.

The Alabama National Bank demurred to the bill, and among other grounds assigned the following: "(1) There is a misjoinder of parties defendant to said bill of complaint, in this: that this defendant, alleged to be a preferred creditor, is improperly joined as a defendant with stockholders of the O'Bear Jewelry Company, who are charged with not having legally paid up their subscriptions to the capital stock of the O'Bear Jewelry Company. (2) The said bill of complaint is multifarious, in that complainants seek in the same suit to have an accounting of the trust created by the alleged deed of assignment made by the O'Bear Jewelry Company, and to collect unpaid subscriptions of the shareholders of the O'Bear Jewelry Company alleged to be fraudulently withheld. (3) The said bill of complaint is multifarious in that it joins, with the claims against the shareholders of the O'Bear Jewelry Company for unpaid subscriptions, claims against this defendant for money alleged to have been improperly paid to this defendant to satisfy a judgment confessed, alleged to be part of a general assignment made to R. D. Johnston, for the creditors of said O'Bear Jewelry Company, and money alleged to have been fraudulently received from insurance, and fraudulently paid to the individual stockholders of the O'Bear Jewelry Company. (4) The said bill of complaint is multifarious, in that it seeks to collect unpaid subscriptions to the capital stock of the O'Bear Jewelry Company, and also to settle a trust, and to have this defendant account for money fraudulently paid to the individual shareholders of the O'Bear Jewelry Company. (5) The said bill of complaint is further multifarious, in that it seeks a settlement of a trust, and also to set aside a fraudulent disposition of the property of the O'Bear Jewelry Company." "(7) This defendant demurs to section 28 of said bill of complaint, for that it is therein alleged that the assets of said O'Bear Jewelry Company constituted a trust fund for the benefit of all creditors alike, when in law the O'Bear Jewelry Company could legally prefer a creditor." And W. B. Copeland separately demurred to the bill assigning the following among other grounds: "(1) There is a misjoinder of parties defendant to the said bill, said Copeland being made defendant with others for the result of transactions with which the said bill does not show he was connected or in any way responsible. (2) The bill is multifarious as to him, because he is by the bill brought in to defend on various matters with a large portion of which the bill does not show he had any knowledge, participation, or connection. . . . (4) There is no equity in the bill, because the bill brings in parties as defendants in regard to matters with which they are not connected, and the relief sought is not the same against all of the defendants." The chancellor overruled these, as well as all other, assignments of demurrer, and from his decree in that behalf this appeal is prosecuted.

As we have seen, it is expressly averred in the bill itself that the theory upon which alone complainants seek relief is that the assets of the O'Bear Jewelry corporation constitute a trust fund or estate; that said corporation was the trustee thereof, and the complainants and the other creditors were the *cestuis que trustent* thereof; and that the chancery court, by virtue of its general jurisdiction over trust estates, was competent to take charge of this fund upon the invocation of such *cestuis que trustent*, restore and protect it by collecting moneys belonging to it from all sources, however diverse and disassociated with each other they might be, and to ultimately settle the trust by dividing the fund ratably among the beneficiaries. The respondents, by their demurrers, insist that said assets do not constitute a trust fund in the sense necessary to the maintenance of the bill, exhibited, as it is, against parties who have nothing, and are not chargeable with any wrong, in common, but whose acts, claims, and attitudes in respect of and towards the corporation are entirely distinct and independent; and hence they say that the bill is multifarious. And in the arguments submitted in this court the decree below is attempted to be supported solely and expressly upon this theory of the spoliation of a trust estate. So that the main, if not only, question presented on this appeal, is whether the assets of an insolvent corporation constitute a trust fund for its creditors in the proper and essential meaning of those terms. This whole idea, that the property of insolvent corporations is held by them in trust for creditors,—is a trust estate in their hands,—and to be administered by chancery as such, originated in a *dictum* of Judge Story in *Wood v. Dummer*, 8 Mason, 808, Fed. Cas. No. 17,944. It had no existence at common law, and has none to this day in the law of England, but is distinctly a creation of some courts in this country, and known in jurisdictions where it obtains as the "American doctrine." This court has quite recently adopted it, and held in the cases of *Corey v. Wadsworth*, 99 Ala. 68, 28 L. R. A. 618; *Goodyear Rubber Co. v. George D. Scott Co.* 96 Ala. 439, and *Gibson v. Troubridge Furniture Co.*, 96 Ala. 357, that the assets of an insolvent corporation are impressed with a trust in the hands of the company in favor of its creditors first, and then in favor of its stockholders. The present writer dissented from the opinion and conclusion of the court in each of those cases. To his mind there is nothing clearer in principle than the proposition that the property of a corporation, solvent or insolvent, bears identically the same relations to the creditors of such corporation as the property of an individual or copartnership, solvent or insolvent, sustains to the creditors of the individual, or partnership, and is or is not to be impressed with a trust character, upon the same circumstances and under the same conditions in the first case as in the latter two. Within the limits of its charter, every corporation authorized to hold and dispose of property at all is entitled, and this generally by the very terms of the statute creating it, to hold and to dispose of it as a natural person might hold and dispose of it under the laws of the land. As said by Judge Bradley in *Graham v. La Crose & M. R. Co.*, 28 L. R. A.

102 U. S. 148, 26 L. ed. 106; "In law a corporation is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same; its interest is the same; its possession is the same." An individual not indebted may give his property away, provided the gift is not actuated by a purpose to defeat future creditors. So can a partnership. And so also, undoubtedly, can a corporation, if the gift would not be violative of its charter. An individual owing debts, but solvent, cannot give away his property to the prejudice of existing creditors. Neither can a partnership nor a corporation. An insolvent individual and an insolvent partnership may—or might have before the Act of 1892-93—sell and convey all of his or its property to one creditor in payment of his debt, the valuation being fair, the price adequate, and no benefit being reserved to the debtor; and so, as expressly ruled by this court in *Goodyear Rubber Co. v. George D. Scott Co.* and *Gibson v. Troubridge Furniture Co.*, *supra*, following the decisions in other states where this American doctrine obtains, may an insolvent corporation sell and convey all its property or apply all its assets to the payment of one creditor, leaving nothing for others. Was such a disposition of a trust estate ever permitted by any court in any land under any system of jurisprudence? I am unable to conceive of it. Certain things have heretofore been generally supposed to be essential to trust estates. There must be property held in trust. There must be a trustee, or the chancery court in the place of a trustee. There must be beneficiaries,—*cestuis que trustent*. The property belongs in equity to the *cestuis que trustent*. They are beneficially interested in it or entitled to it. The legal title is in the trustee. Now, when the beneficiaries constitute a class, and take, or are entitled in equity to take, the property held in trust as members of a class, such as the heirs of A. B., or the legatees named in the will of C. D., or as creditors, nobody, except the votaries of this American doctrine, has ever supposed that one member of the class, all members of which are equally interested in the trust property, would be entitled at the election of the trustee to take the whole estate. This is at war with all essential notions of trusts and equitable jurisdiction and administration of them. It may be argued, however, that these decisions are wrong in this particular, but sound in respect of the declaration that the property of insolvent corporations is trust property. But the decisions are not wrong in this particular. The soundness of the proposition they assert has long been recognized by this court. *Allen v. Montgomery R. Co.* 11 Ala. 487; *Goodwin v. Gehce*, 15 Ala. 282. Given the power, which cannot be denied, to hold and dispose of property as an individual, and the well settled doctrine in this state, and generally, that the insolvent individual may transfer all his property in payment of one or more, to the exclusion of all other debts, it follows in a logical sequence, which nothing but the illogical exercise of the sheer power of courts of last resort can break, that an insolvent corporation may in like manner prefer one cred-

itor to the exclusion and defeat of all others. With this undoubted power in the corporation or its officers, it would seem to be most manifest that neither the corporation nor its officers could possibly sustain the relation of a trustee to other creditors in respect of corporate assets, which they are under no duty at law or equity to administer for the benefit of those who are called the "*cestuis que trustent*."

But apart from this consideration, which, indeed, was not in my mind when I felt constrained to dissent in the first of the cases on the question decided by this court, viz., *Corey v. Wadsworth*, I cannot, upon well settled and elementary general principles and definitions, see my way to an acceptance of this so-called "doctrine." All trusts are of two kinds, expressed and implied. It is of course, nowhere pretended the relations between an insolvent corporation and its creditors constitute an express trust. All implied trusts are of two kinds, resulting and constructive. "Resulting trusts," says Mr. Pomeroy, "arise where the legal estate is disposed of or acquired, not fraudulently or in the violation of any fiduciary duty, but the intent in theory of equity appears or is inferred or assumed from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go with the legal title." Pom. Eq. Jur. § 155. And they are said to arise under the following several states of fact: (1) Where the purchaser of an estate pays the purchase money, and takes title in the name of a third person; (2) where a person standing in a fiduciary relation uses fiduciary funds to purchase property, and takes the title in his own name; (3) where an estate is conveyed upon trusts which fail, either in whole or in part, or are not declared, or are illegal; and (4) where a conveyance is made without consideration, and it appears from the circumstances that the grantee was not intended to take beneficially. 10 Am. & Eng. Encyclop. Law, pp. 4, 5. It requires no discussion to the demonstration of the impossibility of referring this American doctrine of trusts for corporation creditors to the head of resulting trusts.

All constructive trusts are of three kinds, or arise from one or the other of three conditions of fact: First, trusts arising from actual fraud; second, trusts which arise from constructive fraud; and, third, trusts that arise from some equitable principle, independent of the existence of fraud. 10 Am. & Eng. Encyclop. Law, p. 80. As there is no fraud, actual or constructive, involved in the naked fact that a corporation is insolvent, has creditors which it is without assets to pay in full, —and this fact is the base for all the superstructure of this doctrine of trust for its creditors,—it cannot be conceived, and, I suppose, has never been contented, that such trust is referable to either the first or second heads of constructive trusts. And it is the conclusion of so high an authority as Mr. Pomeroy that the third classification of constructive trusts stated above has no existence dissociated from actual and constructive fraud. It is his opinion "that all instances of constructive trusts properly so called may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their

final source. Even in that single class where equity proceeds upon the maxim that an intention to fulfill an obligation should be imputed, and assumes that the purchaser intended to act in pursuance of his fiduciary duty, the notion of fraud is not involved, simply because it is not absolutely necessary under the circumstances; the existence of the trust might in all cases of this class be referred to constructive fraud. This notion of fraud enters into the conception in all its possible degrees. Certain species of the constructive trusts arise from actual fraud. Many others spring from the violation of some positive fiduciary obligation. In all the remaining instances there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls "constructive fraud." 2 Pom. Eq. Jur. § 1044. If this view be adopted, the relation between an insolvent corporation and its creditors is excluded from every possible category of constructive trusts for the reason, or by virtue of the fact, that that relation involves no fraud whatever; and as that relation is, as I have seen, the sole ground for the doctrine of trusts in cases like this, the doctrine is unsound, unsupported in principle or reason, and should not be upheld by any court. But if we adopt the view first stated above that constructive trusts may arise by force of some equitable principle independent of the existence of fraud, actual or constructive, and which seems also to be the opinion of Mr. Perry (1 Perry, Tr. § 168), the same conclusion is equally inevitable. Eliminating the element of fraud from the consideration, there still remains as an essential predicate for the existence of a trust, by construction of law, some unconscientious conduct on the part of the person to be held as trustee *in invitum*, or some unconscionable result, through means or under circumstances, which bring the transaction within some recognized title of equity jurisprudence; as, for instance, where a tenant in common buys in an outstanding term for his own benefit, he is trustee for his cotenant, and, where a conveyance has been made through ignorance, accident, or mistake, the grantee will be the trustee in a constructive trust for the grantor. Thus, wherever one is placed in such relation to another that he becomes interested with or for him in property or business, he is prohibited from acquiring rights in that property or business antagonistic to the person with whom he is associated; as, for illustration, if one partner or other person occupying a fiduciary relation renew a lease theretofore held by the partnership or by the person renewing and another in confidential relation to him, in his own name and with his own funds, he will be a trustee for his associate by construction of law. And so, where, by accident, ignorance, or mistake, more land is embraced in a conveyance than was bargained and sold, a constructive trust arises in favor of the grantor for the excess. 10 Am. & Eng. Encyclop. Law, p. 80. But in all these cases, in all cases of constructive trusts where it is said by some authorities chancery proceeds without regard to fraud, relief is granted upon some acknowledged ground of equitable jurisdiction, and administered by holding the wrongdoer to account as a trustee. There must be a con-

fidential relation and unconscientious conduct on the part of one party to and in abuse of that relation, or there must be some ignorance, accident, mistake, or the like, against the unconscionable consequences of which equity will on general principles grant relief, else there can be no constructive trust.

That the relation of debtor and creditor is not of a confidential character there can, of course, be no doubt. It is absurd to say that the creation of that relation involves aught of accident, mistake, or ignorance. That a debtor has property of his creditor which in equity and good conscience belongs to the creditor because the debt contracted in its sale has not been paid, there is no warrant for saying. Equally unwarranted is the idea that in equity all the property of a debtor who has become insolvent belongs to the creditor, and is held by the debtor in trust for him. And this idea of ownership in the *cestui que trust* underlies the whole doctrine of trusts of every description. In all trusts the legal title is in one; the equitable ownership in another. A mere debt against one who has property, whether solvent or insolvent, is not ownership; nor is a right to charge a fund or a lien upon it the beneficial ownership of it. Confessedly, the property and assets of a solvent corporation do not constitute a trust fund for its creditors. Can it be possible that the mere passing of a corporation from a state of solvency to a state of insolvency amounts to a declaration of an express trust for creditors, or to a resulting trust, upon the theory that title to the assets of the concern should have been made to the creditors? Or is it conceivable that this mutation from the one condition to the other does violence to a confidential relation which never existed, and hence is a constructive trust? Or that this mere change of inherent conditions is the vestiture in the corporation, through the ignorance or mistake of the creditor, or through mistake or through fraud, of a greater title, or title to more property, than was contemplated and intended, when, before the change, confessedly, the corporation had the absolute and indefeasible title, free from all trusts, to all its property and assets, and when the change itself involves nothing of fraud, of abuse of fiduciary relations, of ignorance, or mistake, or accident? The learned judges who uphold this American doctrine may find something in these conditions of fact upon which to construct a trust, but I confess my utter inability to follow their arguments or to see with their eyes. Nothing is clearer to my humble judgment than that the insolvency of a corporation—the existence of a corporation with property and debts, the property being insufficient to pay the debts—is not within any definition of any trust known to equity jurisprudence. The creditors of such corporation have the same rights against it as they have against an insolvent partnership, or an insolvent individual debtor, and no other or more. They do not at law or in equity own the property of the one or the other; but the property of each is a fund for the payment of debts in the sense that neither can give it away or dispose of it with intent to hinder, delay, or defraud creditors. The property of the individual cannot be appropriated to his own use, to the exclu-

sion of his creditors, under any cover whatever. The property of the partnership cannot be appropriated to the personal use of the partners or in payment of the debts of the individuals composing the firm, to the exclusion of partnership creditors under any pretense whatever. And so the property of the corporation cannot be diverted to the use of the stockholders to the exclusion of creditors under any circumstances whatever. The powers and limitations upon the powers of an insolvent corporation to deal with its property are precisely the same in all essentials as the powers and limitations upon the powers of insolvent individuals and insolvent partnerships. The estate of the debtor in each class is essentially the same. The corporation no less than the individual and the partnership, is, at law and in equity, the owner of its property. The rights, remedies, and estates of creditors of each are also the same. They do not own the property of their corporation debtor, or any interest in it, in equity or at law, any more than they own the property of their individual or partnership debtor. Their right against each is the same to have their debts paid out of the property; but this right is not that of a *cestui que trust*, but, whether the property is corporate or individual or partnership, it is the right of a creditor simply. Confessedly, even this right may be defeated as to any particular creditors by a sale of the property in payment of another creditor, or by its being taken on execution in favor of another, or even by its sale by the debtor—corporation, individual, or partnership—to a third person; and this although such purchaser have notice of the insolvency of the debtor. All which, as I have seen, would be impossible if the property constituted a trust estate, with the corporation as trustee and the creditors as *cestuis que trustent*, for in such case all who take with notice of the insolvency would take subject to the trust, and themselves be held as trustees *in irritum*. Not only are the rights of individual, partnership, and corporation creditors the same against their insolvent debtors' estates, and each different in the same way from the rights of *cestuis que trustent*, but the remedies of a corporation creditor, in the absence of a statute, are precisely those of a creditor of an individual or partnership. The remedy of each class of creditors may, upon a given state of facts, be in equity; but, when this is so, it is not because of any supposed trust, but upon some recognized ground of equity jurisprudence, as where the debtor has fraudulently transferred his or its property, and chancery is invoked to set aside the transfer and subject the property. And, when chancery has thus assumed jurisdiction, it will administer the estate for the equal benefit of all creditors before it; and to that end the court becomes a sort of trustee *sub modo* in the administration of the property, but not with reference to the character of the estate, as being held in trust or otherwise, before and at the time jurisdiction attached.

Not all the publicists and courts in this country, nor the ablest of them, countenance this so-called "American doctrine." Mr. Pomeroy expressly repudiates it. He says: "In applying this principle [of constructive trusts], care

should be taken to distinguish between actual trusts and those relations which are only trusts by way of metaphor; between persons who are true trustees, holding the legal title for a beneficial owner, and those who simply occupy a position which is analogous in some respects to that of a trustee. The use of these terms to designate relations and parties which have no essential element in common with actual trusts and trustees can only produce confusion and inaccuracy. . . . There are certain relations which are spoken of as trusts, and as constituting a species of constructive trusts, but which are not, in any true and complete sense, trusts, and can only be called so by way of analogy or metaphor. Since they lack the element of fraud, they do not, in any view, properly belong to the division of constructive trusts. . . . The survivors of a partnership are called trustees for the estate of the deceased partner, with respect to his share of the firm property. This expression is mostly metaphorical. There is certainly nothing in the relation resembling a constructive trust. Extending the analogy still further, courts regard partnership property, after an insolvency or dissolution of the firm, and in the proceeding for winding up its affairs, as a trust fund for the benefit of creditors; and the capital stock and other property of private corporations, especially after their dissolution, is treated as a trust fund in favor of creditors. These statements may be sufficiently accurate as strong modes of expressing the doctrine that such property is a fund sacredly set apart for the payment of partnership and corporation creditors, before it can be appropriated to the use of individual partners or corporators, and that the creditors have a lien upon it for their own security; but it is plain that no constructive trust can arise in favor of the creditors unless the partners or directors, through fraud or a breach of fiduciary duty, wrongfully appropriate the property, and acquire the legal title to it in their own names, and thus place it beyond the reach of creditors through ordinary legal means." And in a note to the above text the learned author says: These "cases are not constructive trusts, and are mentioned simply for the purposes of completeness, and to distinguish between correct and mistaken conceptions." 2 Pom. Eq. Jur. §§ 1044, 1045.

And the highest and ablest court in the land—the Supreme Court of the United States—has quite recently gone over this whole subject, considered exhaustively all its own decisions and *dicta* upon it, and, in an able opinion by Mr. Justice Brewer, repudiated the idea that the property of an insolvent corporation is a trust fund or estate held by the corporation and its officers for creditors as *cestuis que trustent*. Judge Brewer quotes the language of Judge Bradley in *Graham v. La Crosse & M. R. Co.*, 102 U. S. 148, 26 L. ed. 106, to the effect that, when a corporation becomes insolvent, a court of equity, at the instance of the proper parties, "will then make its funds, trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his;" and says of that case, that "all that it decides is that, when a court of equity does take into its possession

the assets of an insolvent corporation, it will administer them on the theory that they in equity belong to the creditors and stockholders, rather than to the corporation itself." And he proceeds further on to say: "It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." And he concludes his opinion upon this subject as follows: "The same idea of equitable lien and trust exists to some extent in the case of partnership property. Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors as well as superior to any claims of the partners themselves. And the partnership property is therefore sometimes said, not inaptly, to be held in trust for the partnership creditors or that they have an equitable lien on such property. Yet all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust. A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and, if there be any exceptions thereto, they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon." *Hollins v. Brierfield Coal & Iron Co.* 150 U. S. 371, 381—386, 37 L. ed. 1113, 1115-1117.

The supreme court of Minnesota, in an able opinion by Mitchell, J., also repudiates this idea that the property of an insolvent corporation is a trust fund. Of it, it has this to say: "This 'trust-fund doctrine,' commonly called the 'American doctrine,' has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a system of legal rules. The doctrine was invented by Justice Story in *Wood v. Dummer*, 3 Mason, 306, Fed. Cas. No. 17,

944, which called for no such invention, the fact in that case being that a bank divided up two thirds of its capital among its stockholders, without providing funds sufficient to pay its outstanding bill holders. Upon old and familiar principles, this was a fraud on creditors. Evidently, all that the eminent jurist meant by the doctrine was that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders,—a proposition that is sound, upon the plainest principles of common honesty. In *Fogg v. Blair*, 183 U. S. 534, 541, 33 L. ed. 721, 724, it is said that this is all the doctrine means. The expression used in *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944, has, however, been taken up as a new discovery, which furnished a solution of every question on the subject. The phrase that 'the capital of a corporation constitutes a trust fund for the benefit of creditors is misleading. Corporate property is not held in 'trust,' in any proper sense of the term. A trust implies two estates or interests,—one equitable, and one legal; one person, as trustee, holding the legal title, while another, as the *cestui que trust*, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further." *Hospes v. Northwestern Mfy. & Car Co.* 48 Minn. 174, 15 L. R. A. 470.

The supreme court of Michigan is equally pronounced against this "trust-fund doctrine," and in support of the right of a corporation, solvent or insolvent, to hold and deal with its property precisely as if it were an individual, that court, in an opinion by Montgomery, J., says: "Nor is it the law of this state that, as soon as a corporation becomes insolvent, the directors of the corporation become trustees for all the creditors alike, in such sense as to prevent their giving valid security by way of preference to one of the stockholders or directors. We are aware that the decisions in the various states are not uniform as to the question, and that a number of very eminent text-writers have deprecated a state of the law which admits of such preferences. But, to adopt the language of Dillon, J., in *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516, this condition of the law 'may constitute a good legislative reason for giving *pro rata* to outside creditors, but the legislature must furnish the remedy.' In the case referred to it was held that being an officer of the corporation did not deprive Buell of the right to enter into competition with the other creditors, and run a race of diligence with them. See also *Hallam v. Indianapolis Hotel Co.* 56 Iowa, 179; *Garrett v. Burlington Plow Co.* 70 Iowa, 697, 59 Am. Rep. 461, *Smith v. Skeary*, 47 Conn. 54; *Catlin v. Eagle Bank of New Haven*, 6 Conn. 238; *Central R. & Bkg. Co. of Georgia v. Claghorn*, 1 Speers, Eq. 545; *Planters Bank of Farmville v. Whittle*, 78 Va. 739; *Leavitt v. Oxford & G. Silver Min. Co.* 3 Utah, 265; *Whitwell v.* 38 L. R. A.

Warner, 20 Vt. 444; *Holt v. Bennett*, 146 Mass. 437; *Twin-Lick Oil Co. of West Virginia v. Marbury*, 91 U. S. 587, 23 L. ed. 828; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635. The rule in this state has, we think, been established since the case of *Town v. Bank of River Raisin*, 2 Dougl. (Mich.) 530, that a corporation may, in the absence of legislative restriction, deal with its property precisely as an individual may, and may prefer one creditor over another; and hence that the assets do not become a trust fund, for *pro rata* distribution among all its creditors, until such time as steps are taken under the 'Winding-Up Act' (chapter 232, How. Ann. Stat.) This is the substance of the rule stated in both *Town v. Bank of River Raisin*, and *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387. And in the later case of *Kendall v. Bishop*, 76 Mich. 684, a mortgage had been given to secure the directors of the corporation, and to secure paper upon which they were indorsers. The question under consideration was fully discussed in the briefs of counsel, and it was said by Justice Campbell: "There seems to be no reason why one honest creditor should be on a worse footing than another, and we do not find in our law any such distinction." *Bank of Montreal v. J. E. Potts Salt & Lumber Co.* 90 Mich. 845. And to like effect are the cases cited in the foregoing quotations.

In line with this view, *Justices Caldwell in Gould v. Little Rock, M. R. & T. R. R. Co.*, 53 Fed. Rep. 688, said: "It is undoubtedly true that the property of a corporation is, in one sense, a trust fund for the payment of its debts; but this rule means no more than that the property of a corporation cannot be distributed among its stockholders, or applied to any purpose foreign to the legitimate business of the corporation, until its debts are paid. The rule, so far as it relates to the payment of debts, is satisfied whenever the property of the corporation is applied to the payment of any of its bona fide debts."

Other authorities might be collated on the question under consideration and in support of the view I have taken of it, but the foregoing will suffice, it is thought, for the purposes of this opinion. Upon them and by the force of the elementary principles of trust estates, I am impelled to the conclusion that the property of an insolvent corporation is not a trust fund or estate accurately speaking, or in any sense other than that when the chancery court takes possession and control of such property upon some general principle of equity jurisdiction, wholly independent of any idea that the property constitutes a trust fund, it will be administered for the equal benefit of creditors. It follows that the bill cannot stand against the demurrers for multifariousness unless that objection can be met upon some other consideration than the trust character of the corporation property and assets, which is alone and expressly, both in the averments of the bill itself and in the argument of counsel, relied on to support the decree overruling the demurrers. I do not think the objection can be met upon any other ground. There is no connection between several of the matters brought forward by the bill, and the defendants attempted to be charged in respect of some of these matters have no interest what-

ever in others. For instance, the Alabama National Bank did not participate in the wrongs committed upon the corporation in respect of the subscriptions to its stock by the O'Bears and Copeland, and it is not interested in the present effort to right those wrongs. Again, the bill seeks the settlement of the trust created by the assignment to R. D. Johnston, and to compel the bank to pay into court money which it owed the corporation, or held belonging to the corporation, and paid over to the stockholders of the corporation, which constituted no part of and had no connection with the assignment to Johnston. And equally dissociated is the effort of the bill to have an accounting by the assignee from its purpose to collect unpaid subscriptions from stockholders. And so in respect of the purpose of the bill to have the judgment in favor of the bank declared a part of the assignment, and to have the bank refund the amount it received in satisfaction thereof. This claim is wholly foreign to the relief sought against the bank as to the insurance money paid to the O'Bears and Copeland, and also to the relief sought against the subscribers to the stock. In other words and in brief, the bill, in my opinion, stands upon the same plane in respect of multifariousness as if it had been filed against an insolvent individual debtor, who was wasting or fraudulently disposing of his property, and against his assignee for the benefit of creditors, a creditor to whom he had confessed judgment which his assignee had paid as a lien on the property assigned, against a person who, having assets of the insolvent debtor in his hands, had paid the same to third persons, so they could not be reached by creditors, and against other persons who, in equity, owed money to the debtor defendant. In such case—and no more in this—there would be no relation or connection between the defendants, or the rights asserted against them respectively either in the character of their wrongs or defaults or in the character of the estate they had despoiled; and recovery against each would be had, if allowed at all, not upon any idea of conserving a fund which the court, because of its trust character, had the right to protect and restore but solely as enforcing several money demands from several defendants in one and the same action, in which also the trustee in the assignment would be brought to account on considerations and in respect of matters with which the claims against some of the other defendants had no connection.

In preparing the foregoing opinion, the writer assumed to express his individual views only because of decisions of this court, referred to above, which take a different view as to the assets of an insolvent corporation being a trust fund. This opinion has now, however, been concurred in by my associates, and stands as the opinion of the court. The cases of *Corey v. Wadsworth*, *Goodyear Rubber Co. v. George D. Scott Co.*, and *Gibson v. Trowbridge Furniture Co.*, *supra*, in so far as they are inconsistent with the views and conclusions we now express, are overruled. The decree overruling the demurrers for multifariousness is reversed, and a decree will be here entered sustaining said assignments of demurrer.

Reversed, rendered, and remanded.

28 L. R. A.

Coleman, J., concurring:

In the case of *Corey v. Wadsworth*, 99 Ala. 68, 23 L. R. A. 618, the facts were that Corey a director and the president of the building supply company, a corporation, became, with other officers, bound as guarantors of a debt of \$6,000 due from the corporation to the Exchange Bank; that the corporation became insolvent, and under these circumstances the corporation sold and conveyed to Corey a large amount of its assets, exceeding in value the amount of the debt due the Exchange Bank, in consideration that Corey would pay the debt of the insolvent corporation, for which he was already bound. The bill was filed to set aside and annul as fraudulent and void the sale and transfer of the property under the circumstances stated. The case was brought before us by appeal from the ruling of the chancery court overruling a demurrer to the bill. The real question presented by the appeal was whether an insolvent corporation, acting through its governing board, can sell and transfer its assets to a member of the governing board (in this case a director and its president), in satisfaction and payment of an unsecured debt due from the insolvent corporation to such member, and thus give him a preference over other creditors of the insolvent corporation. This, as I understand the case made by the bill, was the real question of merit, which called for an adjudication by this court. Much was said in the opinion of the court unnecessary to a decision of the question, and which should be regarded as *dicta*. So far as the conclusion of the court held that the transaction as averred in the bill was fraudulent and void against its creditors, in my opinion, it was correct; and I do not understand the opinion in the case at bar to militate against the principle of law reached in the conclusion of *Corey v. Wadsworth*, which was necessary to a decision of the case.

The case of *Goodyear Rubber Co. v. George D. Scott Co.*, 96 Ala. 489, though published earlier, in fact was rendered subsequent to that of *Corey v. Wadsworth*, *supra*, and decided but one question, and that was "that the transfer by a director and managing officer of an insolvent corporation, without authority of the board of directors, of all its property, in consideration of a debt of the corporation for which he was liable as guarantor or indorser, or joint maker of a note given therefore, is invalid as to other creditors, being in effect a preference of himself. I do not understand the case at bar to combat the soundness of the rule declared in this case. In the opinion of the *Goodyear Rubber Co. Case* (page 442, 96 Ala.) it is said: "We did not however go to the length of holding [in the case of *Corey v. Wadsworth*] that directors of an insolvent corporation are so completely hampered by the trust relation they sustain as to disable them from paying or securing some creditors in preference to and at the expense of others to whom the corporation is indebted. . . . The great weight of authority is the other way, and we are not inclined to run counter to it." The same rule was declared in *Gibson v. Trowbridge Furniture Co.* 96 Ala. 357.

I do not understand the case at bar to overrule any principle of law decided in either of

the foregoing cases, which were necessary to a decision of those cases; but that these cases are overruled only so far as the opinions stated,—that the assets of a corporation became a trust fund for the benefit of creditors, and were placed beyond the power of disposition or control of the governing board, whenever and as soon as the corporation became insolvent, and that insolvency of the corporation alone gave a court of equity jurisdiction to administer the assets as trust property. Such statements were *dicta*, and do not express the opinion of the court.

Bettie H. PRINCE, *Appl.*,

v.

ALABAMA STATE FAIR.

(.....Ala.....)

1. The degree of care required of a bailee depends on the nature and value of the thing bailed and its liability to loss or injury.
2. A presumption of negligence arises from the loss of property in the hands of a bailee who is answerable only for losses occurring through negligence.
3. A legal consideration for the loan of a painting for a competitive exhibition at a fair is furnished in the detriment and inconvenience to which the sender is subjected and the indirect and contingent benefit to the person conducting the exhibition.
4. A general proposal to all persons having articles deemed worthy of exhibition to intrust them to a corporation for a competitive exhibition at a fair, with a promise of redelivery when the exhibition is closed, becomes a special contract with each person sending articles for exhibition when they are received and accepted.
5. The essential elements and characteristics of a lucrative as distinguished from a mere gratuitous bailment exist in the case of the loan of a painting for a competitive exhibition at a fair.
6. A lack of proper care which will create a liability for the loss of a painting on the part of a corporation to which it has been loaned for a competitive exhibition at a fair, is shown, where, after the close of the fair and the withdrawal of policemen, the duty of repacking and reshipping it is intrusted to an agent or officer who is not informed that the painting has been exhibited or in possession of the corporation, and servants are employed to aid him who are unknown to him and of whose skill or integrity there is no evidence.

(April 11, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County reversing a judgment of a justice of the peace in plaintiff's favor in an action brought to recover the value of a picture which she had

NOTE.—The above case is particularly valuable as an illustration of the law of bailments in a class of important cases in which precedents are almost entirely lacking. For one very similar case, see *Smith v. Minneapolis Library Board* (Minn.) 25 L. R. A. 280. See also authorities as to gratuitous bailments, in note to *Bunnell v. Stern* (N. Y.) 10 L. R. A. 481.

28 L. R. A.

loaned to defendant and which it had failed to return. *Reversed.*

Plaintiff packed and forwarded at her own expense to defendant a painted picture, for the purpose of being used as an exhibit at the fair, upon defendant's promise to return it to her. The picture was received by defendant, was awarded a premium, but was never returned.

Further facts sufficiently appear in the opinion.

Mr. Henry K. White for appellant.

Messrs. Ward & John for appellee.

Brickell, Ch. J., delivered the opinion of the court:

The primary question presented is, What was the relation created by the transaction into which the parties entered, and what were their respective rights, duties, and liabilities springing from the relation? The transaction was a bailment. The painting was entrusted to the defendant, upon its invitation, for a special object or purpose, upon a contract that, when the object or purpose was accomplished, the painting would be returned or redelivered to the plaintiff. Story, Bailm. § 2. The insistence of the counsel of the defendant is that, though there was a bailment of the painting, the bailment was of the class known as "naked, gratuitous deposits," accepted as matter of mere favor or courtesy, from which the defendant was not entitled to benefit, or to recompense for any duty the bailment may have involved. If this be the true character of the transaction, the conclusion follows, which is deduced, that the defendant owed to the plaintiff the duty of slight care only in the keeping, preservation, and restoration of the painting, and is answerable only for gross negligence or bad faith, to which the loss of the painting is directly traceable. 2 Kent, Com. 560; Story, Bailm. § 62; Schouler, Bailm. § 14. But if the bailment was made at the instance or on the invitation of the defendant, because of benefits, direct or contingent, it was expected would accrue, or on a contract, express or implied, having a legal consideration, it was not gratuitous. More properly, it may be termed "lucrative;" and the duty of the defendant was the exercise of ordinary care in the keeping, preservation, and restoration of the painting, and for ordinary neglect in the performance of the duty the defendant is answerable. 2 Kent, Com. 565; *Moore v. Mobile*, 1 Stew. (Ala.) 286; *Seals v. Edmondson*, 71 Ala. 509. The transaction has in it the essential elements and characteristics of a lucrative, as distinguished from a mere gratuitous bailment,—a bailment for the sole benefit of the bailor. It originated in the general proposal of the defendant, to all persons having articles deemed worthy of exhibition, to intrust them to the defendant for that purpose, promising redelivery when the exhibition was closed. The proposal, though general in its terms, became a special contract with each person sending articles for exhibition, when the articles were received and accepted by the defendant. *Vigo Agr. Soc. v. Brumfield*, 102 Ind. 146, 53 Am. Rep. 657; 1 Whart. Cont. § 24; Pollock, Cont. 174. The contract was supported by a legal consideration,—the detriment and inconven-

lence to which the sender was subjected, at the instance of the defendant, in the transmission of the article, and the benefit, though indirect and contingent, which the defendant contemplated would accrue from the exhibition. In *Vigo Agr. Soc. v. Brumfield*, *supra*,—a case not distinguishable from the present,—it was said by Elliott, J.: "The bailment was not a gratuitous one, for the reason that the exhibition of the gun, in response to the invitation contained in the advertisement of appellant, constituted a consideration for the undertaking. It may be true that both parties derived a benefit, but this did not strip the contract of its character,—that of a bailment for reward. The reward was not, it is true, in money, but it was nevertheless a reward in the form of an act performed at the request of the bailee. An association which invites persons to supply articles to enable it to conduct an exhibition receives some consideration from the person who responds to the invitation by placing articles in its care for exhibition." In determining whether a bailment is gratuitous or lucrative,—a bailment without compensation or benefit to the bailee, or from which he is to derive benefit or profit,—the inquiry is not directed to the character or certainty of the benefit or profit; it is whether the bailment was accepted for the purpose of deriving the one or the other. Schouler, *Bailm.* §§ 9, 29, 90. Upon this point the observations of Bigelow, J., in *Newhall v. Paige*, 10 Gray, 866, are instructive: "A person becomes a bailee for hire when he takes property into his care and custody for a compensation. The nature and amount of the compensation are immaterial. The law will not inquire into its sufficiency, or the certainty of its being realized by the bailee. The real question is, Was the contract made for a consideration? If so, then it was a *locatum* and not a *depositum*, and the defendant was liable for the want of ordinary care. The general rule as to the consideration of a contract is well understood, and is the same in case of bailments as in all other contracts. The law does not undertake to determine the adequacy of a consideration. That is left to the parties, who are the sole judges of the benefits or advantages to be derived from their contracts. It is sufficient if the consideration be of some value, though slight, or of a nature which may inure to the benefit of the party making the promise. Where such a consideration exists, a contract cannot be said to be a *nudum pactum*; nor a bailment, a gratuitous undertaking." With the growth and expansion of commerce, of trade, of industrial pursuits, multiplying every species of contracts, drawing all classes into more frequent and varied intercourse, bailments multiply; and it is sometimes a matter not free from difficulty to determine to what class a particular transaction may belong, or, when that is ascertained, the measure of duty the bailee assumes. It is not too much to say that each transaction depends largely upon its own facts and circumstances, and the existing relations, if any, the parties may have to each other.

When the objects and purposes of the parties to the present transaction are considered, its real nature and character, not the relations of the parties, can be misapprehended. The de-

fendant proposed to conduct a general fair or exposition, such as is now frequent and customary, not for the purpose, as in other countries and times, of gathering buyers and sellers of merchandise, but which, because of the variety of the things to be exposed to the view of visitors, would attract public attention, inducing a large number of visitors, who would pay the required charge for admission. The feature of competitive exhibition was introduced, to increase the number, and improve the character, of the things or articles intrusted to the defendant for exhibition. The defendant was moved by the benefits it supposed would accrue to it, and one of these benefits was the reward or recompense to be derived from the pecuniary receipts from visitors. The plaintiff was moved by the possibility that a premium would be awarded to her painting, as a work of skill and art, and the gratification thereby afforded her. Each party was subjected to detriment and inconvenience, not incurred as a matter of favor, or gratuitously, but in anticipation of benefits which might accrue. The general rule is that if a bailee of goods, answerable only for losses occurring from his negligence, on demand made, fails to redeliver them, or does not account for a failure to make delivery, *prima facie*, negligence will be imputed to him, and the burden of proving a loss without the want of ordinary care is devolved upon him. The rule is founded upon necessity, and upon the presumption that a party who, from his situation, must have peculiar, if not exclusive, knowledge of facts, if they exist, is best able to prove them. If the bailee in whose possession and under whose care and control goods are will not account for the failure or refusal to deliver them on demand made, it is not a violent presumption that the failure is attributable to his negligence in caring for the goods, or that he has wrongfully converted, or wrongfully retains, them. If there be injury to or a loss of the goods during his possession, it is for him to show the circumstances, acquitting himself of a want of the care in keeping them it was his duty to bestow. *Seals v. Edmondson*, 71 Ala. 509, and authorities cited. There is some discrepancy and conflict of authority on this proposition, but the rule prevails in this state as we have expressed it, and we regard it as supported by the better reasoning. It is said by *Chancellor Kent* that "'diligence' is a relative term, and it is evident that what would amount to the requisite diligence at one time, in one situation, and under one set of circumstances, might not amount to it in another. The deposit is to be kept with the care applicable to it under the circumstances." 2 Kent, Com. 561. And the degree of care any and every bailee must bestow is materially dependent upon the nature and value of the thing bailed, and its liability to loss or injury. As is said by *Judge Story*: "A man would not be expected to take the same care of a bag of oats as of a bag of gold; of a bale of cotton as of a box of diamonds or other jewelry; of a load of common wood as of a box of rare paintings; of a rude block of marble as of an exquisitely sculptured statue. The value, especially, is an important ingredient to be taken into consideration upon every question of negligence, for that may be gross

negligence in the case of a parcel of extraordinary value which in the case of a common parcel would not be so. The degree of care which a man may reasonably be required to take of anything must, if we are at liberty to consult the dictates of common sense, essentially depend upon the quality and value of the thing, and the temptation thereby afforded to theft. The bailee, therefore, ought to proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part." Story, Bailm. § 15. The parties contemplated that during the progress of the fair the painting would be exposed to public view, and that large numbers of all the varied classes of the community would attend the fair. This is the situation, and these the circumstances, under which the defendant was bound to the duty of ordinary care in the keeping and preservation of the painting. If, while the fair was in progress, and while the defendant had in employment and service a sufficient number of policemen to guard the exhibits from injury, preventing unauthorized removals or thefts, the painting had disappeared or been lost, it may be, all presumption of negligence would be repelled. Considering the circumstances, and the situation in which it was intended by the parties the painting should be placed, in the absence of evidence that it was exhibited in a place which rendered it peculiarly subject to theft or unauthorized removal, because of its intrinsic character and value, a want of ordinary care could not be imputed when it was committed to the vigilance of officers of the law charged with the duty of protecting and preserving it. But, if the evidence be not direct and positive, the only fair and reasonable inference from it is that the loss did not occur while the fair was in progress, and it was under the vigilance of the policemen. It occurred

after the close of the fair, when the policemen had been withdrawn, and when the duty of the defendant to repack and reshipe the painting to the plaintiff was absolute. Performance of the duty was intrusted to a corporate agent or officer, who was not informed that the painting had been exhibited, or had ever been in the possession of the defendant. The servants employed to aid him in the performance of the general duty of returning exhibits to the owners were unknown to him, and of their skill or integrity there is a want of evidence. This was not a degree of care adjusted to the nature and value of the painting, and the temptations to theft or unauthorized removal it afforded. A degree of care having a just proportion to the injury or loss likely to ensue from any improvidence on the part of the defendant was not exercised, for the corporate agent or officer who alone could bestow it was not informed that the necessity or occasion for its exercise existed. His want of knowledge that the painting had been exhibited, or had been in the possession of the defendant, was the fault and neglect of the defendant. The presumption of negligence arising from the failure of the defendant to deliver the painting on demand, so far from being removed, is strengthened, and for the value of the painting the defendant is answerable. The weight of the evidence fixes the value at \$100.

The judgment of the Circuit Court must be reversed, and a judgment here entered that the appellant have and recover of the appellee \$100, with the interest thereon from the day of the judgment before the justice of the peace added, together with the costs before the justice and in the circuit court. The appellee will pay the costs of appeal in this court and in the circuit court.

IOWA SUPREME COURT.

Patrick L. SOLAN

v.

CHICAGO, MILWAUKEE & ST. PAUL
R. CO., *Appt.*

(.....Iowa.....)

Neither the common-law rule nor a state statute denying validity to a contract exempting a common carrier from liability can be regarded as a regulation of commerce although applied to an interstate shipment.

(May 31, 1896.)

A PPEAL by defendant from a judgment of the District Court for Sioux County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

NOTE.—The application of state law as to the rule of liability of a carrier in case of negligence is upheld also in *St. Joseph & G. I. R. Co. v. Palmer* (Neb.) 22 L. R. A. 335.

28 L. R. A.

Statement by Given, Ch. J.:

Action to recover for personal injuries alleged to have been caused by the negligence of the defendant in permitting one of the rails in its track to become weak, cracked, and out of repair, and in running the caboose in which plaintiff was riding at a negligent rate of speed, in consequence of which said caboose was derailed, and plaintiff injured. The case was tried to a jury, and a verdict and judgment in favor of the plaintiff for \$1,000. Defendant appeals. The issues and facts sufficiently appear in the opinion.

Mr. George E. Clarke, for appellant:

Section 1803 of the Code is inoperative as affecting the interstate transportation of shipments, or if it should be construed as entering into the contract between the parties upon which plaintiff must necessarily base his right to recover, then it is unconstitutional, as to such construction and effect.

U. S. Const. art. 1, § 8; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 826, 30 L. ed. 1800, 1 Inters.

Com. Rep. 806; *Fargo v. Stevens*, 121 U. S. 280, 30 L. ed. 888; *Pacific Coast S. Co. v. Board of Railroad Comrs.* 18 Fed. Rep. 10; *Hart v. Pennsylvania R. Co.* 113 U. S. 848, 28 L. ed. 721.

A common carrier may by special contract limit his common-law liability; but he cannot stipulate for exemption from the consequences of his own negligence or that of his servants.

New Jersey Steam Nav. Co. v. Merchants Bank of Boston, 47 U. S. 6 How. 844, 13 L. ed. 465; *New York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 8 Wall. 107, 18 L. ed. 170; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 857, 21 L. ed. 627; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556; *Ogdensburg & L. O. R. Co. v. Pratt*, 89 U. S. 22 Wall. 128, 22 L. ed. 827; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 541; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547.

There is no distinction between the right to limit the amount of damages as to property and as to persons.

Hutchinson, Carr. § 588; Cleveland, P. & A. R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 862; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Jacobus v. St. Paul & O. R. Co.* 20 Minn. 125, 18 Am. Rep. 860; *Rose v. Des Moines Valley R. Co.* 89 Iowa, 246; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486; *Flinn v. Philadelphia, W. & B. R. Co.* 1 Houst. (Del.) 469.

The moment that it is established that this contract comes within the rule of interstate commerce then the common-law rule that a carrier may not contract against his own negligence because it is against public policy disappears from the case, because interstate commerce is governed solely by the laws of the United States, and the United States has never adopted the common-law, and hence it follows that the contract between parties becomes the law of the case and the plaintiff cannot recover contrary to the terms of his own contract.

Swift v. Philadelphia & R. R. Co. 58 Fed. Rep. 859, 4 Intern. Com. Rep. 633.

Messrs. Boles & Roth and Powers & Conway, for appellee:

The Supreme Court of the United States has determined, beyond any question of controversy, that the contract, behind which appellant seeks refuge, is against public policy, unconscionable, and of no effect.

New York Cent. R. Co. v. Lockwood, 84 U. S. 17 Wall. 857, 21 L. ed. 627; *Liverpool & G. W. Steam Co. (Limited) v. Phenix Ins. Co.* 129 U. S. 897, 32 L. ed. 788; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556; *Ogdensburg & L. O. R. Co. v. Pratt*, 89 U. S. 22 Wall. 128, 22 L. ed. 827; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 874; *Grand Trunk R. Co. of Canada v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Hart v. Pennsylvania R. Co.* 113 U. S. 831, 28 L. ed. 717; *Phenix Ins. Co. of Brooklyn v. Erie & W. Transp. Co.* 117 U. S. 812, 29 L. ed. 873; *Inman v. South Carolina R. Co.* 129 U. S. 128, 32 L. ed. 612.

Given, Ch. J., delivered the opinion of the court:

1. Plaintiff was injured at a point in Iowa when being carried over defendant's road in 28 I. R. A.

a caboose attached to a freight train, in which one or more cars of cattle, in charge of plaintiff, were being transported. Plaintiff and the cattle were being carried under a contract between the owner of the cattle and the defendant for their transportation from Rock Valley, Iowa, to the Union Stock Yards in Illinois. Said contract contains this provision: "Eight. That the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in an amount exceeding the sum of \$500." The trial court instructed the jury that, if it found for the plaintiff, it should allow him such an amount as would compensate him for the injuries sustained. Appellant contends that the court erred in not instructing that, under the contract, plaintiff was not entitled to recover, if at all, more than \$500, and in this contention we have the only question presented on this appeal. We have no argument for appellee.

2. Appellant assumes that the court omitted to instruct that plaintiff could not recover more than \$500, upon the theory that the part of said contract quoted above was void, under section 1308 of the Code of Iowa. That section is as follows: "No contract, receipt, rule, or regulation, shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation, been made or entered into." Appellant's contention is that as this was a contract for an interstate shipment, and as the power to regulate commerce between the states is exclusively in the congress of the United States, said section does not apply. It cannot be questioned but that this was an interstate shipment, and that congress alone possesses power to regulate commerce between the states; but the inquiry remains whether said section, as applied to this contract, is a regulation of commerce. Appellant concedes "that up to the present time your honors have refused to adopt the application and construction which is now contended for." In the case of *Hart v. Chicago & N. W. R. Co.*, 69 Iowa, 486, the contract was for the shipment of horses from a point in this state to a point in another, and provided that no liability would be assumed by the carrier on the horses for more than \$100 each. Question was made whether section 1308 was applicable, and it was contended "that the state has no power to place a restriction of that character upon the carrier contracts for the transportation of property from this state into another state or territory." The court says: "The position is that the restriction, if applicable to a contract of this character, would be a regulation of commerce among states, and a subject which, under the Federal Constitution, is within the exclusive jurisdiction of the congress of the United States. In our opinion, however, this position cannot be maintained. The provision is in no just or legal sense a regulation of commerce. It prescribes no regulation for the transportation of freight upon any of the channels of communication. It leaves the parties free to make such contracts as they

may choose to make with reference to the compensation which shall be paid for the services to be rendered. The carrier is left free to demand such compensation for the carriage of the property as is just, considering the responsibility he assumes when he receives it. He is forbidden to make any contract that would exempt him from any of the liabilities which arise by implication from his undertaking to carry the property. But no burden is placed upon the property which is the subject of the contract, nor is any rule prescribed for his government respecting it. That it is within the power of the state to prescribe such a limitation upon his power to contract we have no doubt. The statute was enacted by the state in the exercise of the police power with which it is vested, and it is applicable to all contracts entered into within its jurisdiction. The question involved is not different in principle from that decided by the Supreme Court of the United States in what are known as the *Granger Cases*. See *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Cutts*, 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97. Appellant insists that upon authorities cited, and especially the decisions of the Supreme Court of the United States, we should now announce a different holding. Appellant cites *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 123 U. S. 826, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, and *Fargo v. Stevens*, 121 U. S. 280, 30 L. ed. 888, holding that the states have no power to fix rates for interstate shipments. The case of *Hart v. Pennsylvania R. Co.*, 112 U. S. 831, 28 L. ed. 717, is quoted from, and at length largely relied upon as supporting appellant's contention. That was an interstate shipment of horses, under a contract wherein it was agreed that the carrier assumed a liability on the horses "not exceeding two hundred dollars each." The question was whether this clause in the contract was void as against public policy, not because of any statute, but under the common law. The court says: "It is the law of this court that a common carrier may, by special contract limit his common-law liability, but that he cannot stipulate for exemption from the consequence of his own negligence or that of his servants." The court, finding that it was "a

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limited liability live-stock contract, and is confined to live stock," and that the rate of freight was measured by the valuation expressed, announces this conclusion: "The distinct ground of the decision in the case at bar is that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." The reasoning of all the cases cited upon this subject is that the rates charged are based upon the valuation that the limitation as to value does not exempt from liability for negligence, nor induce want of care, and is not therefore within the rule that declares contracts exempting from liability for negligence void. Appellee's cause of action is grounded upon the negligence charged, and the contract is for exemption from liability beyond the sum named for that negligence. The reasoning of the cases cited does not apply. Plaintiff was not being carried for a consideration based upon an agreed value of his life or limb. No case is cited, and none, we think, can be found, wherein an agreement for exemption from liability for negligence in the carrying of passengers has been sustained. See *Ross v. Des Moines Valley R. Co.* 89 Iowa, 247. This contract is within the rule of the common law that declares such contracts void as against public policy, and within the prohibition of section 1808. Surely, neither the statute nor the common law that so declares can be said to "regulate commerce." To so declare is quite different from fixing rates, or from forbidding the making of lawful contracts. In our opinion, neither the common-law rule nor the statute to which we have referred is, as applied to this contract, in any proper sense an attempt to regulate commerce. This conclusion renders it unnecessary that we consider appellant's further contention, that the United States has never adopted the common law.

Affirmed in 169 U. S. 133, 42 L. ed. 688.

LOUISIANA SUPREME COURT.

Isaac GOLDBERG, *Appt.*,
v.
Albert DOBBERTINE.

(46 La. Ann. 1893.)

*1. Where persons mutually engaged in bandying opprobrious epithets, an action of slander is not to be encouraged for words thus uttered.

2. The interchange of opprobrious epithets and mutual vituperation and abuse will justify a judge in approving a verdict for the defendant, although the slanderous words were proved; and a verdict rendered in such a case will not be disturbed by the supreme court.

(July —, 1894.)

APPEAL by plaintiff from a judgment of the District Court for the Parish of Calcasieu in favor of defendant in an action brought to recover damages for alleged slander. *Affirmed.*

The facts are stated in the opinion.

Mr. D. B. Gorham for appellant.

Mr. A. P. Fujo, for appellee:

When persons mutually engage in bandying

*Headnotes by NICHOLLS, *Ch. J.*

NOTE.—*Mutual vituperation or defamation as affecting remedy for libel or slander.*

I. *Libel.*

II. *Slander.*

III. *Time and connection of charges.*

a. *In libel cases.*

b. *In slander cases.*

The headnote in the above case states the decision in very guarded form. That an action of slander "is not to be encouraged" for words uttered by persons mutually engaged in bandying opprobrious epithets and that a verdict for defendant in a case of alleged slander spoken in the interchange of opprobrious epithets and mutual vituperation will be sustained, is what the court actually decided. The decision does not necessarily go so far as to hold that an action for slander could not arise from words spoken in an angry altercation in which mutual vituperation was indulged in.

The doctrine of the courts, sustained by nearly all the decisions, is that defamation of defendant by plaintiff in a suit for libel or slander may mitigate but not justify retaliatory defamation provoked by it. But when the alleged defamation complained of is only by way of self-defense and does not go beyond an honest attempt to protect one's own interests, even if it may be not altogether justifiable, an entirely different case is presented. Here the test is the absence of vindictiveness and the honesty of the attempt at self protection. These cases therefore involve a different principle from that which controls in the cases of mere angry abuse. It will be seen below that substantially the same rules have been applied to both libel and slander cases.

I. *Libel.*

As stated above the courts have generally denied that provocation by abusive or defamatory language could justify retaliation in kind although it might mitigate damages. Yet in a Louisiana case, *Bigney v. Van Benthuyesen*, 36 La. Ann. 38, the court seems to have fairly committed

opprobrious epithets an action for damages for words thus uttered will not lie.

Johnston v. Barrett, 36 La. Ann. 320.

One who is himself in fault cannot recover damages from another who has retaliated in kind, although the latter was not justifiable in law, and this holds good in spite of the truism that one wrong does not justify another.

Bigney v. Van Benthuyesen, 36 La. Ann. 38; *Artieta v. Artieta*, 15 La. Ann. 48.

The verdicts of the jury in cases of this nature are "never disturbed by appellate tribunals unless glaringly unjust or manifestly erroneous."

Young v. Bridges, 34 La. Ann. 335; *King v. Ballard*, 10 La. Ann. 559; *Rodriguez v. Lopez*, 23 La. Ann. 94; *Edwards v. Ricks*, 80 La. Ann. 926.

The courts of Louisiana have never encouraged litigation of this kind.

Fulda v. Caldwell, 9 La. Ann. 358; *Young v. Bridges*, 34 La. Ann. 336.

Nicholls, Ch. J., delivered the opinion of the court:

Plaintiff alleges that: In the public streets of the town of Lake Charles, and at the residence of the petitioner in the said town, in the presence and hearing of a large number of persons, the defendant maliciously and

himself commences a newspaper warfare cannot subsequently come to the court as a plaintiff to complain that he has the worst of the fray. In this case a verdict in favor of the plaintiff for a newspaper libel was set aside and judgment with costs ordered against the plaintiff because he had provoked the libel upon himself by a prior newspaper libel upon the defendant. The court quotes the proposition above laid down from *Odgers on Libel and Slander*, 228, but it must be regarded as overstating the legal effect of such provocation, as will appear from the cases below.

In *Tahart v. Tipper*, 1 Campb. 351, the report represents counsel as citing a decision to the same effect as the Louisiana case above mentioned. The report says counsel cited "Anthony Pasquin's Case as in point, where in an action for libel upon an author Lord Kenyon admitted evidence of the malice of the plaintiff's works and it appearing that they were themselves of a libelous and scandalous description his lordship threw his parchment at his head and dismissed him from the court with infamy." The case does not seem to be reported further than this. Respecting it *Sir James Mansfield* said in *Finnerty v. Tipper*, 2 Campb. 76, "I cannot go so far as Lord Kenyon is stated to have done. The decision of that case I rather think was incorrect in point of form though it was correct in point of justice." This may be construed to mean that the right to substantial damages may have been defeated by plaintiff's own libelous publication but that a nominal right of action existed. Such at least is the doctrine of nearly all the cases.

The decision in *Finnerty v. Tipper*, *supra*, denies that a newspaper libel can be justified by the fact that the person defamed had proposed for a public debating society the question whether the editor or a notorious pickpocket was the greater nuisance to society and had caused boards with this question printed thereon to be carried through the streets.

As already mentioned there is to be distinguished from this class of cases those in which the alleged

without cause slandered and defamed petitioner's wife, calling her by many vile names, and applying to her many vile epithets, which are set out in the petition, all of which was done by Dobberton with a malignant spirit with the full purpose of damaging and injuring plaintiff, although defendant well knew that his declarations were wickedly false and slanderous; and that Dobberton has accordingly damaged and injured his said wife and himself. That she had always demeaned herself with modesty, virtue, and chastity, and has heretofore enjoyed a good reputation, and the esteem, respect, and friendship of all her acquaintances and of the community; but that since the utterance of said vile and infamous slanders her good name and character have been seriously damaged, and her friends and acquaintances have fallen away from and ceased to visit her, and in several instances have totally ignored her. That her spirit has been humbled and crushed, and she has suffered untold mental agony. That said cruel slander has constantly preyed upon her mind, making her nights sleepless and her days miserable. That being then and at the time of the institution of the suit in a delicate situation, her nervous system had been greatly shocked, her health injured, and her life imperiled, and in consequence of said malicious acts

of Dobberton they have been injured as aforesaid in the sum of \$10,000. That he himself has been injured and damaged by the defendant in the additional sum of \$2,000 for this: That Dobberton, not content with slandering and abusing his said wife, as aforesaid, upon being requested by petitioner to cease his said abuse, and leave his premises, cursed and abused him, calling him by all manner of vile, vulgar, and slanderous epithets, too vulgar to be repeated, and further threatened the lives of petitioner and his wife, and in pursuance of his threats made a felonious assault upon them, while peaceably at home, by hurling heavy beer bottles and other deadly missiles at them; they barely escaping from his murderous assault by hastily closing and bolting their doors. That by reason of said vile and slanderous abuse, uttered with the view of publicly defaming and injuring petitioner and bringing him into contempt and disrepute among his neighbors, in which he has been unfortunately too successful, and said wanton and malicious trespass as aforesaid, and the injury done to petitioner's feelings and those of his said wife as aforesaid, and the loss and expense to which he has been placed by said tortious acts of Dobberton, and to secure his just rights thereon, he has been damaged and injured in said further sum of \$3,000, which

libel is in fact justified as an honest effort at self protection in reply to charges that had been made against the defendant.

Thus, where plaintiff had published a card calling defendant's published statement "a contemptible, cowardly, malicious lie," defendant was held to be within his privilege to publish a reply referring to plaintiff's "known character as a liar" and refusing to recognize him as a gentleman, if the jury should find that this was said in a reasonable and honest performance of his duties or protection of defendant's interest. *Chaffin v. Lynch*, 83 Va. 106, 84 Va. 884.

The same doctrine is declared in *O'Donoghue v. Hussey*, 5 Ir. C. L. Rep. 124.

So the fact that a barrister in opposing a bill to give additional patronage to a bishop impugned the bishop's conduct and motives is held to rebut any presumption of malice in a publication by the bishop in reply, although some expressions go beyond strict self-defense, if express malice is not found but the reply was only for vindication. *Laughton v. Sodor and Man*, L. R. 4 P. C. 495, 42 L. J. P. C. 11, 9 Moore, P. C. C. N. S. 818, 21 Week. Rep. 204, 28 L. T. N. S. 877.

The same doctrine was also declared in *Coward v. Wellington*, 7 Car. & P. 55k, holding that in case of a letter defending one's self against attack the question for the jury was whether it was malicious or vindictive or not.

The fact that somewhat exaggerated language in commenting on the conduct of another person was provoked by similar language on his part is considered in *Hibbs v. Wilkinson*, 1 Fost. & F. 608, as having some bearing on the right to use strong expressions, such as the statement that offensive interpolations in an alleged quotation respecting another person were made with a malice which evidently overcame the sense of truth and honesty.

Where a barrister holding a judicial office as recorder of a town in a speech and also in a public protest attacked as unjust a decision censuring him, made by the benchers of the inn which had jurisdiction to review his conduct, and alleged that he had been persecuted with bitter malignity and 28 L. R. A.

cruelty because he was an Irishman, and an article in a legal review presumably written by a member of the bar severely handled him, the court said if the jury thought the language passed the proper limits of fair criticism they should consider how far it was provoked by the broadcast aspersions by the subject thereof upon men of the highest character and honor in the professions. *Seymour v. Butterworth*, 3 Fost. & F. 372.

Yet affirmative allegations of misconduct of the party who has libeled another, made in a reply, if unconnected with the conduct charged in the first publication and not mere matter of excess, is not privileged. *Dwyer v. Esmonde*, 11 Ir. L. Rep. 542.

But while retaliatory defamation is not strictly justifiable courts are clearly inclined to limit the recovery of a person where he has provoked the defamation. Thus it is said in *Pugh v. McCarty*, 40 Ga. 445, that the court should neither encourage nor favor those who engage in a publication of libels concerning each other.

And again in *Child v. Homer*, 13 Pick. 508, it is said: "If parties will engage in newspaper controversies and yielding to their angry passions will lavish abuse and slanderous imputations on each other with an unparrying hand, let them be prosecuted and punished if the public good requires it; but when both parties are *in pari delicto* neither of them should be encouraged in a claim for damages and indemnity."

So in *Shattuc v. McArthur*, 29 Fed. Rep. 136, it is said that if parties to a libel suit had engaged in a bitter controversy it is for the jury to say what is fair compensation for the libelous charge, and if this was only an honest effort to repel accusations, they can only allow compensatory and not exemplary damages. But see on this point the cases above as to complete justification.

In *Tarpley v. Blabey*, 2 Bing. N. C. 427, 2 Scott, 642, *Hodges*, 414, *Tindall*, Ch. J., said: "If the damages had been a farthing I rather think where parties have been libeling each other I should let the loss fall where the loss throws it."

That the law pays some regard to the passions

he should recover from defendant. He prays for judgment against defendant for damages for \$15,000. Defendant pleads first the general issue to that portion of plaintiff's demand wherein he seeks to obtain judgment for alleged libel and slander to plaintiff's wife. For answer to that portion of plaintiff's demand wherein he seeks to recover judgment against him for libel and slander of himself he pleads in bar of plaintiff's right to such recovery that plaintiff and he mutually engaged in cursing and abusing each other at the time stated; that the language attributed to him in plaintiff's petition was preceded by language equally libelous, slanderous, and defamatory on the part of the plaintiff, who cursed and defamed him, applying to him many opprobrious, vulgar, and indecent epithets; that at the time he was defamed, libeled, and slandered as aforesaid, and when he used the language attributed to him by plaintiff, said declarations were without malice, and were used in a moment of heat and passion, induced by the immediate preceding words of plaintiff; that, both parties being equally in fault, plaintiff had no right to recover herein. He specially denies that he made any assault upon or threw bottles at plaintiff. He prayed for and obtained a trial by jury. The jury rendered a verdict in favor of the defendant.

After an unsuccessful attempt to obtain a new trial, plaintiff appealed.

The families of the plaintiff and of the defendant occupied houses about fifteen feet apart, separated by a fence. Plaintiff's premises were leased from the defendant. On the 29th of May, 1893, plaintiff and defendant met at some point in the business part of the town of Lake Charles, where a conversation took place between them in reference to the continued occupancy of the property by Goldberg. The plaintiff says that Dobberton, in a loud tone, charged him with not keeping the premises in a cleanly condition; that, being embarrassed by this, he withdrew, without using any harsh or opprobrious language. The fact here mentioned is not referred to in the pleadings, but shown by the testimony, and is only important as being doubtless the origin of the subsequent trouble between the parties. Plaintiff's testimony in the case begins with the statement that on his return home he heard the defendant abusing his wife, and that he heard him apply to her an insulting and disgraceful epithet, which he mentions, telling her to get out of his house, to go out at once, and that he took a bottle towards the fence, and threw it into their dining room; that he then jumped over the fence, but his wife closed the doors; that defendant then went from the

and the infirmities of men is declared in *Duncan v. Brown*, 15 B. Mon. 186, adding that it pays regard also to that higher principle which impels a man to vindicate his own character and fame and which excites and inflames him when his good name is assailed.

In refusing a new trial for inadequacy of damages where a series of gross and offensive libels had been published against a clergyman, the court said that although there could be no set-off of one libel against another, the jury might fairly consider the fact that plaintiff had preached and published vigorous attacks on the defendants. *Kelly v. Sherlock*, L. R. 1 Q. B. 686, 35 L. J. Q. B. 209, 12 Jur. N. S. 337, 6 Best & S. 480.

That a prior publication by plaintiff of a libel concerning defendant which provokes a libel in retaliation will mitigate damages for the latter is not denied in any case but it is the doctrine of all the cases, with the modification that the libel by plaintiff must have been so connected with the other, or so near it in point of time, as to be reasonably presumed to constitute provocation. As to the proximity in time or the length of interval which should be regarded as cooling time, cases are not altogether consistent with each other. On this point see *infra*, III., a.

That plaintiff has published a libel provoking that by defendant is said in *Moore v. Oastler*, 1 Moody & R. 451, *nota*, to have a tendency to show "that the plaintiff is in some measure the cause of the injury he complains of."

In criminal as well as in civil cases the fact that a libel was provoked by a prior libel to which it replies may be shown to mitigate the offense. *Hartford v. State*, 96 Ind. 461, 49 Am. Rep. 185.

Among the other cases which clearly apply the doctrine that a provocative libel may mitigate damages although it cannot justify another libel, are *Battell v. Wallace*, 30 Fed. Rep. 229; *Thomas v. Dunaway*, 30 Ill. 373; *Hotchkiss v. Lothrop*, 1 Johns. 596; *Watts v. Fraser*, 7 Ad. & El. 223, 7 Car. & P. 369, 7 Nev. & P. 157, 1 Moody & R. 449.

It is held in *Pugh v. McCarty*, 40 Ga. 449, that only 26 L. R. A.

nominal damages ought to be given for a newspaper article alleging that an employé of a rival paper who made an affidavit in a dispute about circulation was "convicted of perjury by the solemn oath of a gentleman whose veracity stands unimpeached and unimpeachable," where this was in reply to a publication by the other paper of a charge of duplicity and theft on the part of an employé of the former.

In *Southwick v. Stevens*, 10 Johns. 443, it was held that very trifling or nominal damages were all that should be given for one newspaper libel to answer to another.

So the fact that plaintiff in a libel suit had circulated a charge that defendant used false weights, and refused to sign a retraction on learning that this was not true, mitigates the libel which is published by the injured party in repudiating the slander charged against himself. *Knott v. Burwell*, 96 N. C. 272.

And the fact that a plaintiff in a suit for libel by a newspaper had previously published a sermon attacking it as "the dregs of provincial journalism," and also charged some of his opponents with subornation of perjury, is to be considered in estimating his damages, and the court cannot say that the jury is bound to give him substantial damages. *Kelly v. Sherlock*, L. R. 1 Q. B. 686, 35 L. J. Q. B. 213, 12 Jur. N. S. 337, 6 Best & S. 480.

And where plaintiff published a card saying that the purchase of a coat for a person who lost his at a fire while working to save the defendant's store was made by contributions from persons named, among whose names that of defendant did not appear, was regarded as a provocation for an attack on the plaintiff in a publication by the defendant to vindicate himself. *Masuer v. Dickens*, 70 Wis. 83.

And it is said in *Duncan v. Brown*, 15 B. Mon. 186, "circumstances of provocation which are insufficient to justify may yet by weakening the inference of malice palliate the publication of a slander or libel and may operate to mitigate the damages to be recovered for it."

rear of the yard (where this had occurred) to the front, cursing both plaintiff and his wife, and again repeating as to her the opprobrious term which he had already used; that he went into the front street, and there again used the same language. He says that when defendant applied to his wife the particular expression mentioned, he (the plaintiff) said that was going too far, and that he would break defendant's neck; that he went into the room, and got a revolver, but when he got back his wife held him, and locked the door, so that he should not go any further. It will be seen that Goldberg's testimony takes up the trouble as one already commenced between plaintiff's wife and Dobberton when he first came to a knowledge of it. He does not attempt to explain how it was or why it was that defendant came to use the language attributed to him to Mrs. Goldberg, or to say who commenced the conversation in which the insulting expressions were employed, and what was said at the commencement. The only persons who seem to have been present at the beginning of the trouble were Goldberg and wife, Dobberton, and Lizzie Smith, a colored woman employed by the Goldbergs, who was examined as a witness for the defense. Her testimony was loosely taken, and does not give occurrences with any definiteness as to the time and order

in which they took place. From it it would appear, however, that on Goldberg's returning home he related to his wife the circumstances connected with the meeting of himself and Dobberton in the street, of which we have spoken, and that a conversation took place between the two in relation to that matter in which some expression not complimentary to Dobberton was made use of by Mrs. Goldberg; that Dobberton, who was standing in his own yard at the time, heard this remark, and became very much angered. A very excited, wordy altercation followed, in which Goldberg himself is not shown (so far as this witness' testimony goes) to have used any particular epithets, though, to use her expression, "all three were fussing." She denies that Dobberton went into plaintiff's yard, or jumped over the fence, or threw any bottles. She denies that at that time defendant used towards Mrs. Goldberg the objectionable epithets spoken of in the petition. She says, however, that, not wishing to get involved in the trouble, she left before it was over; that she heard the parties still talking, but did not hear what they said. She says that in the course of that part of the conversation which she did hear she heard Mrs. Goldberg make a very insulting remark to Dobberton, which remark witness repeated in court. This witness being asked whether she

II. Slander.

It is a well-settled doctrine that words in themselves slanderous will not be actionable if used merely as abusive epithets without meaning what the words ordinarily express, as for instance where one person in a passion calls another a thief without meaning to impute actual theft.

The case of *GOLDBERG v. DOBBERTON* might have been decided on this basis as the court says it did not think any one hearing the expressions used "would have considered them other than violent expletives utterly wrong and reprehensible but none the less not really carrying in themselves charges of the commission of the offenses which the terms themselves would have implied as having been committed had they been made coolly and deliberately."

Three of the cases cited in support of the decision are of similar character. Thus *Artieta v. Artieta*, 15 La. Ann. 48, decided that it was not actionable to call another a rogue in a moment of irritation merely with a reference to an unwillingness to pay money claimed to be due.

And *Fulda v. Caldwell*, 9 La. Ann. 358, was also a case in which it did not appear that there was any real slander. The court said: "The jury no doubt regard the opprobrious epithets so lavishly bestowed by both of them on each other as mere mutual vituperation and abuse. Under these circumstances we will not disturb the verdict."

So in *Young v. Bridges*, 84 La. Ann. 333, it is held not actionable to call a person a "thieving puppy and villain" in the course of mutual vituperation, although in this case the court does not make it very plain whether it regarded the words as spoken in a slanderous sense or not.

To the same effect it is held in *McKee v. Ingalls*, 5 Ill. 80, that it is not actionable to call a person a thief in the heat of passion without any intent to impute crime.

And in *Ritchie v. Stenius*, 78 Mich. 503, substantially the same decision is made. Also in *Fisher v. Rotureau*, 2 McCord, L. 115.

There are other decisions of the same sort in 38 L. R. A.

which the question of mutual vituperation does not particularly appear.

In *Johnston v. Barrett*, 36 La. Ann. 320, the court said, "Where persons actually engage in bandying opprobrious epithets an action of slander is not to be favored for words thus uttered," but this was said after deciding that there was nothing to show that plaintiff had been injured in his reputation or standing.

The same rule in substance that has been established in libel cases is established also in case of slander. Acts or declarations which provoke passion and thereby cause the person provoked to defame the one provoking him are sufficient to mitigate damages but not to justify the defamation. *Jauch v. Jauch*, 50 Ind. 135, 19 Am. Rep. 690; *Mousler v. Harding*, 33 Ind. 176, 5 Am. Rep. 196; *McClintock v. Crick*, 4 Iowa, 453; *Freeman v. Tinsley*, 50 Ill. 497; *Hosley v. Brooks*, 20 Ill. 116; *Harbison v. Shook*, 41 Ill. 142; *Flagg v. Roberts*, 67 Ill. 435; *Miller v. Johnson*, 79 Ill. 58; *Miles v. Harrington*, 8 Kan. 425; *Powers v. Prossgroves*, 38 Miss. 227; *Else v. Ferrie*, Anthon, N. P. 23; *Courtney v. Mannheim*, 39 N. Y. S. R. 125; *Palmer v. Lang*, 7 Daly, 38; *Walker v. Flynn*, 130 Mass. 151. See also *infra*, III., b.

III. Time and connection of charges.

a. In libel cases.

But some connection must be shown between the libels published by the plaintiff and the defendant in order to make the former such provocation for the latter as will mitigate damages. *Tarpley v. Blabey*, 2 Bing. N. C. 437, 2 Scott, 643; *Hodges*, 414; *May v. Brown*, 8 Barn. & C. 113, 4 Dowd. & R. 670; *Maynard v. Beardley*, 7 Wend. 530, 22 Am. Dec. 535. Mere evidence that plaintiff was a common libeler is not admissible. *Dole v. Lyon*, 19 Johns. 447, 6 Am. Dec. 346.

And proof that plaintiff has frequently libeled the defendant is not admissible although it is said that letters published in the same correspondence would be. *Wakley v. Johnson*, *Ryan & M.* 422.

So in *Child v. Homer*, 18 Pick. 503, it is said that the rule as to provocation by prior libel applies

had not on the night of the disturbance told a certain person named that defendant had applied to Mrs. Goldberg the epithets complained of, denied having done so. At a later stage of the proceedings the person referred to was produced, and testified that the witness had told her on the night in question that defendant made use of one of the expressions, giving to her its corresponding word in French. Dobberton's version of the affair is that at the time of the quarrel he was in his back yard, when he heard a woman using very vulgar language about some Dutchman; that at first he paid no attention, but finally "he said something, though without mentioning any one's name." What he did say we do not know, as the transcript has left out some portion of this testimony. We think it clear that he must have said something uncomplimentary, which called out a remark from Goldberg's wife, for, after making Dobberton declare that "he said something without mentioning names," the transcript makes him next declare that he said (evidently to her), "I ain't talking to you" and immediately afterwards makes him say, "Then this lady said, 'I am talking to you' using an insulting expression to him. Dobberton testifies that after this Goldberg (from across the fence) commenced abusing and cursing him

violently, which language he admits he returned in kind. He says that Goldberg told him if he would come across the fence he would break his neck; that he tried to get over the fence, but that his wife took hold of him, and prevented him; that he then went to the front towards the gate on the street, and invited the plaintiff to come out and break his neck; that it was this threat of plaintiff's which made him mad. He admits using profane language and cursing on the street, but denies that he ever cursed Mrs. Goldberg at any time there. He states that he always respected her as a lady, and denies that either on this or any other occasion did he make use of the words alleged in the petition about her or to her. We may say here that there is nothing in the record which in the slightest degree would go to impugn the character of the plaintiff's wife. The testimony of those who have known her all her life show that an attack upon it would have been thoroughly unjustifiable, and defendant so admits. The only person who testifies to defendant's having applied to plaintiff's wife the epithets mentioned in the petition is the plaintiff himself, and his testimony is met by the positive testimony of the defendant to the contrary. If the particular expressions complained of were in fact used, they could not have worked any

only to recent publications, all parts of a connected controversy.

But it seems that connection in subject-matter ought not to be regarded as absolutely essential to permit the operation of the rule as to mitigation by provocation where the defendant's libel is published in retaliation while smarting under the effect of plaintiff's libel.

In *Child v. Homer*, *supra*, a reply to a newspaper libel presumably written on the same day and published on the day following is regarded as made under the influence of the provocation.

But libel charging a physician with malpractice, published on the day after a libel commenting on an alleged "brutal jest," was held in *Quinby v. Minnesota Tribune Co.*, 33 Minn. 523, to have doubtful right to mitigation as there was time for the blood to cool.

Any provocation by a newspaper libel three days before is denied effect to mitigate a newspaper libel which was not in reply to the former, as there had been time for the passions to cool. The court said: "There must be some relation, some perceptible connection, between the subject-matter of the publications." *Beardley v. Maynard*, 4 Wend. 336.

After a lapse of two weeks a publication in reply was held to be too late to afford a presumption that it was published under the impulse of passion produced by the prior libel. *Gould v. Weed*, 12 Wend. 12.

Yet charging a person with false swearing in court and afterwards refusing to retract was held sufficient to mitigate a libel about two months after the charge was made, in a card calling the other party a degraded scoundrel, a liar, and a blackguard. *Davis v. Griffith*, 4 Gill & J. 342.

A merely boastful advertisement by an agent of the merits of pianos for sale by him is held not admissible to mitigate a libelous publication charging him with having recommended others as superior while acting as agent for both. *Whittemore v. Weiss*, 33 Mich. 343.

Mere proof of a previous difficulty is not admissible as a basis for mitigation of a libel. *Brown v. Autrey*, 78 Ga. 753.

28 L. R. A.

b. In slander cases.

The provocation need not be in words spoken by the person who gives the provocation to the person to whom it is given. Thus abusive language to one's wife and children repeated to him on coming home constitutes provocation which will mitigate damages for slanderous charges immediately made by him in retaliation. *Newman v. Stein*, 73 Mich. 402.

So insulting or provoking words by plaintiff to a third person about defendant in the latter's hearing may mitigate slander spoken by defendant about plaintiff to the third person immediately after. *Ranger v. Goodrich*, 17 Wis. 79.

And irritating language by one party to another party in a law-suit claiming to have good witnesses in his own family does not constitute provocation for a charge made by the latter to a third person that the son of the former testifies falsely for his father. *Underhill v. Taylor*, 2 Barb. 348.

Mere expressed hostility to another and a statement that one does not wish to live in peace and on good terms with him does not mitigate a slander by the latter of the former. *Andrews v. Bartholomew*, 2 Met. 509.

But irritation on seeing on one's steps a rival who has enticed away customers may be provocation which will mitigate damages for calling him a thief. *Dolevin v. Wilder*, 34 How. Pr. 438.

So an abuse of one's confidence by testifying in a law-suit to admissions made by him to the witness may constitute provocation for slanderous words about the witness. *Miles v. Harrington*, 3 Kan. 423.

A charge that excitement mitigates slander was considered in *Brown v. Brooks*, 3 Ind. 518, in which it was said that the defendant, at least, could not complain of it, but that it was too favorable to him, because words might be spoken with malice even in the heat of passion.

In *Pierson v. Steortz*, *Morris* (Iowa) 136, one ground of alleged error was an instruction that a person would be liable for words spoken in the heat of passion. This was not discussed in the opinion but the judgment was affirmed.

The general habit of plaintiff in a slander suit to

damage to character, as no third person has been produced on the stand who heard them. We are unable, from the record, to say who commenced the war of words, and who was first to blame. The whole matter seems to have been one of those quarrels constantly occurring between neighbors, to the credit of neither, from which, if either or both suffer damage, it is from the fact of the quarrel itself, and not from the force and effect of the various insulting or disgraceful epithets which are hurled at each other in the course of it. We do not think that, had defendant, under the circumstances of this case, made use of the expressions charged, any one hearing them, as so used, would have considered them other than violent expletives, utterly wrong and reprehensible, but none the less not really carrying within themselves charges of the commission of the offenses which the terms themselves would have implied as having been committed had they been made coolly and deliberately. After a

careful examination of this case, we have come to the conclusion that at most it would fall within the rule announced in *Fulda v. Caldwell*, 9 La. Ann. 358, where it is said that "the interchange of opprobrious epithets and mutual vituperation and abuse will justify a judge in approving a verdict for the defendant, although the slanderous words were proved; and a verdict rendered in such a case will not be disturbed by the supreme court." See on this subject, *Artieta v. Artieta*, 15 La. Ann. 48; *Young v. Bridges*, 34 La. Ann. 336; *Bigney v. Van Benthuyzen*, 36 La. Ann. 38. In *Johnston v. Barrett*, Id. 320, this court said: "Where persons mutually engage in bandying opprobrious epithets, an action of slander is not to be encouraged for the words thus uttered." We see no reason to disturb the verdict of the jury and the judgment of the court thereon rendered.

The judgment appealed from is hereby affirmed.

vulify defendant is held not provable to mitigate damages, although language which constituted part of the *res gestæ* would be competent. *M'Alexander v. Harris*, 6 Munf. 465; *Goodbread v. Ledbetter*, 18 N. C. 12. See also *Dole v. Lyon*, 10 Johns. 447, 6 Am. Dec. 344, and *Wakley v. Johnson*, Ryan & M. 422, Ill. 2.

So frequent allegations by plaintiff in a slander suit to the effect that defendant was insolvent was held to constitute provocation for defendant's statement that plaintiff was insolvent, although the latter was not made immediately after plaintiff's statements. *Botelar v. Bell*, 1 Md. 175.

The state of feeling existing between the parties to a slander suit at the time of the slander may be pertinent evidence, but it is otherwise with respect to their feeling at a previous time. *Justice v. Kirlin*, 17 Ind. 588.

The provocation for a slander which can mitigate it need not immediately precede it but should be contemporaneous or nearly so. *Hackett v. Brown*, 3 Heisk. 284.

Plaintiff's abusive and provoking language to defendant in the afternoon may mitigate a slander spoken when the quarrel was renewed in the evening. *Warner v. Lookerby*, 31 Minn. 421.

Transactions long prior to the time of a slander and conversations forty-eight hours previous thereto are denied effect as provocation, in *Steever v. Beehler*, 1 Miles (Pa.) 146.

Although under the practice in Ireland disconnected slander may be ground for a counterclaim, an allegation of divers quarrels between the parties and their wives was held improper and was struck out of an answer. *Quin v. Hession*, 40 L. T. N. S. 70, L. R. 4 Ir. Rep. 35.

Provoking and violent words spoken by the plaintiff the evening before were held insufficient to mitigate a slander although it was said that the law makes allowance for the infirmities of human nature and what is done in the heat of passion. 29 L. R. A.

caused by the improper conduct of an adverse party. *Sheffill v. Van Deusen*, 15 Gray, 435, 77 Am. Dec. 377.

Equally offensive and insulting words by the plaintiff spoken at another time were held not to mitigate defendant's slander, in *Bourland v. Eidson*, 8 Grant, 27, where the court speaks of the slanders as "reciprocal crimination unconnected except by a general spirit of hostility and revenge."

The general rule is fairly expressed by the decision in *Moore v. Clay*, 24 Ala. 235, 60 Am. Dec. 461, to the effect that derogatory language by the plaintiff provoking the slander complained of must have been concurrent or nearly so, so as to have actually incited and provoked it.

So in *Richardson v. Northrup*, 56 Barb. 105, it is held that no act or declaration of the plaintiff against the defendant is provable to mitigate damages for slander unless it was part of the *res gestæ*. But it is held that a series of provocations may be proved provided they continue to the time of the words complained of. Here the provocation consisted of a series of petty law-suits sustained in whole or in part by the testimony of the plaintiff himself and the slander was in charging perjury.

Former controversies having nothing to do with the subject of a slander cannot mitigate it. *Lister v. Wright*, 2 Hill, 320.

Passion caused by an assault on the defendant in a slander suit by the plaintiff may mitigate the slander but will not mitigate a repetition thereof after time to cool. *Thomas v. Fisher*, 71 Ill. 576.

Calling defendant a liar and perjured wretch was held not provable to mitigate his slander by calling the plaintiff a perjurer on another occasion not connected with the former, and plaintiff's habitual attempts to irritate the defendant and his inveterate and continued hostility were also held not provable in mitigation. *Porter v. Henderson*, 11 Mich. 20, 83 Am. Dec. 66.

B. A. R.

INDIANA SUPREME COURT.

COLUMBIAN ATHLETIC CLUB, *Appt.*,
v.STATE of Indiana, *ex rel.* Willis C. Mc-
MAHAN.

(.....Ind.....)

1. An injunction against the abuse of corporate privileges by conducting prize-fights will not be denied because the wrongful acts constitute crimes.
2. A receiver of the property of a corporation which has forfeited its franchise by unlawfully conducting prize-fights may be appointed to hold the property subject to the order of the court when necessary to aid an injunction against the further unlawful use of the property.

(June 4, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Lake County enjoining it from continuing to exercise functions which it claimed the right to exercise under its charter and appointing a receiver for a portion of its property. *Affirmed.*

The facts are stated in the opinion.

Messrs. John B. Peterson and E. D. Crumpacker for appellant.

Messrs. James E. McMullough, J. Koepke, and Willis C. McMahon, with *Messrs. Byron K. Elliott and William F. Elliott,* for appellee:

The complaint shows that the corporation is engaged in no other business than that of breaking the law by conducting prize-fights.

The statute making prize-fighting a crime is valid.

The term "prize-fight" has a definite and known meaning. It needs no statutory definition.

Seville v. State, 15 L. R. A. 517, 49 Ohio St. 117; *People v. Taylor*, 21 L. R. A. 287, 96 Mich. 578; *Com. v. Welch*, 7 Gray, 824; *Com. v. Barrett*, 108 Mass. 303; *Sullivan v. State*, 67 Miss. 346; *People v. Kent*, 1 Dougl. (Mich.) 42; *Rice v. People*, 15 Mich. 9; *Durand v. People*, 47 Mich. 332.

Where a term has a known meaning it may be used in a statute declaring what shall constitute a criminal offense without defining it.

State v. Berdette, 73 Ind. 185, 38 Am. Rep. 117; *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478, 49 Am. Rep. 469; *Burke v. State*, 27 Ind. 480; *State v. Craig*, 28 Ind. 185; *State v. Oakins*, 28 Ind. 364; *Wall v. State*, 23 Ind. 150; *Hartford v. State*, 98 Ind. 461, 49 Am. Rep. 185; *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768.

The legislature has not empowered the appellant to engage, as it has done and was doing until checked by the order of the trial court, in the business of conducting prize-fights.

It was not intended that a corporation organized under the voluntary association act should have authority to engage in the business of procuring and conducting prize-fights.

NOTE.—As to authority to appoint a receiver of a corporation when no other relief is asked, see note to Supreme Sitting Order of Iron Hall v. Baker (Ind.) 20 L. R. A. 210.

28 L. R. A.

Repeals by implication are not favored.

Blain v. Bailey, 25 Ind. 165; *Bowen v. Lease*, 5 Hill, 221; *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Dwarris, Stat.* 684; *Tyson v. Postlethwaite*, 13 Ill. 728; *McCool v. Smith*, 66 U. S. 1 Black, 459, 17 L. ed. 218; *Sedgw. Stat. & Const. L.* 127; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 1; *Williams v. Potter*, 2 Barb. 816.

If prize-fighting is a crime, as unquestionably it is, the appellant corporation is a felon. It did conspire to commit crime in the nighttime and to so conspire is to commit a felony.

Elliott's Supp. § 362; *Hobbs v. State*, 18 L. R. A. 774, 183 Ind. 404.

It is a public nuisance to bring riotous and disorderly throngs of men together.

Inchbald v. Robinson, L. R. 4 Ch. 388; *Walker v. Brewster*, L. R. 5 Eq. 25; *Bostock v. North Staffordshire R. Co.* 5 DeG. & S. 584; *State v. Toole*, 106 N. C. 786.

Even where the business of the person who brings a riotous crowd together is a lawful one, a nuisance exists.

Rez v. Moore, 3 Barn. & Ad. 184.

Whatever tends to corrupt public morals, or to draw together disorderly crowds, is a nuisance.

State v. Bertheol, 6 Blackf. 474, 39 Am. Dec. 442; 5 Bacon, Abr. 147; *Rez v. Smith*, 1 Strange, 704.

The business conducted by the defendant being *per se* a nuisance there is a clear right to employ such remedies as will destroy it completely and forever.

Indianapolis v. Miller, 27 Ind. 394; *State v. Flannagan*, 67 Ind. 140; *Mayhew v. Burns*, 103 Ind. 328.

There is a perversion of corporate privileges to corrupt and criminal purposes.

In such a case the right of the state to deprive the corporation of life is clear and undoubted.

Bank of Vincennes v. State, 1 Blackf. 267, 12 Am. Dec. 234; *People v. Dispensary & Hospital Soc. of Women's Inst. of New York*, 7 Laws. 304; *Dansville & W. Pt. Road Co. v. State*, 16 Ind. 456.

The abuse of corporate privileges is none the less remedial by a civil proceeding because it is criminal.

Bank of Vincennes v. State, supra.

The jurisdiction of equity is the same in its general nature over corporations as over natural persons.

Equity remedies are flexible, and are constructed for the purpose of securing ample justice.

Equity adapts its remedies to the particular case.

1 Story, Eq. Jur. § 28.

A corporation may be enjoined at the suit of the state from abusing its corporate privileges or from performing acts in excess of its corporate powers.

Stockton v. Central R. Co. 17 L. R. A. 97, 50 N. J. Eq. 52; *National Trust Co. of New York v. Miller*, 33 N. J. Eq. 162; *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 465; *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 518; *Thomas*

v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; *Green Bay & M. R. Co. v. Union S. B. Co.* 107 U. S. 98, 27 L. ed. 413; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Atty-Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 681; 2 Pom. Eq. Jur. § 1093; *Atty-Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425; *Ware v. Regent's Canal Co.* 3 DeG. & J. 212; *Brice's Ultra Vires*, 508, 509; *Fishmongers Co. v. East India Co.* 1 Dick. 163; *Agar v. Regents Canal Co. Coop. Ch.* 77; *River Dun Nav. Co. v. North Midland R. Co.* 1 Eng. Ry. & Canal Cas. 135; *Blakemore v. Glamorganshire Canal Navigation*, 1 Myl. & K. 154; *Coats v. Clarence R. Co.* 1 Russ. & M. 181; *Dawson v. Paver*, 5 Hare, 415; *Broadbent v. Imperial Gas Co.* 7 DeG. M. & G. 437; *London & B. R. Co. v. Cooper*, 2 Eng. Ry. & Canal Cas. 312; *Atty-Gen. v. Johnson*, 2 Wils. 87; *Atty-Gen. v. Forbes*, 2 Myl. & C. 123; *Atty-Gen. v. Eastern Counties R. Co.* 3 Eng. Ry. & Canal Cas. 387; *Atty-Gen. v. Great Northern R. Co.* 4 DeG. & S. 75; *Atty-Gen. v. Sheffield Gas Consumers Co.* 3 DeG. M. & G. 304; *Atty-Gen. v. Great Northern R. Co.* 1 Drew. & S. 154; *Atty-Gen. v. Mid-Kent R. Co.* 1 L. R. 8 Ch. 100; *Atty-Gen. v. Cambridge Consumers Gas Co.* L. R. 4 Ch. 71.

If there is a right to an injunction there is a right to all other relief essential to make the injunction effective.

Where a receiver is necessary to make an injunction serve the purpose for which it was granted, then a receiver may be appointed.

Penn v. Whitehead, 12 Gratt. 88; *Denny v. Denny*, 113 Ind. 22; *Watson v. Sutherland*, 72 U. S. 5 Wall. 74, 18 L. ed. 580; *Boyce v. Grundy*, 28 U. S. 3 Pet. 210, 7 L. ed. 655; *Allen v. Hanks*, 136 U. S. 300, 34 L. ed. 414; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909; *Hodges v. Kowing*, 7 L. R. A. 87, 58 Conn. 12.

Preventive justice is preferable to all other species of justice where preventive justice is obtainable.

Champ v. Kendrick, 130 Ind. 549; *Clark v. Jeffersonville, M. & I. R. Co.* 44 Ind. 248; *Thatcher v. Humble*, 67 Ind. 444; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731; *Spicer v. Hoop*, 51 Ind. 385; *McAfee v. Reynolds*, 18 L. R. A. 211, 130 Ind. 38; *Morse v. Morse*, 44 Vt. 84; *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215.

Abuse of corporate franchises may always be prevented by equity.

People's Gas Co. v. Tyner, 16 L. R. A. 448, 131 Ind. 277; *Atty-Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425; *State v. Crawford*, 28 Kan. 728, 42 Am. Rep. 192; *Columbus v. Jaques*, 30 Ga. 506; *People v. St. Louis*, 10 Ill. 357; *Atty-Gen. v. Hunter*, 46 N. C. 12; *State v. Saunders*, 18 L. R. A. 646, 66 N. H. 39; *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19; *Atty-Gen. v. New Jersey R. & Transp. Co.* 3 N. J. Eq. 136; *Minke v. Hopeman*, 87 Ill. 450, 29 Am. Rep. 63; *Atty-Gen. v. Nichol*, 3 Meriv. 687; 2 Morawetz, Priv. Corp. § 1043.

The state has a right to a receiver in aid of the equitable relief by injunction.

Skinner v. Maxwell, 66 N. C. 47; *Adams, Eq.* 8th Am. ed. 353, 3 Pom. Eq. Jur. § 1332.

A natural person cannot hold property for a

purpose which the law denounces as criminal, much less can a corporation do so.

Morgan v. Donovan, 58 Ala. 241; *Occum Co. v. A. & W. Sprague Mfg. Co.* 34 Conn. 529; *Taber v. Cincinnati, I. & C. R. Co.* 15 Ind. 459; *Hayward v. Davidson*, 41 Ind. 212.

The right to take into legal custody the instrument of the crime is of the essence of preventive justice.

Spalding v. Preston, 21 Vt. 9, 50 Am. Dec. 68; *State v. Robbins*, 8 L. R. A. 438, 124 Ind. 308; 1 Bishop, Crim. Proc. §§ 210, 211.

All property is held under the implied obligation that it shall not be used as an instrument of crime.

Mugler v. Kansas, 133 U. S. 623, 31 L. ed. 205; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Com. v. Alger*, 7 Cush. 53.

The thing which constitutes a nuisance may be destroyed by a citizen or by order of court, and the order will be made in the most effective form.

Goodson v. Richardson, L. R. 9 Ch. 221; *Atty-Gen. v. Nichol*, 16 Ves. Jr. 342; *Atty-Gen. v. Algonquin Club*, 11 L. R. A. 500, 158 Mass. 447; *Atty-Gen. v. Sheffield Gas Consumers Co.* 19 Eng. L. & Eq. 639; *Beadel v. Perry*, L. R. 9 Eq. 485; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 395, 54 Fed. Rep. 746; *Cos v. Louisville & N. R. Co.* 3 Fed. Rep. 775.

Howard, O. J., delivered the opinion of the court:

On the 2d day of September, 1893, the appellee, by her relator, who is the prosecuting attorney, filed in the clerk's office of the court below her verified complaint or information, alleging, among other things, that the appellant was a corporation duly organized and then existing under the laws of the state of Indiana; that the said appellant, assuming to act as such corporation, was engaged in violating the laws of the state, and had misused its corporate powers and franchises; that under the claim of corporate right, and in its character as a corporation, the appellant had willfully violated the statute of the state prohibiting prize fighting, giving the details of such violation; that the appellant claimed the right, as a corporate franchise, to conduct prize fights, insisting that the statute under which it was organized gave to it such right; that, by reason of such wrongful claim, it had induced persons to believe that it had a franchise under the laws of the state to engage in such business of prize fighting, and so had greatly abused its corporate privileges and usurped authority which it did not possess; that it had fitted up and maintained its premises in the county of Lake for the sole purpose of engaging in prize fighting; that it advertised such business in the most public manner, and thus induced thousands of persons to come upon its said premises in order to witness men engaged in fighting one another for prizes to be awarded to the victors; that the appellant, as such corporation, had further abused and misused its corporate franchises and violated the statutes by bringing into the state certain persons to perform

the duties of sheriffs and other peace officers, and by causing such imported persons, so feloniously assuming to act as peace officers, to beat, bruise, and wound persons assembled on appellant's said premises; that many persons were in consequence grievously wounded, and that even death had been thereby caused; that appellant, in violation of another statute, had conspired with divers persons, to appellee unknown, to commit and procure the commission of an offense in the night-time, to wit, prize fighting, upon said premises; that appellant, in its said corporate capacity, had caused, created, and was then maintaining a public nuisance on its said premises, in that it had thereon prepared and constructed buildings and other structures for the sole purpose of procuring men to fight therein for prizes, giving details of fights that had already taken place, stating also the riotous proceedings that followed, and that appellant avows its purpose to continue such prize fighting; that appellant fortified and strengthened its buildings so as the better to enable it to carry on its said illegal business, as well as to render it the more difficult for sheriffs and other peace officers to enter and arrest those engaged in the violation of the laws, pursuant also to the purpose and design of the appellant to permanently use and maintain its premises for the sole purpose of conducting prize fights on its said premises; that, under claim of corporate right and privilege, appellant would, if not enjoined, continue its usurpation of corporate functions and its abuse of its corporate franchises, thereby causing tumults and riots, so that human life would be endangered and the local officers of the county be unable to suppress the consequent violence; that the incorporators, as well as all those thus engaged in violation of the laws, were nonresidents of the state of Indiana; that appellant had conspired with certain persons named and with others, whose names were unknown, with the purpose, in the event that the court should issue such restraining order, to render the same nugatory by having the prize fights conducted by such other persons; that, unless a receiver should also be appointed, the appellant would falsely and fraudulently assign its rights and property to said co-conspirators or other third parties, so that prize fighting and other unlawful acts might still be conducted notwithstanding such order of the court. The prayer was for a dissolution of the incorporation, as having forfeited its franchises, and that it be ousted therefrom; that an injunction be issued; and that a receiver be appointed to take charge of the property, until the further order of the court. The restraining order was issued by the judge in vacation, and was directed especially against a fight advertised for the 4th day of September, being two days after the issue of the order; and the receiver was appointed for the property of appellant in Lake county, being the premises in question.

The appointment of the receiver is assigned as error; and it is contended by counsel for appellant that the court erred both in the issuing of its restraining order and also in the

appointment of the receiver, for the reason that equity will not aid in the punishment or in the prevention of crime. "One sufficient reason, among the many," says counsel, "for denying the jurisdiction of equity in this class of cases, is that the law regards the crimes charged as those of the individual perpetrators, and not of the corporation, and the penal laws are adequate to redress wrongs against society by punishing the offenders. Corporations, as such, have no capacity to commit the kind of crimes charged in the information." In answer to this may be given what a great English judge, *Vice Chancellor Shadwell*, said when appealed to for a receiver in a case where a corporation had violated an injunction: "The directors of the company, their agents and servants, cannot, on this motion, be committed to prison; but what can be done shall by me be done to repress this daring invasion of public and private rights,—an invasion maintained, moreover, in open defiance of all law, authority, and order. Let a sequestration issue." *Atty-Gen. v. Great Northern R. Co.*, 4 De G. & S. 75, as cited in 2 Redfield on Railways, 6th ed. 419. In *Judge Redfield's* work, cited above (vol. 2, p. 364), the author says: "Injunctions in courts of equity, to restrain railways from exceeding the powers of their charters, or committing irreparable injury to other persons natural or artificial, have been common for a long time in England and in this country." Extraordinary emergencies in many cases call for extraordinary remedies. In chapter 29 of the work from which we have quoted, *Judge Redfield*, both in the text and in the notes, gives numerous instances of the interposition of equity to prevent threatened wrongs on the part of corporations. The rule to be observed in such cases is quoted at page 366 from *Lord Chancellor Cottenham*: "That it is the duty of courts of equity (and the same is true of all courts and of all institutions) to adapt its practice and course of proceedings, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy." *Taylor v. Salmon*, 4 Myl. & C. 141. This rule, the author concludes, is certainly worthy of one of the ablest, wisest, and best judges that ever administered the chancery law of England or America. In the well-considered case of *Atty-Gen. v. Chicago & N. W. R. Co.*, 35 Wis. 425, by *Chief Justice Ryan*, that eminent jurist quotes with approval from *Brice's Ultra Vires* as follows: "Under many circumstances, the court of chancery has, on public grounds, jurisdiction to prevent corporations acting in various ways, or contrary to the intent for which they have been created. The public, however, must be represented in all applications relating to such matters, and this is done by the intervention of the attorney-general. No single person, whether a member of the corporation or not, is able

on his own account, and of his own motion, to call upon the court to interfere for his special protection. The wrong he complains of is not confined to himself. No right or privilege peculiar to himself is violated. The wrongs inflicted and the rights invaded affect the public, and the public, consequently, must be a party to the proceedings. The occasions upon which the court will exercise jurisdiction to restrain the doing of acts of this kind seem to fall into the three following heads: (1) When a corporation is abusing powers given for public purposes; (2) or is committing a breach of trust; (3) or is acting adversely to public policy." Under the third head, "When any corporation is doing acts detrimental to the public welfare or hostile to public policy," the author quotes from *Atty-Gen. v. Great Northern R. Co.*, where Kindersley, V. C., said: "Whenever the interests of the public are damaged by a company established for any particular purpose by an act of parliament, acting illegally and in contravention of the powers conferred upon it, I conceive it is the function of the attorney-general to protect the interests of the public by an information; and that when, in the case of an injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the act creating it, it is competent for the attorney-general, in cases of injury to public interests from such a cause, to file an information for an injunction." In the same case the learned chief justice, in criticising *Bigelow v. Hartford Bridge Co.*, 14 Conn. 580, 86 Am. Dec. 502, says: "The court holds the jurisdiction in cases of private nuisance and of public nuisance inflicting particular injury at the suit of an individual, and questions it at the suit of the state. It is not easy to comprehend why the remedy should avail against the less evil, and not against the greater; why equity should interpose to restrain what affects one person only, and refuse its protection against what affects all persons; in the case of a public nuisance, restrain it at the suit of one whom it especially aggrieves, and refuse to do so for the public, whom it equally aggrieves."

Counsel for appellant says that "an act is frequently of such a character as to involve not only a breach of criminal law, but also a transgression of civil duty, and in such cases redress may be had, not only by the state in the form of a criminal prosecution, but the one who suffers a civil injury may have his action for damages. For instance, if one steal a horse, he is subject to prosecution under the criminal laws of the state, and at the same time, notwithstanding that liability, the individual who suffers the loss has a right to prosecute an action against the offender for damages; and, in connection with such action, conditions may be such that the court would enjoin the defendant from disposing of his property until judgment could be obtained, and even go further and appoint a receiver for the purpose of preserving the property in order that the judgment might be satisfied. But no one will

contend that the state could enjoin the offender from stealing other horses." Counsel admit very much here. It is not, however, the stealing of other horses that is in question. It is quite enough to attend to the horse and to the crime under consideration. The court might certainly enjoin the using of the horse for such purpose as might affect the rights of the complaining party; as, for instance, might enjoin the sale or transfer of the property to others. So here, while it is perhaps true that the commission of crime, strictly speaking, cannot be enjoined, yet the transfer of property for fraudulent purposes, or to evade the processes of the court, or to prevent the execution of its decrees, may be enjoined. If this corporation might transfer its rights, franchises, and property to another company or to individuals during the pendency of this action, and so continue the perpetration of the acts complained of in the very face of the court, it would be but a mockery of justice to have instituted the action in the first place. This is a proceeding against property, as well as against the corporation. The property itself is criminal, and can be used only for criminal purposes. If there be any virtue in the quo warranto proceeding, it must result not only in the dissolution of the corporation, but also in the discontinuance of the use of its property for the evil purposes to which it has been prostituted.

In case the offender were an individual, and the property were personal, there could be no question that it could not be lawfully held by the criminal. Shall it be said that what the state may do in the case of one of its own citizens it is powerless to do in the case of a corporate creature—the product of its own statutes? In *State v. Lewis*, 134 Ind. 250, 20 L. R. A. 52, this court upheld a statute making it a misdemeanor for any one to have in his possession any gill net or seine, except as permitted by the statute; and numerous decisions sustaining like statutes were cited. In those cases the mere possession of articles otherwise harmless was rendered unlawful for the reason that they might be used in the commission of acts made criminal by the statute. But where the articles found in possession of one arrested for crime are themselves the instruments of such crime, and made only to be used in violation of the law, it has always been held that the criminal could not lawfully own or possess them. The right to seize and hold such instruments of crime is no more doubtful than the right to arrest the criminal himself. Accordingly, the gambler's outfit, the burglar's tools, the counterfeiter's dies, are seized wherever and whenever found. There can be no lawful possession or use of such things by any one save the officers of the law. Shall the courts be helpless in like cases where the criminal is a corporation, and where the property used as the instrument of crime is real, and not personal? In *Smith v. McDowell*, 148 Ill. 51, 23 L. R. A. 398, which was a case where it was sought to vacate a part of a public street for the benefit of a private person, the court held that such attempted vacation and use of the street would constitute a public nuisance;

and that the public was entitled to the speediest and most effective remedy to prevent the threatened invasion of its rights; and, therefore, that such nuisance might be forbidden by injunction at the suit of the proper officer; citing *Wood, Nuisances*, §§ 777-786; *Dill. Mun. Corp.* 520; 8 Pom. Eq. Jur. 1359, and other authorities. Even where a private citizen brings an action to prevent a public wrong, from which he would suffer an injury peculiar to himself, and not sustained by the public in general, an injunction may be awarded to prevent the commission of the threatened crime; and the objection will not be heard that the equity powers of the court cannot be employed to aid in enforcing the criminal laws of the state by thus preventing crime about to be committed. *People's Gas Co. v. Tyner*, 131 Ind. 277, 16 L. R. A. 448. "No authority," said the court in that case, "has been cited, and we know of none, supporting the position of appellants that the appellee is not entitled to an injunction because the accumulation of nitro-glycerine within the corporate limits of a town or city is a crime." But counsel say that in these cases equity interposed for the protection of property rights, and not for the prevention of crime. It may be remarked that property rights are in question in the case before us also. Notwithstanding the criminal use to which the property of appellant has heretofore been put, it should, nevertheless, be preserved for such final and just disposition as may be decreed by the court. Moreover, since the incorporators are all nonresidents, and since they own no property but this in the state, the state is interested in its preservation at least to the extent of the expenses of this suit. Besides, though generally true, it is not absolutely so, that an injunction can only issue to preserve mere property rights. "There are many adjudged cases," as said in *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19, "which expressly hold that the fact that a nuisance is a crime, and punishable as such, does not deprive equity of its jurisdiction to restrain and abate it by injunction." See also *Tiedeman, Eq. Jur.* §§ 483, 484, 581. In *State v. Saunders*, 66 N. H. 89, 18 L. R. A. 646, the supreme court of New Hampshire, in a very elaborate and well-considered case, decided that "an injunction against the unlawful use of buildings as a nuisance is not beyond the jurisdiction of equity on the ground that it is in the nature of a punishment of a criminal offense." It will be observed that this decision is exactly in point; the court below having issued its injunction against the unlawful use of appellant's buildings. In both cases the state sued by its proper officer; and property rights are no more in question in one case than in the other. In *State v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182, the court said: "While it is unquestionably true that the keeping of the saloon in question is a criminal offense, and its operation involves the commission of many criminal offenses, yet we cannot think that these facts can possibly take away any of the jurisdiction which courts of equity might otherwise exercise." In *Littleton v. Fritz*, *supra*, it was said: "One maintain-

ing a nuisance may not only be punished in a criminal proceeding, but a civil action at law, and an action in equity to restrain the nuisance may be prosecuted against him.

. . . The defendant, in order to succeed in the defense that the proceeding by injunction is an attempt to enforce a criminal law by civil process, demands, in effect, that the courts must establish the principle that, because the nuisance complained of is a crime, it is entitled to favor and protection in a court of equity." The main contention of appellant is thus well answered by the supreme court of Iowa. There could be no doubt that under section 1145, Rev. Stat. 1894 (Rev. Stat. 1881, § 1181), an information might be filed against corporations such as this where they "do or omit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or where they exercise powers not conferred by law." Nor could there be any doubt that under section 1236, Rev. Stat. 1894 (Rev. Stat. 1881, § 1222), a receiver might be appointed when the corporation "has forfeited its corporate rights," or when, "in the discretion of the court, or the judge thereof in vacation, it may be necessary to secure ample justice to the parties." As soon, however, as it appears that the acts shown in the information are criminal, the conclusion is at once reached that the criminality of the transactions throws a shield over the culprit, so that equity may not reach it. As in the case of other criminals, justice and equity are the very last things it seeks for.

Counsel for appellee well observe in this connection that "it would be monstrous to adjudge that, because acts constituting the abuse of corporate privileges are crimes, therefore the corporation may persist in doing them. This would be to encourage corporations to perpetrate the gravest abuses, since, under such a rule, the graver the abuse, the less the power of the civil branch of our law. It comes with an ill grace from a corporation to aver that, because the abuse of its corporate privileges consists in committing crime, civil remedies are unavailing. It would outrage common sense unspeakably to give ear to a corporation defending itself against a civil proceeding by asserting its own infamy and insisting that redress can only be had under the laws punishing crimes." A like conclusion was reached in Massachusetts, in the case of *Carleton v. Rugg*, 149 Mass. 550, 5 L. R. A. 198, the language of the court being: "The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance." See also *Morawetz, Priv. Corp.* § 1048. As to whether the premises of appellant constitute a public nuisance, we may very fittingly borrow the following definition from *State v. Crawford*, *supra*, that "every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance." The definition fits this prize-fighting establishment most perfectly; and, under the foregoing authorities, we have no doubt that equity may interpose to restrain its further operation, even though the

acts charged in the information are criminal. And, if equity may so interpose, certainly it may make its interposition effective. As shown by the information, the injunction, if issued, would not of itself have been sufficient to restrain the nuisance without the aid of the receivership. But equitable remedies must be complete. The arm of equity is not shortened, but will reach out to secure full right in the premises. The receivership being therefore necessary in order to secure the full effect of the injunction, equity will not refrain from the appointment of a receiver for such purpose. The receivership in this case is not necessarily for the sequestration and sale of the property, but only to take charge of the same until the further order of the court, in aid of the injunction.

The circumstances set forth in the information that appellant pretends to have conducted its nefarious business under provisions of the voluntary association statutes of the state scarcely merit consideration. The constitution puts its special bans upon lotteries, duels, and all infamous crimes, while at the same time it provides for the moral and intellectual improvement of the people. A statute which should attempt to authorize prize fighting would most certainly be opposed to the spirit of the constitution, and indeed to that of the law itself, long since defined to be "a rule of civil conduct prescribed by the supreme power of estate commanding what is right, and prohibiting what is wrong." The legislature had no intention to enact any such statute.

For the reason therefore, that the information shows the premises of appellant to be a public nuisance, and also for the reason that it is likewise shown that appellant has misused and abused its corporate franchises and privileges, the court did not err in issuing the restraining order and in appointing a receiver, the appointment of a receiver being necessary to render the restraining order effective.

The judgment is affirmed.

Hackney, J., dissenting:

While it would be a pleasure to me to concur in any opinion that had for its purpose to stay the commission of the numerous offenses against the criminal and civil laws of the state charged in the complaint against the appellant, I regret that I cannot concur in the conclusion that the equitable remedy of a receivership can be invoked for that purpose. I do not question the conclusion that the writ of injunction was properly issued. That question, however, is not before us; but, if a proper remedy, it was certainly effectual to stay the employment of the state's corporate franchises in the commission of crime. If the scope of the writ were too narrow to reach those who might operate in spite of its terms, a wider scope could be given it, if power existed at all to issue the writ. It is certainly enough to say that equity will go so far as to hold the criminal while the law punishes him. My doubts have arisen as to the proposition that a receiver may be appointed,—a remedy only granted by equity in clear cases where the

rights and interests of the parties must suffer by its denial. The office of a receiver, so far as my knowledge and observation have gone, has always been to preserve the property to be received, held, or disposed of, for the benefit of an owner, creditor, lienor, lessee, or other person interested, and not simply to restrain the owner from transferring it or using it. Such holding of the property is but another method of enjoining. The theory of the appellee is, when reduced to its logical results, that equity, by its remedy of receivership, will confiscate property used for criminal purposes. Indeed, many of the citations of counsel and of the majority opinion are to the effect that such taking is, as in cases of confiscation, of the implements of crime. I think it may be safely said that no case can be found where a confiscation was under equitable authority, but in every instance it has been authorized by statute. Nor do I believe that Rev. Stat. 1894, § 1236 (Rev. Stat. 1881, § 1232), enlarges the powers of equity in this respect. The implication must accompany this statutory provision that the receiver is necessary to preserve the property for some person having an interest in it. I cannot resist the conclusion that the true office of a receiver does not include the mere holding of property to stay the commission of crime.

William C. NEWCOMB, *App't.*,
v.

City of INDIANAPOLIS *et al.*

(.....Ind.....)

1. A statute granting a right or imposing a duty also confers by implication every proper power for the exercise of the one or the performance of the other.
2. The provision against establishing additional executive or administrative departments in Rev. Stat. 1894, § 3812, is not violated by the creation of a board of examiners to ascertain the fitness of applicants for office in city departments which it is made the duty of the mayor and heads of departments under section 3816 to provide for by rules and regulations prescribing a systematic method.
3. The creation of a board of examiners is a proper means for the exercise of the duty imposed upon the mayor and heads of the departments of a city by Rev. Stat. 1894, § 3816, requiring them to make rules and regulations for prescribing a systematic method of ascertaining the fitness of applicants for appointment and promotion in city departments without regard to political opinions or services.

(May 23, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendants in an action brought to enjoin defendants from transferring their appointive power to a board of examiners. *Affirmed.*

NOTE.—As to executive function of appointment of officers, see *People v. Henderson* (Wyo.) 23 L. R. A. 751, and cases cited in footnote thereto.

The facts are stated in the opinion.

Mr. William V. Rooker for appellant.

Messrs. Robert W. McBride and J. E. Scott, for appellees:

No question is made as to the validity of the provisions of the charter. They were unquestionably within the power of the legislature. Where power to legislate exists the courts will only inquire, "Has the power been exercised?"

Sutherland, Stat. Constr. § 407, and cases cited; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471.

Where a statute commands an act to be done it authorizes all that is necessary for the performance of that act.

Sedg. Stat. & Const. L. 2d ed. p. 228; *Green v. New York*, 2 Hilt. 203.

When a power is given by statute everything necessary to make it effectual or requisite to attain the end is implied.

1 Kent, Com. 464; *Stief v. Hart*, 1 N. Y. 20; *Mitchell v. Marwell*, 2 Fla. 594; *Re Neagle*, 5 L. R. A. 78, 89 Fed. Rep. 833; *Cunningham v. Neagle*, 135 U. S. 1, 34 L. ed. 55; *Com. v. Conyngham*, 66 Pa. 99; *Witherspoon v. Dunlap*, 1 McCord, L. 546.

Statutes containing grants of power are to be construed so as to include the authority to do all things necessary to accomplish the objects for which the power is granted.

People v. Eddy, 57 Barb. 593; *New York v. Sands*, 105 N. Y. 210; Sutherland, Stat. Constr. §§ 334, 427.

Wherever the provision of a statute is general, everything which is necessary to make such provision effectual is supplied by the common law and by implication.

Sutherland, Stat. Constr. §§ 337, 428; 6 Bacon, Abr. 369; *Booth v. Kitchen*, 7 Hun, 260; *Livingston v. Harris*, 11 Wend. 329; 1 Kent, Com. 404; *People v. Briggs*, 50 N. Y. 553; *Odell v. De Witt*, 58 N. Y. 643.

Rules for the construction of constitutions may be properly applied to the construction of the charter of a municipal corporation.

Dill. Mun. Corp. § 89.

Where a general power is conferred or a duty enjoined, every particular power necessary for the exercise of the one or the performance of the other is conferred.

Cooley, Const. Lim. *63, 64; Dill. Mun. Corp. § 91; *Hitchcock v. Galveston*, 96 U. S. 343, 24 L. ed. 661; Beach, Mun. Corp. 279, note 2; *Anderson v. O'Connor*, 98 Ind. 168; *Duncan v. Lawrence County Comrs.* 101 Ind. 403; *Miller v. Dearborn County Comrs.* 66 Ind. 166; *Richmond v. McGirr*, 78 Ind. 197.

The duties of the so-called civil service board are purely ministerial and in no sense executive or administrative in their character.

Mech. Pub. Off. § 657; *Pennington v. Streight*, 54 Ind. 876; *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *Ray v. Jeffersonville*, 90 Ind. 573.

Jordan, J., delivered the opinion of the court:

Appellant, as a citizen and taxpayer of the city of Indianapolis, instituted this action in the lower court for an injunction. As against the municipal corporation and its several officials, appellees herein, it was sought by the action to enjoin them from

turning over their official functions or duties alleged to be incumbent upon each to appellees Denny, Daniels, Picketts, Brown, and White. It is charged in the complaint that these last-mentioned persons are assuming to act as a pretended board of examiners, after the manner of a "civil service commission," and are thereby interfering with the various departments of the city in the discharge of duties defined and imposed by law, by requiring the city and its properly constituted officers to relinquish to said board the duty of selecting and supervising the subordinate employes of said city; and appellant asks that they be restrained from intermeddling with the affairs of said city, etc. The complaint, after describing the several departments of municipal government, and referring to the duties of the official heads thereof, proceeds with the following averments: "That on the 13th day of February, 1894, at a meeting of the mayor with the heads of the several departments, rules and regulations were adopted for the appointment and promotion of the employes of said city." Copies of these rules are filed as exhibits therewith. Considering the complaint as an entirety, and it is evident from its general scope and character that it seeks to assail the validity of the action of the mayor and the heads of the departments of the city of Indianapolis in the adoption of the rules mentioned therein, denominated "civil service rules," for the appointment of the employes of the city, and also the right of the board of examiners created thereby to exercise any powers thereunder. The pleading proceeds upon the theory that there is no grant of authority, under the city's charter, to adopt the rules and regulations in question, or to create the board of examiners. A demurrer was sustained to the complaint, and this is the only error assigned.

The grounds of the contentions of appellant's learned counsel are substantially as follows: "(1) That the rules in controversy operate as an unwarranted abridgment of the powers of the heads of departments, and require them to surrender unto unauthorized and irresponsible persons certain functions or duties which the law enjoined upon these officials; (2) that by the creation of the board of examiners there is an attempt to establish an independent executive or administrative department of the municipal government, in violation of law." On the side of appellees, their learned counsel contend: "That the rules and regulations, under the charter, are required to be adopted (and in this case were) by the mayor and all of the heads of the several departments (except that of assessment and collection) acting together. That it was the legislative intention that when these rules were adopted they should be paramount and controlling upon the heads of these departments. That it was the object of the legislature, when it enacted the statute for the government of the city, to put the administration of its affairs upon a practical business basis, and thereby have the city conducted as a business institution is operated, instead of being run as a political machine." That, as aids to accomplish this purpose,

they contend that it appears to have been the legislative intent " (1) to secure, so far as possible, uniformity in the methods of administering the affairs of the several city departments, by substituting for the individual will and caprice of the several heads of departments, rules and regulations adopted by all acting together, and representing their collective judgment; (2) to make business capacity, instead of political activity, the prime qualification for place among the servants of the city; (3) to require the adopting of a systematic method, which should be common to all departments of the city government (except one), for ascertaining the comparative fitness of all applicants for office position, and promotion, and of selecting, appointing, and promoting those found to be best fitted, . . . without regard to political opinions or services; (4) that these rules and regulations, when adopted, should be paramount to any rules and regulations which might be adopted by the heads of departments for the government of their own subordinates, and should control the individual action of the heads of departments."

In order to determine the questions presented by this appeal it will be necessary to examine and consider the scope and character of the series of rules and regulations in controversy as they are presented by the record, and which are alleged to have been adopted by the mayor and the several heads of departments. Rules 1 and 2 are as follows: "Rule 1. The mayor shall appoint from among the officers or the employes of the city two persons, and two other residents of Indianapolis, not connected with the city service, who, together with the mayor, as *ex officio* chairman, shall constitute the 'Board of Examiners.' All such persons shall serve without pay. Not more than three members of said board shall be of the same political party. Three members of such board shall constitute a quorum. The board shall elect a secretary (either of its own number or otherwise), who shall keep records of all its proceedings, which records shall be open to the inspection of the public. This board shall conduct by themselves or by their appointees all examinations held under these regulations, to ascertain the comparative fitness of applicants for position and promotion. The secretary of the board shall also keep all necessary records of applicants, their examinations and standings, and a complete record of all persons employed in the several departments, and of all appointments, promotions, dismissals, resignations and changes of any sort therein. Rule 2. For the purpose of 'ascertaining the comparative fitness of applicants for employment, and of selecting and appointing those found to be best fitted, without regard to political opinions or services,' the board of examiners will designate qualified persons (either from their own number or otherwise) to conduct examinations, and may at any time substitute another person in place of any one so selected. Whenever the qualifications required for a position are such as that assistance from experts in conducting the examinations is desirable, such experts may be designated to

aid the examining board, and so far as practicable such experts shall be persons employed in the department to which the applicant seeks admission." Rule 3 classifies the offices and places to be filled thereunder, and this classification embraces all the subordinate employes of the city. No. 4 defines the qualification of applicants for positions; 5 relates to the manner of making applications; 6 applies to the character of examinations of applicants; rule 7 refers to the marking and grading of applicants upon examination; 8 defines the duty of a city official in the appointment of an employe. The ninth rule is as follows: "Rule 9. No persons shall be appointed to any position, or given any employment, in which an examination is required, or in which the appointment is made by promotion, or in any other manner herein described, except, in cases of emergency, for not more than thirty days; and no person specially appointed shall be reappointed after said thirty days, except by examination and promotion. If there be no more names upon the eligible list when such appointment is required to be made, a new examination shall be held with all possible dispatch. Every original appointment made after examination shall be for a probationary period of two months, at the end of which time, if the conduct and capacity of the person appointed be found satisfactory, the probationer shall be absolutely appointed, but otherwise he shall be deemed out of the service. The officer under whom the probationer shall serve shall carefully observe the value of the service rendered, and report the fact to the secretary of the board of examiners, together with his conclusion at the end of the probationary term. Every person or board having power of appointment shall, within ten days, notify the secretary of the board of examiners of the name and place of residence of any person appointed or rejected, and of the transfer, promotion, resignation, removal, discharge, or death of the persons serving under him, with the date thereof. Transfers with the classified service may be made without examination from a position in one department to a similar position in another department, provided that no employe shall be transferred from any position or employment for which no examination was required to one for which an examination is required. The board of examiners may, in its discretion, order examinations for promotions from classes of the lower grade to classes of a higher grade." Rule 10 provides for the registration of applicants, and 11 provides that no person shall defeat or obstruct any person in respect to his right of examinations, etc.

The question involved in the case at bar relative to the validity of these rules and regulations requires an examination of the statutory provisions under which the appellees claim that the several officials of the city denominated "Heads of Departments" had the power, when convened in a body, to adopt them. At the time of the adoption thereof by this body, called by counsel "The Cabinet," the city of Indianapolis was managing its municipal affairs and operating under an

act of the legislature approved March 6, 1891, entitled "An act concerning the incorporation and government of cities having more than one hundred thousand population," etc. (Acts 1891, p. 137). Section 45 of this Act, being section 8816, Rev. Stat. 1894, in part is as follows: "Sec. 45. It shall be the duty of the mayor . . . to call together the heads of departments, except of assessment and collection, for consultation and advice upon the affairs of the city at least once a month, and to call on the heads of all departments for reports from the same, which it shall be their duty to prepare and submit in writing. Records shall be kept of such meetings above provided for; and rules and regulations shall be adopted therefor for the administration of the affairs of the city departments, not inconsistent with any law or ordinance, which regulations shall prescribe a common and systematic method of ascertaining the comparative fitness of applicants for office, position, and promotion, and of selecting, appointing, and promoting those found to be best fitted, except in the department of public safety, without regard to political opinions or services." Section 48, being section 8819, Rev. Stat. 1894, in part is as follows: "Sec. 48. The following executive departments are hereby established in such city: (a) Department of finance. (b) Department of law. (c) Department of public works. (d) Department of public safety. (e) Department of assessment and collection. (f) Department of public health and charities. No other executive or administrative departments shall be established in such city. Subordinate officers and employés not herein provided for shall be appointed by the heads of departments. Each department shall have power to prescribe rules and regulations not inconsistent with any statute or ordinance, or regulation established pursuant to section 45 of this Act, for its own government, regulating the conduct of its officers, clerks, and employés in the distribution and performance of its business, and preservation of books, records, papers, and property under its control. . . . All official business of the several departments shall be transacted at the offices thereof, and a continuous record or minute shall be kept at said offices respectively of such business. The officer or officers at the head of any department may appoint and remove any of his or their clerks or assistants, subject to any regulations adopted pursuant to section 45 of this Act. . . ."

The authorities cited by counsel for appellant in support of his contentions "are few and far between." No question seems to be raised as to the right of the legislature to authorize the adoption of these rules, and we think that no reasonable objections can be urged or interposed against this legislative grant of power to the municipal authorities. The question relative to the political policy or wisdom of the legislature in granting this power, or as to the propriety or necessity of the "mayor's cabinet" in carrying the same into effect by adopting these "civil service rules," is of no concern to this court, and a matter over which it has no control. The expediency or in expediency of the action upon

the part of this municipal body in the adoption of these regulations by the methods or means designated, by which the fitness of persons who apply for office or position in the public service may be ascertained, and whereby the services of those best fitted may be secured without regard to political opinions or party fealty, is a question to be determined solely by the body invested with the authority by the statute for the adoption of the rules in controversy. Recurring again to the cardinal points in issue, can the contentions of the appellant that these rules operate as an unwarranted abridgment of the rights of the heads of the several departments of the city's government, and as a surrender of functions which, under the charter, devolved upon them, and also that the board of examiners, created by rule 1, constituted an independent department in violation of law, be sustained? It appears from section 45 of the charter that the duty of convening the heads of the departments, except that of assessment and collection, is enjoined upon the mayor, and that rules and regulations shall be adopted by these several official heads when so convened for the administration of the affairs of the city departments, not inconsistent with any law or ordinance, which regulations shall prescribe a common and systematic method of ascertaining the comparative fitness of applicants for office, position, and promotion, and of selecting, appointing, and promoting those found to be best fitted, except in the department of public safety, without regard to political opinions or services. By section 48 the departments therein mentioned are established, and all other executive or administrative departments are prohibited. This section further provides that "each department shall have power to prescribe rules and regulations not inconsistent with any statute or ordinance or regulations established pursuant to section 45 of this Act. . . . The officer or officers at the head of any department may appoint and remove any of his clerks or assistants, subject to any regulations adopted pursuant to section 45 of the Act," etc. This power to enact rules and regulations to carry out the legislative purpose is expressly given and recognized by the provisions of the sections to which we have herein referred. Hence, being clothed with this power, the inquiry arises, Did this body, composed of the heads of the departments in question, properly exercise it by employing the means which it did for carrying it into effect? When a statute grants a right or imposes a duty, it also confers by implication every particular power necessary for the exercise of the one or the performance of the other. Bishop, Stat. Crimes, § 137; Sutherland, Stat. Constr. §§ 428, 531; 1 Kent, Com. 404; *Field v. People*, 3 Ill. 79; *Stief v. Hart*, 1 N. Y. 20; *New York v. Sands*, 105 N. Y. 210. But it is also elementary that when the statute gives or provides the means for the exercise of the power, those means, and no other, must be employed. The charter or statute by which a municipal corporation is created or governed is its organic law. Dill. Mun. Corp. § 89. Therefore the rules applicable to the

interpretation of constitutions may be properly considered in the construction of a municipal charter. In *Judge Cooley's* work on Constitutional Limitations, at star pages 63 and 64, it is said: "That where a general power is conferred, or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other is conferred. . . . Under every constitution, implication must be resorted to in order to carry out the general grant of power. A constitution cannot, from its very nature, enter into a minute specification of all the minor powers naturally and obviously included in and flowing from the great and important ones which are expressly granted. It is therefore established as a general rule that when a constitution gives a general power, or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the enjoyment of the other." The principle involved by the manner in which the power granted by section 45, *supra*, was exercised by and through the means and agencies provided by the rules and regulations in controversy is admirably and clearly stated by *Judge Dillon*, as follows: "It has long been an established principle in the laws of [municipal] corporations that they may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. In doing this they must (unless restricted in this respect) have a choice of means adapted to ends, and are not to be confined to any one mode of operation." *Dill. Mun. Corp.* § 91. In section 94 of this work, it is further said: "Power to do an act is often conferred upon municipal corporations in general terms, without being accompanied by any prescribed mode of exercising it. In such cases the common council or governing body necessarily have, to a greater or less extent, a discretion as to the manner in which the power shall be used. This discretion cannot be judicially interfered with or questioned, except where the power is exceeded, or fraud imputed or shown, or there is a manifest invasion of private rights." The following authorities also support the principles above enunciated: *Miller v. Dearborn County Comrs.* 66 Ind. 162; *Richmond v. McGirr*, 78 Ind. 192; *Anderson v. O'Conner*, 98 Ind. 168; *Duncan v. Lawrence County Comrs.* 101 Ind. 408; *Hitchcock v. Galveston*, 96 U. S. 848, 24 L. ed. 661. As we have seen, the charter expressly gave this power to adopt rules and regulations in general terms, without being accompanied by any prescribed means or mode to be provided by the regulations or rules that shall be adopted for the purpose of carrying out the power so granted. It was clearly, we think, the legislative intent that the governing body (being in this case composed of the heads of the several departments) vested with the right or power in question should be clothed with a reasonable discretion as to the medium, agency, or means to be employed or provided to give effect to the provisions of the law. This being true, the rule stated by *Judge Dillon*, that this discretion will not be interfered with or called in question by the courts, ex-

cept where the power is exceeded, or fraud imputed or shown, or in case there is a manifest invasion of private rights, must control. It cannot, in reason, be said that creating the board of examiners, which was but a medium or agency through which the comparative fitness of applicants for position or promotion might be ascertained, was an attempt to establish an independent executive or administrative department, in violation of the prohibition in section 48 of the Statute; or that by the adoption of these rules by this body it so exceeded its power, or violated any law, as to give appellant any legal or equitable grounds for complaint. We discover nothing in the rules and regulations which tends to deprive the municipal officials of any right or power given to them by law. The right of making appointments, conferred upon the several heads of the departments by the charter, is by section 48 thereof expressly made subject to any regulations adopted pursuant to section 45 of the same act. The evident object of the legislature, as it appears from the words employed, namely, "appointing and promoting those found to be best fitted, without regard to political opinions or services," was to make the fitness of the applicant the test or basis in support of his claim to the place or promotion desired, regardless of his political opinions or party services. It follows that the contentions of appellant have no support in law, and consequently cannot be sustained. The case of *Benjamin v. Webster*, 100 Ind. 15, cited and relied upon by appellant as controlling in this cause, has no application under the facts as they exist herein. The question involved in that case was as to the power of the city of Indianapolis, under the law by which it was then governed, to create a fire board, and clothe it with powers and duties granted by the statute to and imposed upon other city officials. This court, on page 19 of the opinion, said: "In creating the fire board, and prescribing the powers and duties of such board, these ordinances certainly contravened the express provisions and the clear implications of the statutes under which the city was and is incorporated. The creation of the fire board was wholly unauthorized by the statute, and it was impliedly forbidden thereby. Powers and duties were attempted to be given to such board, some of which the statute imposed upon the common council as a body, and some were the plain statutory duties of the chief engineer of the fire department." It is further claimed by appellant that, unless the court will interpose and restrain the city authorities, expenses will be incurred by the board of examiners for clerk hire, stationery, etc. As the power exists to create this board and enforce these rules, it incidentally results that the power also exists to incur necessary and reasonable expenses, for which the city will be liable. The facts alleged in the complaint do not entitle appellant to any relief, legal or equitable, and the court did not err in sustaining the demurrer.

Judgment affirmed, with costs.
All concur.

NORTH CAROLINA SUPREME COURT.

Elias CARR, *App't.*

v.

Octavius COKE, Secretary of State.

(.....N. C.)

Fraud in procuring the enrollment of a bill and the signature thereto by the president of the senate and the speaker of the house of representatives, but which is on its face regular and in due form, gives the courts no power to order its removal from the files of the secretary of state, or to enjoin him from delivering a copy to the public printer, but the remedy if any is with the legislature.

(Avery and Clark, JJ., dissent.)

(1895.)

APPPEAL by plaintiff from a judgment of the Superior Court for Wake County denying to him a writ of mandamus to compel defendant to strike from the files of his office a certain bill the certifications of which as a law were alleged to have been fraudulently procured. *Affirmed.*

The facts are stated in the opinion.

Messrs. F. H. Busbee and Graham, Boone & Boone for appellant.*Messrs. J. B. Batchelor and Armistead Jones* for appellee.*Faircloth, Ch. J.*, delivered the opinion of the court:

The plaintiff, as a citizen and taxpayer of the state, brings this action against the defendant, as secretary of state, who, by virtue of his office, is the custodian of all acts passed by the legislature, or which purport to have been passed, whose duty it is to deliver certified copies of said acts to the public printer for publication. The prayer is that the defendant show cause why a peremptory mandamus shall not issue to compel him to remove the act in consideration from his files, and why he should not be enjoined from delivering a certified copy of the same to the public printer. An act to regulate assignments and other conveyances of like nature in North Carolina, ratified March 18, 1895, is the one under consideration. The complaint alleges that the act was signed by the president of the senate and the speaker of the house of representatives on the said 18th of March, in the presence of each house, and purports to have been ratified upon that day; that, upon information and belief, the act did not become law according to the constitution of the state; that the journals of both houses show that it was not read three times in either; that it was never read in the senate, and was tabled in the house on its second reading; and that by some unknown fraud-

ulent means the bill was enrolled by some person, unknown to the plaintiff, and signed by the said president and speaker by mistake. The defendant answered, denying the material allegations. At the hearing the defendant moved to dismiss the action on the ground that the court had no jurisdiction to grant the relief prayed for by the plaintiff. The motion was heard, and his honor dismissed the action for want of jurisdiction to grant the relief on the ground that the court cannot go behind the ratification of the act as the same appeared in the office of the secretary of state. With the act before us, on its face regular and in due form, ratified by the genuine signatures of the president of the senate and speaker of the house, the question is presented: Can the court, as a co-ordinate branch of the government, look behind this record, and investigate by inquiry and proof the manner in which this record was established by the legislative branch of the government, for any of the causes alleged in the complaint? It may be stated in the outset that it is an important question, and one that has not been heretofore presented directly to this court. The court cannot be blind to the consequences that will flow from a decision either way. On the one hand, if we cannot look behind the record, then paid and corrupt men, lobbyists, and other interested ones in and around the legislative halls, will feel more confident and safer in their disreputable work. On the other hand, if we can open the door, and permit every act of the legislature to be inquired into, behind the record, for any of the causes alleged in the complaint, then the state will be plagued with all the evils of a veritable Pandora's box. By an examination of the decisions of the courts of the different states, we find some diversity among the decisions and the opinions of eminent jurists. Those courts holding the affirmative of the question as a rule have done so by reason of some provision in their state constitutions, or some pre-existing statutes. In one or more states the negative was held, and, after a change in their constitutions, the reverse was held by reason of some new clause in the organic law. We find in no state constitution the exact wording as it is in ours. We are therefore left to reason with ourselves, and construe the true meaning of our organic law, aided by the best authorities at our command.

Let it now be understood that it is not a question of fraud or wrongdoing in the legislative halls, as alleged in the complaint, with which we are confronted, but simply a question of power. It cannot be said that this court, from its origin until now, has ever failed to lay its hands upon fraud or any wrongdoing, whenever authorized by law and requested to do so. If crimes are perpetrated in legislation, the authors are liable, and can be punished as other violators of the law; and possibly a reasonable and honest effort by the proper authorities would bring to light the authors of the wrong, if any has been done. There is now before the

NOTE.—The above case is one of first impression so far as it involves the question of the effect of fraud or forgery upon a statute signed and enrolled in proper form, but never passed in that form by votes of the legislators. As to the conclusiveness of an enrolled bill in general, see *State v. Jones* (Wash.) 23 L. R. A. 340.

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court in this proceeding no one who is in the slightest degree alleged or supposed to be connected with wrongdoing in this matter. So, then, we are considering a question of power, and not of investigation behind the record of a co-ordinate branch of the state government. Our constitution (art. 2, § 16) declares that "each house shall keep a journal of its proceedings which shall be printed and made public immediately after the adjournment of the general assembly;" and in section 23: "All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws; and shall be signed by the presiding officers of both houses." What shall be the entries on the journals is not indicated by the constitution, except as above. It is the province and duty of the court to construe and interpret legislative acts, and see if they disregard or violate any provision of the constitution, and, if so found, to declare them invalid, and this is done upon the face of the act itself. Beyond this duty arises the question of power in the court to look behind the legislative record, and inquire into its proceedings for any cause set out in the complaint. Our decision upon this question is based upon the "reason of the thing," upon public policy for the best interests of the state, and upon the decisions of other courts and our own, which commend themselves to our minds, some of which are now cited. At common law the ratification and approval of an act of parliament was conclusive and unimpeachable, etc. "An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth." "And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms, and by the same authority of parliament; for it is a maxim in law that it requires the same strength to dissolve as to create an obligation." 1 Bl. Com. 185, 186. "The journal is of good use for the intercourse between the two houses, and the like, but when the act is passed the journal is expired. The journals of parliament are not records, and cannot weaken or control a statute, which is a record, and to be tried only by itself." *Rea v. Arundel* (Trinity Term, 14 Jac.) Hob. 109-111. *Brodnax v. Groom*, 64 N. C. 244, was a question upon a private act requiring thirty days' notice of application, required by article 11, section 4, of the Constitution, and the motion was to prove that the notice had been not given. Pearson, *Ch. J.*, said: "We are of opinion that the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a 'matter of record,' which cannot be impeached before the courts in a collateral way. Lord Coke says, 'A record until reversed importeth verity.' There can be no doubt that acts of the legislature, like judgments of courts, are matters of record; and the idea that the verity of the record can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim, 'Omnia præsumuntur,' etc. Suppose an act of congress is returned by the president with his objection, and the vice-president and

the speaker of the house certify that it passed afterwards by the constitutional majority, is it open for the courts to go behind the record, and hear proof to the contrary?" In *State v. Robinson*, 81 N. C. 409, in which this question was not directly before the court, Smith, *Ch. J.*, in the discussion, uses this language on page 426: "The constitution declares that the legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other. Article 1, section 8. And if the nature and effect of an enrolled bill, duly certified and deposited in the proper office, be such as we have attributed to it, it unavoidably follows that the compulsory order demanded in the action would be an interference with the legitimate exercise of the law-making power, and an obstruction to the harmonious working of the 'separate and distinct' co-ordinate departments of the government, and must consequently be denied." We quote this extract in order to show the trend of the judicial mind of the court as then constituted. In *Marshall Field & Co. v. Clark* (1891) 143 U. S. 649, 36 L. ed. 294, the question was elaborately argued and considered in an able opinion. The allegation was that an important section in the bill as it passed was not in the enrolled bill authenticated by the signatures of the speakers and deposited in the office of the secretary of state. After full consideration of the numerous points argued, the court held as follows: "The signing by the speaker and by the president of the senate, in open session, of an enrolled bill is an official attestation by the two houses of such bill as one that has passed congress; and when the bill, thus attested, receives the approval of the president, and is deposited in the department of state according to law, its authentication as a bill that has passed congress is complete and unimpeachable. It is not competent to show from the journals of either house of congress that an act so authenticated, approved, and deposited did not pass in the precise form in which it was signed by the presiding officers of the two houses and approved by the president." The argument was pressed that a bill signed by the speakers and approved by the president and deposited with the secretary as an act does not become a law if it had not in fact been passed by congress. The court said, in view of the express requirements of the constitution, the correctness of this general principle cannot be doubted. "But," said the court, "this concession of the general principle does not determine the precise question before the court, for it remains to inquire as to the nature of the evidence upon which a court may act when the issue is made as to whether a bill, asserted to have become a law, was or was not passed by congress. This question is now presented for the first time in this court. We cannot be unmindful of the consequences that must result if this court should feel obliged to declare that an enrolled bill, on which depend public and private interests of vast magnitude, which has been duly authenticated by the presid-

ing officers, and deposited in the archives as an act of congress, was not in fact passed, and therefore did not become a law." Page 670, 143 U. S., and page 302, 86 L. ed. Although the constitution does not require that acts of congress shall be authenticated by the speakers' signatures, the court said that: "Usage, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication;" and when a bill is so authenticated "it carries on its face a solemn assurance by the legislative and executive departments that it was passed by congress. The respect due to coequal and independent departments requires the judicial department to act on that assurance, leaving the courts to determine whether the act so authenticated is in conformity with the constitution." Page 672, 143 U. S., and page 803, 86 L. ed. "It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself, nothing to the contrary appearing upon its face, that it passed congress." *Ibid.* In *State v. Young*, 83 N. J. L. 29, Beasley, Ch. J., delivered a strong opinion against the affirmative of the present question; and Judge Harlan says: "The conclusion was that, upon grounds of public policy, as well as upon the ancient and well-settled rules of law, a copy of a bill bearing the signatures of the presiding officers of the two houses, . . . and in custody of the secretary of state, was conclusive proof of the enactment and contents of a statute, and could not be contradicted by the legislative journals, or in any other mode." Page 674, 143 U. S., and page 304, 86 L. ed., and other cases. In *Ex parte Wren*, 68 Miss. 512, 56 Am. Rep. 825, is found a case much in point, in which Campbell, J., in an able and vigorous opinion, said that an enrolled act, such as we are considering, "is the sole exposition of its contents, and the conclusive evidence of its existence according to its purport; and that it is not allowable to look further to discover the history of the act or ascertain its provisions. Every other view subordinates the legislature, and disregards that coequal position in our system of the three departments of government." He then shows that, if such a rule should prevail, a justice of the peace and all other judicial officers would be compellable and would have the right to investigate the question whether any legislative act was passed according to the requirements of the constitution, and whether it was procured by mistake, fraud, or otherwise, and upon the complaint of any resident taxpayer.

With these authorities we are content. There are numerous others, but it would be useless to pursue them. We are considering the main and important question which we understand the plaintiff intended to bring to the attention of the court, without any remarks on the pleadings. It seems to be conceded that the main allegation cannot be established by the journals as evidence, and that, consequently, it must be done by some other kind of proof. It is urged that fraud vitiates everything; but, if we can go behind

the record, would not mistake, bribery, etc., serve equally as well? It is also argued that the fraud alleged is admitted, and is therefore to be taken as a fact for the purposes of this action. Admitted by whom? The respondent does not admit it in his answer. The motion was to dismiss for want of jurisdiction, and the court rendered its decision expressly on that ground. The defendant is a mere ministerial state officer, who was not a member of the legislature, and has no authority from it to plead or admit anything for it. Is he authorized by the speakers of the two houses to admit that they signed the bill by mistake? They have made no such admission, so far as this record discloses, and they have no opportunity to admit or deny anything. Is the defendant authorized to admit that by some unknown and fraudulent means the bill was enrolled? If so, who authorized him to admit it? The defendant might have ignored this proceeding entirely without the slightest dereliction of duty. Who, then, defends the legislature or its speakers when this grave question is under consideration? The executive does not feel it his duty to defend in the matter, presumably because he is not authorized by any one to do so. Then, is there such admission of fraud or any other wrong as to enable the court to treat the allegations of the complaint as facts? But, however these matters are, we have seen that we have no power to make the order asked for by the plaintiff, and that the remedy, if any is needed, is with the legislative branch of the state government.

We are of opinion that his honor committed no error, and his judgment is affirmed.

Montgomery, J., concurring:

The single question for decision is, Can this court inquire into and pass upon the history of a paper writing which purports to be an act of the general assembly, and which is authenticated by the undisputed and genuine signatures of the president of the senate and the speaker of the house of representatives? It is to be always kept in mind that the point is not as to the powers of the supreme court to pronounce a law, which is admitted to have been enacted, void by reason of its unconstitutionality. Our jurisdiction in that case would be complete and unchallenged. But the question is, When the legislature has solemnly certified to a fact,—that is, to the passage and ratification of an act which is within its own sphere,—will the judiciary be permitted to inquire into or dispute that certification? The case is of the very first impression, and it ought to be settled upon the principles of sound reason and well-considered authority. This is a strictly legal question, and ought to be settled according to the principles of the law. The court is aware that its judgment in this case may be attended with dangers in the future, but it is not our province to provide against dangers to the commonwealth further than to construe honestly, and as intelligently as we can, the laws which the legislative department of the government has enacted. It may be said, however, in this connection, that if policy ought to have governed the court in

this matter, if results ought to have been anticipated, we feel that in the decision of the court we have chosen the lesser of the two evils to be dreaded. The question at issue brought to the light the more than possibilities of two most serious menaces to popular government: The first one, that of the power of a corruptible or incompetent clerical force, or that of a depraved and hired set of lobbyists, or both together, to tamper with the acts and proceedings of the legislature and have that certified to be law which was never in fact enacted; the second, that of the power of defeated and unscrupulous politicians, when stung by loss of office or a desire for revenge on their political enemies, to practically repeal the legislation of their successful opponents by resorts to the courts upon mere allegations that there was fraud in the passage of the acts or in their ratification, and by procuring injunctions upon affidavits obtained possibly through bribery, or through the ignorance or carelessness of the oath maker. By the decision of the court, the latter danger—the far most to be dreaded—is avoided. The presiding officers of the two houses may, by taking a sufficiency of time, and by close scrutiny and rigid examination of the bills and wrappers, prevent fraud and error in ratification, if such a thing be attempted; while for the latter danger no limit or restraint can be found except in the conscience of men who have never cultivated a sense of either generosity or justice. The motives and purposes of the plaintiffs in this action are not intended to be reflected on, neither are the character or official conduct of any officer or clerk of the last general assembly. No testimony has been heard in the case, and this court knows nothing of the facts or motives. We have simply discussed dangers in the future in this connection. In the conclusions to which I have arrived I have tried to keep before me the great importance of the legal question involved, and to keep out of mind, as an utterly insignificant feature of the case, the wretched creatures who would commit such a detestable piece of meanness as the complaint charges. They, when detected, will receive the execration of all good men, and most richly will they deserve it. It would have been well for the people and for the cause of good government if they had, or could have been, ferreted out, and named in the complaint, that they might have been pilloried in an indignant public sentiment. But to the law in the case:

Of the three coequal departments of our government, the legislative is of the most importance. It is sovereign as long as it keeps within the bounds of the constitution. The powers of the judicial department are clearly defined and limited in the constitution. Except to hear claims against the state (and then only to recommend action to the general assembly), the whole power of this court is embraced in these words: "The supreme court shall have jurisdiction to review upon appeal any decision of the courts below upon any matter of law or legal inference." Const. art. 4, § 8. This means, in plain English, that this court can construe the laws

when their meaning is a matter of contention between litigants, and that it can determine, in cases properly before it, whether or not statutory enactments are constitutional. The writer of this knows of no other instances in which this court can, directly or indirectly, pass upon the conduct of the general assembly. As to the *formula* that are necessary to convert a bill into a law, we cannot inquire, if the ratification in proper form appears, and the signatures of the proper officers are duly attached. However, in the case before us, the plaintiff alleges that what he styles the "pretended act" is not a law, because it was not read three times in each house before it received the signatures of the presiding officers of both, as the constitution requires. That instrument certainly does require that "all bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of both houses;" and it is as equally certain, under the decisions of this court, that the certificate of ratification, attested by the signatures of the presiding officers, carries with it the presumption conclusive that all such bills and resolutions have been duly passed by the bodies, and cannot be questioned by the courts. Suppose, as individuals, we admit—which the answer does not—that this bill did not pass its several readings, can that fact be shown in a court of law in the face of ratification and the genuine signatures of the presiding officers certifying to the contrary? This is the naked question. Ratification gives authority to the act. The presiding officers who, upon ratification, attach their signatures to a bill, do it in open session, calling the attention of the members to the fact that the same is about to be signed, and reading the title of the bill. When it is signed, ratification is thereupon made of it by the body through their agent, the presiding officer. It is their act and deed, and nothing, not even the journal itself, can contradict it, or be used as evidence against it. Ratification is of higher dignity and of more authority than the journals kept by the clerks. Ratification and the signatures of the proper officers presume a passage of the bill by the legislature according to the requirements of the constitution, and the courts of law—the judicial department, a coequal department—are not allowed to go behind or question them. We have clear authority for this in our own reports. In the case of *Brodnax v. Groom*, 64 N. C. 244, certain taxpayers in Rockingham county, in their complaint, sought an injunction against the collection of a tax levied by the commissioners under an act of the general assembly, on the ground that the act was private, and was passed without the thirty days' notice of application required by the constitution. That case presented the very question which we have before us now. Could the plaintiffs in that case be allowed to go behind the ratification of the act, and show by any kind of proof—by the journals or otherwise—that the constitutional requirement had not been complied with? The constitution provides that "the general assembly shall not pass any

private law unless it shall be made to appear that thirty days' notice of application to pass such a law shall have been given." The constitution provides that "all bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws." The constitutional requirement in both these instances is specific and definite and positive, and yet this court held in the *Brodnax Case*, *supra*, that, the act having been certified by the presiding officers of both houses as duly ratified, it was not competent for the judiciary to go behind the ratification. Chief Justice Pearson, who delivered the opinion of the court in that case, said: "We do not think it necessary to enter into the question whether this is a public act or a private one, in regard to which thirty days' notice of the application must be given; for, taking it to be a mere private act, we are of the opinion that the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a 'matter of record,' which cannot be impeached before the courts in a collateral way. Lord Coke says, 'A record until reversed importeth verity.' There can be no doubt that acts of the general assembly, like judgments of courts, are matters of record, and the idea that the 'verity of the record' can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim '*omnia presumuntur*.' Suppose an act of congress is returned by the president with his objections, and the vice-president and the speaker of the house certify that it passed afterwards by the constitutional majority, is it open for the courts to go behind the record, and hear proof to the contrary?" It is clear from the above that the meaning of the chief justice when he said, "We are of opinion that the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a matter of record which cannot be impeached before the courts in a collateral way," was that all attacks in the courts upon legislation which appeared to be ratified, and had the signatures of the presiding officers attached, were collateral attacks, and that any direct impeachment of such acts must arise in and be conducted by that jurisdiction which has power in the matter,—the legislative department. If he only meant to say that the courts could afford a remedy in such matters, but that they would not do so in the case then before the court, because the attack was collateral, then it would have to be admitted that he expressed himself most confusedly in one of the most important questions ever brought before the court. That would be a bold assertion to make of Judge Pearson. And besides, if the proceeding in that case was not direct, but only collateral, then it is not saying too much to declare that no direct method of attacking an act of the legislature through the courts can be devised. Certainly that was a more direct impeachment than the one now before the court.

We are not without direct authorities from other courts than our own. In the case of *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825, this same question is discussed, and 28 L. R. A.

decided upon the same principle as was *Brodnax v. Groom*, *supra*, that court holding that an enrolled act of the legislature, having been signed by the presiding officer of the two houses and the governor, is the sole expositor of its contents, and is conclusive evidence that the act so signed contains the provisions of the bill as passed by the two houses. And the journals of those houses cannot be resorted to to show that such act does not contain amendments to the bill which were adopted by the two branches of the legislature. The court said, "Every other view subordinates the legislature and disregards the coequal position in our system of the three departments of government." The opinion in *Wren's Case*, is comparatively of recent date, is a very able one, and reviews the decisions of many of the state courts on the question. It mentions that the courts of many of the states, including that of North Carolina in the case of *Brodnax v. Groom*, held the same opinion as did the supreme court of Mississippi. In *State v. Young*, 33 N. J. L. 29, the principle laid down in the *Brodnax Case* is more than indorsed. The supreme court of New Jersey in that case decided: First. That when an act has been passed by the legislature and signed by the speaker of each house, approved by the governor, and filed in the office of the secretary of state, an exemplification of it under the great seal is conclusive evidence of its existence and contents. Second. It is not competent for the court to go behind this attestation, or to admit evidence to show that the law, as actually voted on and passed, and approved by the governor, was variant from that filed in the office of the secretary of state. Third. The minutes of the two houses, or either of them, although kept under the requirements of the constitution, cannot be received as evidence for such purpose. In that case the court said that: The body which passes a law must of necessity promulgate it in some form. In point of fact the legislative power over the certification of its own laws is of necessity almost unlimited, as will appear from the circumstance that, with regard to the body of an act, there is no evidence of any kind but that which the legislature itself furnishes in the copy deposited in the state archives. We are also to reflect that it is the power which passes the law, which can best determine what the law is which itself has created. The legislature in this case has certified to this court by the hands of its two principal officers that the act now before us is the identical statute which it approved, and, in my opinion, it is not competent for the court to institute an inquiry into the truth of the fact thus solemnly attested." The above-cited authorities seem to me to be founded on experience and the law, and on a wise public policy; and, as Justice Avery well said, in substance, in *Logan v. North Carolina R. Co.* (at this term) 21 S. E. Rep. 959, we ought to be influenced, when looking for assistance from the decisions of other courts, by those opinions which embody sound principles and just reasoning, rather than by a simple numerical array of decided cases.

I have tried to show that the decision of the court in this case is in harmony with its former decisions, and that the court is sustained by the opinions of some of the ablest courts of other states. *State v. Glasgow*, Taylor & C. (N. C.) 88, 2 Am. Dec. 629, was not even cited as an authority by the counsel for plaintiff in the argument before us. It has no bearing, that I can see, on this case, as a law authority, though interesting as a bit of early official corruption. No legislative act or power was questioned. It was simply the case where a former secretary of state himself fraudulently issued a land warrant, was indicted, and convicted for the offense, and stripped of his official honors. In addition, there is, to my mind, another insuperable objection to the adoption by the court of the plaintiff's view of this case. It is this: There could, in that event, be no unity of decision even in our own courts. If the certificate of ratification can be inquired into by the courts, then the trial courts, with the same matter in issue,—that is, whether an act properly certified as having been ratified had duly passed its several readings,—might and could arrive at different verdicts and judgments, as the proof varied in each trial. To-day a statute might be declared void because a jury had determined that it had not passed its several readings, and to-morrow the same statute, in a new trial, with additional testimony, or in a different court, might be declared good and valid. And again, if ratification be not conclusive, how are the stability and integrity of our statutory laws to be maintained in other states and abroad? From the position I have taken in this concurring opinion, it is not necessary for me to discuss the other allegations of the complaint that the signatures of the presiding officers were procured by fraud. If the certificate of ratification cannot be impeached in a court of law, even by the journals themselves as evidence, it is certain that by all the rules of evidence parol proof cannot be introduced for that purpose. In conclusion I desire to emphasize that the court has not made a decision upon a mere matter of fraud. It is a question of jurisdiction,—of power,—whether one coequal department of the government can invade the province of another, and question or dispute the solemn act of the latter, attested by the genuine signatures of those officers who are empowered and required to attest and certify those acts. I insist that the decision of the court in this case upholds the integrity and independence of one of the coequal departments of the government, and preserves the power and jurisdiction of the two involved in this suit. It is better for us, and will be better for posterity, if in cases where fraud and deceit have been or shall be practiced upon the presiding officers of the senate and house, by means of which their signatures to spurious bills have been obtained, for the legislature to be convened (if an adjournment was had before discovery), and allowed to correct its own errors or mistakes, than that the court should assume a jurisdiction which does not belong to it, and thereby begin an encroachment upon the rights of the

legislative department, to end, possibly, in judicial tyranny, the basest and the most detestable species of oppression.

Avery, J., dissenting:

The plaintiff alleges, on behalf of the people of North Carolina, that a forged paper, purporting to be an enrolled bill, that had passed both houses of the general assembly was placed before the presiding officers of the senate and house of representatives, and that, being misled by fraudulent misrepresentations, they were induced to attach their official signatures to it, and give to it the force and effect of a law. Upon these facts, the plaintiff, as a citizen, and in the name of the people of the state, prays the court to declare that this paper, which by such covinous trickery has been placed upon the files in the office of the secretary of state, is not a part of the statute law, and to restrain that officer from furnishing it for publication among the acts of the legislature. The judge who presided in the court below holds that, admitting the paper ratified in this way to have been a forgery, the courts are powerless to remedy this great wrong, and the people can have no relief till the legislature shall again assemble. If it be asked how this admission was made, I answer that it was made by the judge who heard the case below when he held, on motion of defendant's counsel, that the plaintiff was not entitled to the relief demanded upon the face of the complaint unanswered; or, in other words, if there were no denial by answer of the allegation that the enrollment of the bill was procured by fraud, and the signatures made by mistake, the court had no authority to remedy the wrong done to the public. If authority be demanded to sustain this proposition, then I refer, as the last of an indefinite line of decisions sustaining this familiar doctrine, to *Bank of New Hanover v. Adrian* (decided at this term) 21 S. E. Rep. 792, in which the present chief justice, in a very elaborate opinion declared that when a plaintiff insisted that the answer did not state facts sufficient to constitute a defense, just as the defendant contends here that the complaint fails to state facts constituting a cause of action, it was a case "in which one party alleged fraud and the other admitted it." In my opinion, to admit that an adroit forger can fraudulently convert his own handiwork into a statute which the courts, with full knowledge of its character, must enforce as law, is to confess before the world that government of the people and by the people is an egregious failure. I am not prepared to admit that courts of equity, which have dealt deathblows to fraud wherever it has reared its hydra head for hundreds of years, must desist from unearthing and undoing such in equity because the perpetrator attempts to take refuge in the purlieus of the temple, where a co-ordinate department of the government is in council. The arm of the law is not so shortened that it cannot right such wrong wherever done. No precincts are too sacred to be invaded by its process when such an end is in view. We cannot forget the fact that this is a case of the first impression.

The judicial annals of the states of this Union have been searched in vain to find a parallel for it, and any argument founded upon the authorities cited is misleading, in that it assumes an analogy where none exists. As this is the first case in the history of Anglo Saxon civilization where a forger has attempted to play the role of law-maker, it seems to me a fitting opportunity to vindicate the truth of the axiom that our system of jurisprudence affords an adequate remedy for every wrong done to a citizen, either as individual or as a representative of the public. Courts of equity (says a leading law-writer) have been confidently resorted to in order to sift the consciences of men, and trace out fraud, so that titles founded upon it might be declared void. When the plaintiff comes into court to demand this probing of the consciences of those who know the history of this admitted fraud and forgery, counsel for the defense meet him with the objection that the clause of the constitution which guarantees the independence of three co-ordinate branches of the state government is an insuperable barrier to any action on the part of the courts. Section 8 of article 1 of the Constitution provides that "the legislative, executive, and supreme judicial powers of the state ought to be forever separate and distinct." Is it an invasion of the domain of either of the other two departments to draw in question before the courts the validity of an instrument duly attested by the chief officers of either of them? The organic law, it will be observed, couples the executive with the legislative department. Where a private citizen of North Carolina records an entry upon the entry taker's books, containing a specific description of a tract of land, or by a survey makes an indefinite description certain, before his neighbor makes an entry of the same land, though the latter may procure an older grant, signed by the governor of the state, the courts, in the exercise of their equitable jurisdiction, have never hesitated, upon application of the senior enterer, to declare the older grant issued by the head of the executive department null and void, and to compel the junior enterer to convey the legal title to him, who has the better right, because, with notice that his neighbor had expended his money for an entry of the same land the junior enterer is guilty of fraud in procuring the first title from the state. *Johnston v. Shelton*, 39 N. C. 85; *Harris v. Ewing*, 21 N. C. 374; *Currie v. Gibern*, 57 N. C. 25; *Munroe v. McCormick*, 41 N. C. 85; *Grayson v. English*, 115 N. C. 361. Though grants for land are signed by the chief officer of a co ordinate branch of the government, it has never been suggested during the century in which the courts have been setting aside these solemn patents, under the great seal of state, on the ground that they were procured by fraud, that the courts were invading the independent domain of the governor, as the head of the executive department. This being a case of the first impression here, the issue must not be obscured by remote analogies, drawn from precedents not in point. If section 8 of article 1 of the Constitution is invoked to prevent this in-

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vestigation demanded by the people through that one of their number whom they have chosen as their executive chief, it will be seen at a glance by layman as well as lawyer that the constitution affords the same protection to the independence of the executive as of the legislative and judicial departments. If it is an impenetrable shield, behind which fraud may stalk secure, and mock with ghouliah glee the anger of an injured people when suit is brought to show that the signatures of the two presiding officers of the two branches of the legislature were procured by fraud, and attached by mistake to an instrument affecting the rights of the whole body of the people, how is it that it has never occurred to the long line of illustrious men, who have preceded us in this court, that it was an invasion of the distinct power of the executive department to set aside its great seal, which, above all things, imports verity at home and abroad, and the signature of its chief officer, where a single citizen complains that another procured that solemn attestation in fraud of the complainant's individual right? The single issue of law presented by this appeal is whether a forged paper, purporting to be an enrolled bill that had passed both houses, when presented to the presiding officers, and signed by them under the mistaken belief that it is genuine, is open to attack for fraud like a grant signed by the governor. The gravamen of the complaint is embodied in section 3, subd. 11, where it is alleged that "by some means unknown to this plaintiff, but which he is informed and believes to be fraudulent, the said bill was enrolled by some person to the plaintiff unknown, in the office of the enrolling clerk, and signed by mistake by the president of the senate and speaker of the house of representatives, upon the day upon which it purports to have been ratified." Equity vacates a patent which the governor signs, not by mistake, but in accordance with the requirements of law, because it is procured in fraud of the superior right of a single citizen. Why, then, shall the same tribunal declare itself powerless to rectify a fraud upon the rights of the whole people of the state, accomplished by imposition practiced in the most specious way, directly upon the chiefs of the two branches of the legislative department? When the people met in convention and framed a constitution they expressly delegated certain powers to each of the three departments, and prohibited one or all of these agencies, for the most part, in article 1, in terms quite clear, from exercising certain other sovereign authority. The result was that, while the legislature, as the representative of the popular will, is still clothed with the residuary power, or that which is not expressly granted to either of the other departments, and that does not fall within the prohibitions mentioned, it is, in the exercise of its own delegated authority, coequal, not superior, to the other co-ordinate branches, acting within the purview of their powers. All three are mere agents of the people, acting under an express power of attorney. When, therefore, it is provided in section 16, article 3, of the Constitution, that

"all grants and commissions shall be issued in the name and by authority of the state of North Carolina, sealed with the great seal of the state, signed by the governor and countersigned by the secretary of state," and in section 23, article 2, that "all bills," etc., "shall be signed by the presiding officers of the two houses," the one clause is hedged about with no more of the divinity of sovereignty than the other. Battle, J., says in *State v. Glen*, 52 N. C. 828: "Our predecessors were the first of any judges in any state in the Union to assume and exercise the jurisdiction of deciding that legislative enactment was forbidden by the constitution, and was therefore null and void. See *Bayard v. Singleton*, 1 Mart. (N. C.) 48, decided in November, 1787, which was four or five years anterior to the earliest case on the subject referred to by Chancellor Kent. 1 Kent, Com. 450." Since that early day this court has never hesitated to assume this authority to pronounce a statute passed by the legislature with all of the forms of law, null and void because repugnant to the constitution. Indeed, at this term, an act which had not been published in the laws, but which was regularly passed at the last session of the legislature, has been, in effect, declared unconstitutional, because the right of exacting more than 6 per cent as interest, allowed therein, was held to fall within the constitutional inhibition against granting special privileges. No one questions the right of this court in a proper case to pronounce an act, which is admitted to embody the true sentiment of the legislature, void on the ground that it had no right to pass it. Yet, if what now purports to be the statute before us had provided that the lawful rate of interest in this state should be 8 per cent a month, or 96 per annum, and its passage had been procured by speculators and not shavers, it would nevertheless be contended, if the opinion of the court is founded upon the correct interpretation of the organic law, that the people would be placed in the dreadful dilemma of groaning under such a burden until another general assembly should meet, or of asking the governor to call an extraordinary procession, at a heavy expense, of the same legislature that, according to the admissions in the pleadings, failed at its last session to close some of its clerks' rooms against forgery and fraud. I do not believe that the law, properly interpreted, reduces us to this dire extremity. There would be a prospect of a much more economical and satisfactory settlement of this controversy by the trial before a jury of an issue of fraud, as demanded by the plaintiff, than by inviting the same bodies, with the same lobbyists lurking around them, to remedy the great wrong that the public have suffered through some agency that was, at its last session, able to reach its employés. With due deference for the views of others, I am of opinion that we ought on this question, which has been presented to us first of all the courts of America, to follow the example of our predecessors more than a century ago, and assert for the courts the power to unravel fraud, even if the tangled skein should take us behind the solemn act of ratification by

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presiding officers, as did the determination of the early judges to prevent violations of the sacred instrument which they had sworn to support.

The clear-cut issue of law raised by admitting the truth of the charge of fraud must not be obscured by discussing the preceding allegations in reference to a bill in the same words, the legislative history of which is traced till it is found tabled in the house, and turned over to the state librarian, who is the custodian of bills which are thus strangled in the earlier stages of their existence. These allegations are, at most, but an attempt to negative the idea in advance, that the forged paper had a legislative history leading up to its ratification, which the defendant might contend could not be contradicted. It does not seem to me bad pleading to have inserted these allegations, when the relief demanded was a perpetual restraining order against the defendant, although the plaintiff relied solely upon the ground that the paper presented to the presiding officers was falsely and fraudulently represented to them to be an enrolled bill, and its ratification procured in that way. Counsel for the defendant cannot be allowed "to blow hot and cold" to induce the court, on motion, to hold that it cannot hear proof of the allegation of fraud, if true, and then to say by way of breaking the force of the ruling invoked that they could disprove the charge of forgery and fraud, if they would. The fact that the bill was enrolled without authority, and signed by mistake, is not, for the purposes of this appeal, denied by any one. That it was fraudulently enrolled and presented for signature is alleged in the complaint, and his honor holds that, even though all this is true, the court has no jurisdiction to hear evidence to show its truth. The argument deduced from supposed future inconvenience is always the most specious and unsatisfactory kind of reasoning. To the suggestion that possible evils may ensue from sustaining the power of the courts to impeach the validity of a statute, it may be answered that the announcement that the constitution is a shield for manufacturers of forged law will indeed open a Pandora's box, out of which will issue invitations to those who are capable of such crime to throng the lobbies of our legislative halls, and make, by bribery, forgery, and other fraudulent practices, the laws which should be framed to afford remedies for the grievances and protection to the rights of the people. A free government like ours must always be dependent for its stability more upon the virtue and integrity than upon the intelligence of its citizens. As well might we insist that the statute which allows any person in the state to make affidavit that any other person has, as he is informed and believes, committed murder, and demand a warrant for his arrest, should be repealed, because it opens a way for the arrest of every innocent man in the state, as that to permit investigation of the allegation that what purports to be a law regularly ratified is not in reality an expression of the will of the people through their representatives, but the work of a forger, would raise a doubt as to

the validity of every statute passed by the legislature. Where a plaintiff asks, on behalf of the people, an order restraining the secretary of state from publishing a ratified act on file in his office he is required to make an oath, which, if made falsely, and without probable cause, subjects him to punishment for perjury. It is not to be supposed that such risks will be taken inconsiderately, and, if the perpetrators of this disgraceful crime could be impaled before the world, and held up to public execration, it is to be hoped that another century of our history would glide by without such a flagrant instance of corrupt interference with legislation.

I understand my brethren to concede—what cannot be denied—that not one of the cases cited to sustain the opinion of the court is exactly in point here, for the reason that it has never before been charged, much less proved, that the ratification of a forged bill was fraudulently procured, when it had not in fact passed. The question raised in the cases relied upon by the majority of the court to sustain their position was whether the journals of the two legislative houses could be used to show that an enrolled bill did not pass. No such thing is proposed by the plaintiff here. In the complaint he says that a paper purporting to be an act of the legislature was fraudulently enrolled and signed by mistake, and, as introductory to this allegation, he avers, in substance, that the journals not only do not contradict, but tend to confirm, it. A similar bill passed its first reading in the house of representatives, was tabled on its second reading, and can now be adduced in evidence from the office of the lawful custodian of such papers. The journal of the senate fails to show that any such bill was ever before that body. So that the record of the one body, as far as it goes, tends to corroborate, while there is no recorded history of any such bill in the journals of the other to contradict, what is relied upon by the plaintiff as the basis of his action,—the fact that a forged paper, signed by the presiding officers by mistake, is now being enforced to restrict the right of the citizen in the interest of the procurers of this monumental fraud. Looking at the case from the standpoint of my brethren, it appears from a brief of cases involving the question whether the ratification can be contradicted by the journal, which will be found in the notes on pages 661-667 of volume 143 of the United States Reports (*Marshall Field & Co. v. Clark*, 86 L. ed. 294-301), that in twenty-eight of the states the courts have held that it is competent to impeach the ratification by the journals directly; while it is held to the contrary in but nine states. The conceded fact that in some of those states there are constitutional amendments providing that the ratification may be contradicted by the journal, shows conclusively that we have no reason to fear the threatened ills which are prophesied as probable results of going behind the ratification of an act to show that it did not pass, and that its enrollment was procured by fraud, when twenty-eight states still afford good government to their citizens, after permitting the journals to be used to show not

fraud, but that the ratified bill did not pass. Indeed, it is worthy of special notice that the forgery of what purports to be an enrolled bill has been first attempted where the people had never been permitted to go behind the ratification, and when it was hoped by the perpetrators of the fraud that their covinous work would prove, as it has done, effectual. When the courts of more than three fourths of the states have ventured to go behind the ratification of statutes to call in question the regularity of the successive steps preceding the signing by presiding officers, it seems to me that we may venture, when the first attempt is made to impeach for fraud instead of irregularity, to look, for an analogy to govern us, rather to the views of the twenty-eight than to the opinions of the nine courts.

The position of the court, in my opinion, finds no support in the case of *Brodnax v. Groom*, 64 N. C. 247, where *Chief Justice* Pearson, speaking for the court, holds that "the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a matter of record, which cannot be impeached before the courts in a collateral way." But the plaintiff is making not a collateral, but a direct, attack, and the court in that opinion concedes that even a record can be successfully avoided and reversed, where it is directly attacked for fraud or irregularity. It is true that where there is a want of jurisdiction apparent upon the face of a record it may be impeached without any direct proceeding, just as the validity of a ratified statute may be questioned for repugnance to the constitution. *Springer v. Shavender* (decided at this term), 21 S. E. Rep. 397. If the constitution does not forbid, why should public policy prohibit a citizen on behalf of the whole people from impeaching a statute for fraud, when, for his own protection, he may attack a judgment regular upon its face. It was said *obiter* in *State v. Robinson*, 81 N. C. 418, that the journals could not be introduced to attack the existence and validity of a statute regularly filed among the records in the office of the secretary of state. If that doctrine is conceded to have the force of law, it in no wise affects a case where the plaintiff relies upon proving that the enrollment of the bill was procured by fraud, and where, if the defendant resorts to the journals to disprove it, he finds that they tend rather to corroborate than to contradict the allegation. The opinion of the majority of the court in the case of *State v. Meares* (decided at this term) 21 S. E. Rep. 973, intimates very broadly that the opinion in *State v. Robinson* ought to be overruled upon the point really involved, because it conceded to the presiding officers, if corrupt or unmindful of their duty, the power, by refusing to sign, to in reality veto bills regularly passed by the representatives of the people. Should we, then, standing in a position to make a precedent for the courts of America, hesitate to declare invalid an act which we must assume both of these officials would declare to have been done by mistake on their part, and to have been procured by fraud on the part of others? I

deeply regret that the majority of the court have deemed it their duty to hold that the courts have no power to investigate and remedy the great wrong which has been done to the public. I regret it because it gives immunity to the wrongdoers in this case, and, in my judgment, encouragement to others to attempt like frauds in the future.

Clark, J., dissenting:

A demurrer *ors tenuis* was entered, and the action dismissed, because a cause of action was not stated. For the purposes of this proceeding, therefore, the allegations of the complaint are admitted to be true. It is thereby admitted that a bill was introduced into the lower house of the general assembly; that this bill, on its second reading, was voted down by the representatives of the people; that the journal also shows that fact, and the bill itself was stamped "Tabled" and placed in the package of "tabled" bills, where it still remains. It is further admitted that the bill was not introduced in the senate at all, but that, notwithstanding the bill was defeated in one house and never presented for consideration in the other, a fraudulent copy of a bill of similar tenor was procured to be made by a subcopyist of the enrolling clerk, and by mistake on the part of the two speakers, who were made to believe that it was a bill which had been duly read three times in each house, it was signed by them. The purport of the bill is to prohibit debtors from preferring any creditor in making assignments. The plaintiff alleges that as a taxpayer he has a right to be protected from paying the expenses of printing the fraudulent bill and distributing it among the laws of the state; that, as a citizen, he has a right to be excused from including it among the laws which, as a voter, he has sworn to support; and that, as a creditor, the right he has had by our laws, time out of time, to have his debtors prefer him, should they see fit, should not be taken away from him against the will of the people, as expressed by their representatives in this legislature, as likewise in many previous ones. The constitution under which we live, and which every officer of the state, from the highest to the least, and every registered voter has sworn to support, provides that "all bills shall be read three times in each house before they pass into laws." It is admitted here that this pretended law has not been read three times in each house. It is admitted that it has not been read three times in either house. It is admitted that it was read in only one house, and in that the people, through their representatives, defeated it and refused to let it pass. It is admitted that subsequently the speakers were imposed upon, and erroneously certified that the bill had passed three readings in each house. It is contended, however, that we cannot go behind the signatures of the speakers. But the signatures of the speakers, procured by fraud, are not their signatures. Fraud vitiates them as it vitiates everything it touches. But it is urged that it is dangerous to open up the acts of the legislature to be set aside for fraud, and that this would unsettle the laws. The fraud

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alleged is not in procuring the passage of an act, but in procuring an untrue certificate that it has been passed. If the alleged statute is not the will of the people, expressed in a constitutional way by three readings in each house of the general assembly, there is no power to make it a law, and no consideration of danger should prevent a declaration that the laws heretofore made by the people, in the constitutional mode, cannot be repealed, revoked, and set aside in this mode. If there could be any danger in refusing to admit as a law a bill, which, without having been passed, is untruly certified as having been passed, it is to be remembered that among a free people no other danger is comparable to that of substituting in the enactment of laws for the will of the people the power of money in securing, by shifty devices, a false certificate of the passage of an act, and a holding by the courts that such villainy is conclusive, and above the power of the people to correct through their courts. Deeds signed, sealed, and delivered bind the parties, but it has never been considered that land titles would be unsettled if deeds procured by fraud were set aside. This rather tends to settle land titles. So, rejecting from the statute book a surreptitious bill, not enacted by the votes of the people's representatives, is not to unsettle the laws, but to establish them "broad based upon the people's will." If a judgment of this or any other court under seal should be procured by mistake or fraud, it can be set aside.

It is urged, however, that this touches a co-ordinate department of the government. But the judiciary is the only body authorized to investigate and ascertain whether it is the act of the general assembly, or a measure which, rejected by that body, has nevertheless been fraudulently palmed off on the speakers, and their signatures thereto procured by a fraud practiced on them. The executive is also a co-ordinate department. It is matter of history that towards the close of the last century certain land warrants were fraudulently issued by the secretary of state, the broad seal of the state was affixed, and the governor, being misled, honestly affixed his signature (as the speakers did here); but the court went behind the great seal, behind the admittedly genuine signature of the governor, set the fraudulent land warrants aside, and jailed the agent of the fraud, and the next legislature changed the name of the county (Glasgow), which had been named in honor of the dishonest secretary of state. The supreme court of this state had its origin in the organization by law of a temporary tribunal created to investigate and set aside this fraud perpetrated on the executive department, and, indeed, by one of its heads, and to punish its perpetrators. *State v. Glasgow*, Taylor & C. (N. C.) 88, 2 Am. Dec. 629. It would be singular if, after the lapse of nearly a century, the developed court, with larger powers, and chosen by the people, should be powerless to set aside and annul a greater fraud upon popular rights, perpetrated by simulating the people's *imprimatur* in pass-

ing off as a law of the state a bill which their representatives rejected, and which some corrupt hireling of interested parties procured to be falsely certified as an act of the general assembly by the officers of that body, who were deceived, in the rush and hurry of the closing hours of the session, into believing it a genuine bill. Failing for many sessions to procure the passage of the act from the popular assembly, the interested parties fraudulently procured this bill to be certified as having been passed. To give it currency as law is to pass off "the buzzard in the eagle's nest" as the imperial eagle itself. We acknowledge as laws only the legal expression of the people's will. This bill is not the people's will. It is what their representatives have declared by a vote was not their will. It is not such as this that the men of North Carolina have sworn to support as "laws." It is such as this which we have sworn not to support as laws, by our oath to a constitution which says nothing shall be a law till it has been adopted by having received the assent of our representatives on three several occasions in each house of the general assembly. This has not only not received such assent, but has received their refusal.

The power to construe a law necessarily carries with it the power to investigate whether a pretended law is really a law duly enacted or a fraudulent simulation which in fact was never enacted into law. In the presence of so vital and so plain a principle, precedents are not needed, but we have them. The constitution provides that, before becoming laws, bills shall be read three times in each house, and shall be signed by the speakers. In *State v. Robinson*, 81 N. C. 409, it was held that if the latter requirement was lacking, the bill was not a law, even though it had the other and far more important requirement of having been passed three times in each house. *A fortiori*, if the bill has not received the assent of the three constitutional readings, it cannot be the will of the general assembly. To hold otherwise would be to sacrifice form to substance, and to say that the certificate of the speakers is sufficient without a vote of the general assembly, and (as in this case) in spite of an adverse vote of that body. Again, the constitution requires that the style of an act shall be, "The general assembly of North Carolina do enact." In *State v. Patterson*, 98 N. C. 680, it was held that, although the speakers had signed and certified a bill as ratified, yet, if this formula was omitted therefrom, it was a nullity, because the constitution required it. But we are in the presence of a greater and more important constitutional requirement than the formula which begins an act, or the certificate of the speakers. These are matters of form, and essential only because required by the constitution. We are now face to face with the constitutional requirement that the bill shall three times receive the assent of each house "before it shall become a law," and the principle, greater than the constitution itself, that the law-making power resides in the sovereign people, to be exercised by their

representatives, and that nothing shall be law unless voted by them, and especially nothing shall be law which (as in this case) has been refused by their vote. Even the common law itself is law in this state only by virtue of an enactment of the general assembly. In other states, questions have come up as to the power to go behind the certificate of ratification signed by the speakers, in cases of mere irregularities, and it has been held in twenty-eight states that this can be done, as this court has already held in *State v. Patterson*, *supra*. In nine states only it has been held that the certificate of ratification is conclusive against irregularities. These cases need not be here recited and reviewed. They are easily accessible in 23 Am. & Eng. Encyclop. Law, pp. 196 *et seq.* But in none of these cases have we the bold and glaring and admitted fraud upon popular sovereignty which is here presented.

The requirement that thirty days' notice must be given of a private law is a condition precedent which the legislature passes upon, but a constitutional provision that the bill must be read three times in each house before it passes into law goes into the essential matter which a court must determine in passing upon the question whether a printed piece of paper laid before it is a legislative enactment. The certificate of the speakers is certainly *prima facie* and very strong presumption that it is, but when the very matter at issue is the allegation that the certificate of the speaker was procured by fraud (and this is admitted by the demurrer), then it is begging the question to say that such piece of paper is conclusively the law of the land without the vote, nay, against the vote, of the law-making power. It is also begging the question to say that the legislature certifies to us, over the signatures of their two principal officers, that this act was passed. The very issue is, Did the two officers so certify, or were their signatures procured by fraud? If so, they are in law not their signatures, and this is admitted by the demurrer, which admits the allegations that in truth the bill did not pass, but was defeated, and that the certificate of the presiding officers is false, and was procured by fraud practiced on them, an allegation which those officers, in justice to themselves, should have been permitted to prove by their own testimony in court. The people are the source of all power, but if there is fraud in certifying untruly to the declaration of their will at the ballot box, the courts can and will right the wrong and declare the true result. Whence comes it that the legislative department is so superior or so inferior that a certificate fraudulently procured, which falsely certifies that it has passed a bill, cannot be set aside on proof that in truth the opposite result was declared? The courts have the same power to investigate in one case as in the other. It is not the declaration of the result of a vote by the legislature itself which is in question, for that would be conclusive, but the false certificate that it had so declared, when it is admitted that the legislature declared just the opposite by tabling the bill. In this proceeding, if the jury found that

the certificate was false and was fraudulently procured, the judgment would be to strike the fraudulent bill out of the files and out of the printed laws, and to declare it what it is, a nullity as to all the world.

This being an equitable jurisdiction, the action can only be maintained in the superior court, and one action is conclusive. It is not open to the objection that such proceedings might, if allowed, be brought before a justice of the peace, nor that there might be different verdicts before different juries. That could be urged against a proceeding as in *Wyatt v. Wheeler & Wilson Mfg. Co.* (at this term) 23 S. E. Rep. 120,—where the invalidity of an act is attempted to set up, collaterally as it were, in litigation between parties. But it cannot apply where the proceeding is brought against the secretary of state directly, to have the act which is fraudulently procured to be certified struck out of the files of enrolled bills in his office, and declared a nullity.

The constitution does not require that the presiding officers shall sign bills in the presence of the houses, or with their assent; and neither the certificate itself nor the complaint indicates that this was done. It may be the usual practice, but it is not required, nor does it appear to have been done. There is no presumption that it was done upon which an argument can be based. The signing has no law-making power in itself, but is a mere certification of what the law-making body has decided, and, like all certificates, may be impeached for fraud or mistake; otherwise the certificate is more powerful than the authority doing the act which is certified. If we could conceive that the two presiding officers of any legislature should purposely certify that a bill has passed which had in fact been defeated, this could not nullify the action of the two houses. If it could, then they, and not the general assembly, are the law-making power. Certainly, for a stronger reason, when the signatures of the presiding officers are procured by a trick and fraud practiced on them, there cannot be such virtue therein as to make a law against the vote of the body. The case most strongly relied on by the defendant is *Marshall Field & Co. v. Clark*, 148 U. S. 695, 36 L. ed. 810, but in that case it was admitted that the act had passed both houses and had been approved by the president, and the point decided by the court was that the act would not be vitiated because a section, which was in it when passed by the houses, was omitted in the en-

rolled act on file. It must be noted also that the United States Constitution does not contain the essential provision which is in our constitution that "each bill must be read three times in each house before it becomes a law," and that, in addition to the signatures of the speakers, there is the further safeguard that the bill is subject to the supervision and approval of the president, which the bill in question had. Notwithstanding these vital differences in the two constitutions, and the remote bearing the actual point there decided has upon this case, the court nevertheless takes occasion to say (Harlan, J.) in that very opinion: "A bill signed by the speaker of the house of representatives and by the president of the senate, presented to and approved by the president of the United States, and delivered by the latter to the secretary of state as an act passed by congress, does not become a law of the United States if it had not in fact been passed by congress. In view of the express requirements of the constitution, the correctness of this general principle cannot be doubted." An enunciation more exactly in point in its application to the controversy before us cannot be found. Here the bill was not voted in either house, but was expressly negatived by a vote, and this fact appears by the journals (which are required by the constitution to be kept), and is also admittedly beyond controversy. The certificate of ratification was not purposely and knowingly appended by the speakers. They never knowingly intended to certify that this bill had been read three times in each house. Their signatures were inadvertently appended, and were procured by a gross fraud. They, in law, are not their signatures. This is not the "signing" which the constitution requires to bills which have three times before such signing been read with the approval of each house.

The conflicting decisions from other states as to whether the signatures of the speakers can be contradicted by the journals have no application to this case, where the allegation is of fraud in procuring their signatures. The facts of this great fraud are admitted for the purpose of this appeal. It is lawful to allege and to prove such fraud if "government by the people and for the people" is to continue; otherwise government by fraud has begun, the sure and unfailing sign in all history that the end of representative government is at hand.

The judgment below should be reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Margaret CONDRAN, Admx. of Henry Condran, Deceased, *Plff. in Err.*,

CHICAGO, MILWAUKEE & ST. PAUL R. CO.

(97 Fed. Rep. 522.)

(April 1, 1895.)

1. The relation of carrier and passenger is not established between a railroad company and one who gets upon a passenger train with the deliberate purpose not to pay his fare, and adheres to that purpose; or, who being on the train, and having money with him with which he could pay his fare, falsely and fraudulently represents to the conductor that he is without means, and thereby induces the conductor to permit him to remain on the train without paying his fare.
2. It is a matter of common knowledge of which the court will take judicial notice, and of which the public are bound to take notice, that railroad passenger trains are operated to carry passengers for hire.
3. The court will take judicial notice that the authority of a railroad conductor does not extend to the carrying of passengers without the payment of the regular fare.
4. One riding on a railroad train by fraud or stealth without the payment of fare takes upon himself all the risk, and if injured by an accident happening to the train, not due to recklessness or willfulness on the part of the company, cannot recover.
5. The rule that one riding upon a train by fraud or stealth without payment of fare cannot recover for injuries not due to recklessness or willfulness of the company is not modified or abrogated by McClain's Anno. Code, § 2002, making every railroad company liable for all damages sustained by any person in consequence of the neglect of agents, or by mismanagement of the engineers or other employes.

NOTE.—May wrongdoer take advantage of general statutory imposition of damages for negligent injuries?

Statutes imposing liability for damages for injuries to "any person" by reason of negligence are not sufficiently common to have decisions construing them very numerous.

But so far as such constructions exist they seem to agree that the language will not be construed broadly enough to cover cases of trespassers or wrongdoers.

The authorities collected in the note to *Loneragan v. Illinois Cent. R. Co.* (Iowa) 17 L. R. A. 254, show a uniform refusal to extend the benefit of statutes requiring signals to be given by railroad trains upon approaching highway crossings to trespassers on the track.

So the note to *Shellenberger v. Ransom* (Neb.) 25 L. R. A. 572, shows that the maxim *nulius in commodum opore potest de injuria sua propria* will prevent one who has been guilty of even contributory negligence from taking advantage of a statute imposing liability for negligent injuries.

There are not many cases in which language similar to that used in the statute construed in *CONDHAN V. CHICAGO, M. & ST. P. R. CO.*, but what few there are seem to be in harmony with that decision.

Thus a statute making a railroad company liable for all damages sustained by "any person" by rea-

ERROR to the Circuit Court of the United States for the Southern District of Iowa to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate while a passenger on defendant's train. *Affirmed.*

The facts are stated in the opinion.

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Messrs. John Shortley and James G. Day, for plaintiff in error:

There was error in submitting to the jury whether deceased had, at the time of his death, money to pay his fare, because there was no competent evidence upon this question. *Moorehead v. Hyde*, 88 Iowa, 883; *United States v. Breilling*, 61 U. S. 20 How. 252, 15 L. ed. 900.

A railroad company is under obligation to exercise towards a mere trespasser reasonable and ordinary care.

Murphy v. Chicago, R. I. & P. R. Co. 88 Iowa, 539; *Clampitt v. Chicago, St. P. & K. O. R. Co.* 84 Iowa, 75.

The whole question is governed by the Iowa statute.

Iowa Code, § 1807; McClain's Anno. Code, § 2002.

This statute includes all persons.

Ross v. Des Moines Valley R. Co. 39 Iowa, 246; *Way v. Chicago, R. I. & P. R. Co.* 64 Iowa, 51, 52 Am. Rep. 481, 78 Iowa, 463; *Hunt v. Chicago & N. W. R. Co.* 26 Iowa, 863; *Murphy v. Chicago, R. I. & P. R. Co. supra.*

When the employes of a railroad company discover a person in a situation of danger, although that danger results from an act of trespass, it is the duty of such employes to use

son of neglect to comply with its requirements as to giving signals when approaching a crossing does not operate in favor of a trespasser walking on the track. *O'Donnell v. Providence & W. R. Co.* 6 R. L. 211.

So a statute requiring a bell to be rung or whistle blown on approaching a crossing and providing that the company is liable for "all damages sustained by any person" and caused by its locomotive, train, or cars when the provisions of this section are not complied with does not place any duty on the company in favor of a mere trespasser upon the track. In that case the court says: "Suppose that a train wrecker should wish to destroy a particular train, and should rely upon the whistle or bell at a neighboring crossing for warning in time to make his escape, but should be taken unawares and should be run over, because no whistle was blown or bell rung, would he be heard to say that the duty imposed by statute was a duty to him, and that its omission was negligence for which he could recover? We think not." *Toomey v. Southern Pac. R. Co.* 10 L. R. A. 143, 86 Cal. 374.

In *Akers v. Chicago, St. P. M. & O. R. Co.* (Minn.) 60 Am. & Eng. R. R. Cas. 30, in holding a railroad company not liable for injuries caused by catching a foot in a frog which was not blocked as required by statute the court said the principle is the same whether the statute expressly declares that a person shall be liable for any damages sustained by

all reasonable diligence and care to avoid inflicting upon him an injury.

Harlan v. St. Louis, K. C. & N. R. Co. 65 Mo. 22; *Doolley v. Mobile & O. R. Co.* 69 Miss. 648; *Glass v. Memphis & C. R. Co.* 94 Ala. 581; *Ward v. Southern Pac. Co.* 23 L. R. A. 715, 25 Or. 433; *Williams v. Southern Pac. R. Co.* 72 Cal. 120; *McAllister v. Burlington & N. W. R. Co.* 64 Iowa, 895; *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602; *Burnett v. Burlington & M. R. R. Co.* 16 Neb. 332; *Morris v. Chicago, B. & Q. R. Co.* 45 Iowa, 29.

Mr. Charles B. Keeler, for defendant in error:

If a person were stealthily, and wholly without the knowledge of any of the employees of the company, to get upon a train and secrete himself, for the purpose of passing from one place to another, he could not recover if injured.

Then, does the act of a person who knowingly induces the conductor to violate a rule of the company, and prevails upon him to disregard his obligation of fidelity to his employer, to accomplish the same purpose, occupy a different position, or is he entitled to any more rights? He thereby combines with the conductor to wrong and defraud his employer out of the amount of his fare, and for his own profit.

Toledo, W. & W. R. Co. v. Brooks, 81 Ill. 250; *Chicago & A. R. Co. v. Michie*, 83 Ill. 431; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 84, 28 Am. Rep. 613; *Schouler*, Bailm. § 620; *Chicago, B. & Q. R. Co. v. Mehlack*, 181 Ill. 64.

If a person solicits and secures free transportation, or if he rides on a part of the train from which passengers are excluded, or takes passage upon a train not allowed to carry passengers, knowing that his act is against the rules of the carrier, and in permitting it the conductor is disobedient, he is guilty of fraud, and not entitled to a passenger's right.

McVeety v. St. Paul, M. & M. R. Co. 11 L. R. A. 174, 45 Minn. 269; *Toledo, W. & W. R. Co. v. Brooks*, and *Toledo, W. & W. R. Co. v.*

Beggs, *supra*; *Robertson v. New York & E. R. Co.* 22 Barb. 91; *Union Pac. R. Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475; *Prince v. International & G. N. R. Co.* 64 Tex. 146; *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 174; *Brown v. Missouri, K. & T. R. Co.* 64 Mo. 536.

The only relation existing between the decedent and the company having been induced by fraud, he cannot be allowed to set up that relation against the company as a basis of recovery.

Way v. Chicago, R. I. & P. R. Co. 64 Iowa, 51, 78 Iowa, 465; *Hutchinson*, Carr. 2d ed. § 555; *Thompson*, Carr. § 8, p. 43; *Ray's Negligence of Imposed Duties, Passenger Carriers*, pp. 15, 16; *Great Northern R. Co. v. Harrison*, 10 Exch. 876, 26 Eng. L. & Eq. 443; *McNameara*, Carr. p. 465.

As to trespassers upon trains the company is liable only for gross negligence, amounting to reckless or wanton conduct; while as to trespassers upon tracks, the settled doctrine is that there is no duty "except the negative one, not maliciously or with gross and reckless carelessness to run over them."

Morrissey v. Eastern R. Co. 126 Mass. 336, 30 Am. Rep. 666; *Wright v. Boston & A. R. Co.* 142 Mass. 301; *Roden v. Chicago & G. T. R. Co.* 183 Ill. 73; *Mason v. Missouri Pac. R. Co.* 27 Kan. 83, 41 Am. Rep. 405; *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 22; *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 257; *Little Rock, M. R. & T. R. Co. v. Haynes*, 47 Ark. 497; *Ward v. Southern Pac. Co.* 23 L. R. A. 715, 25 Or. 433; *Glass v. Memphis & C. R. Co.* 94 Ala. 581; *Nave v. Alabama G. & S. R. Co.* 96 Ala. 264; *Georgia Pac. R. Co. v. Ross*, 100 Ala. 490; *Louisville, N. O. & T. R. Co. v. Williams*, 69 Miss. 631; *Schernayders v. Texas & P. R. Co.* 46 La. Ann. 248; *Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250; *McClaren v. Indianapolis & V. R. Co.* 83 Ind. 312.

There is nothing in the language or purpose of 1 McClain's Anno. Code, § 2002, p. 515, to indicate that it was ever intended to, or did, change any rule of law as to the degree of

reason of its breach, or merely imposes the duty with a penalty for its nonperformance. A violation of a statutory duty can be made the foundation of an action only by a person belonging to the class intended to be protected by such regulation, and all statutes requiring the owner to adopt certain precautions to render premises safe are designed for the protection, not of the wrongdoers or trespassers, but of those who are rightfully upon them.

So in *Dillon v. Connecticut River R. Co.*, 154 Mass. 478, where a recovery was refused for a death caused by a train running off from the track to one who was in a house erected on the right of way without permission, the court says whether this construction of the statute be reached by a broad interpretation of the exception of people "being upon its road contrary to law" or reading in an exception implied by common sense does not matter for the purposes of this case.

A statute requiring signals to be given by a moving train is intended to protect persons and property rightfully at or approaching public crossings or stopping places of the train, but has no application to places or conditions not within its provisions as where a person is walking along its tracks. *Savannah & W. R. Co. v. Meadors*, 95 Ala. 137.

A requirement that signals shall be given before

reaching a public crossing will not operate in favor of a trespasser who is trying to cross a trestle between the blow post and the crossing. *Atlanta & C. Air Line R. Co. v. Gravitt* (Ga.) 28 L. R. A. 553.

Provisions for signals are not applicable to trespassers on the track. *Bell v. Hannibal & St. J. R. Co.* 72 Mo. 50; *Holmes v. Central R. & Bkg. Co.* 37 Ga. 593.

The defense of contributory negligence is not cut off by a statute which provides that a railroad company neglecting or refusing to comply with the provisions of the act requiring safe crossings shall be liable "for all damages" sustained by reason of such neglect and refusal, and providing that in order for the injured person to recover it shall only be necessary for him to prove such neglect or refusal. *Ford v. Chicago, R. I. & P. R. Co.* (Iowa) 24 L. R. A. 657; *Reeves v. Dubuque & S. C. R. Co.* (Iowa) 60 N. W. Rep. 243.

But the language of the statute may be such as to positively require a different construction.

Thus mere contributory negligence is no defense under a statute making a railroad company which neglects to have a proper fence liable for all injuries to stock on account thereof unless the same was caused by the willful act of the owner or his agent. *Anderson v. Chicago, R. I. & P. R. Co.* (Iowa) 61 N. W. Rep. 1068.

care due to trespassers upon trains, or to persons procuring free rides by fraudulent practices.

Richards v. Chicago, St. P. & K. C. R. Co., 81 Iowa, 480; *Musser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602; *McAllister v. Burlington & N. W. R. Co.* 64 Iowa, 395; *Murphy v. Chicago, R. I. & P. R. Co.* 45 Iowa, 665.

Caldwell, Circuit Judge, delivered the opinion of the court:

The case is stated by Judge Shiras, who tried it in the circuit court, in his charge to the jury as follows:

"In the case now on trial before you it appears from the undisputed evidence in the case that on the evening of June 16, 1891, a passenger train on the defendant's line of railway was derailed at or near a bridge crossing the Coon river, not far from the town of Coon Rapids, in this state; that Henry Condran was on the train when it was derailed, and was instantly killed; that the plaintiff is the administratrix of his estate, and that she brings this suit to recover the damages caused to the estate of Henry Condran by his death, claiming that the said Henry Condran was a passenger on defendant's train, and that the derailment of the train, and consequent death of said Henry Condran, was caused by the negligence of the railway company. On part of the defendant it is denied that said Henry Condran was a passenger on the train at the time of the accident, or that the accident was due to negligence in any particular on the part of the company. Under the issues thus presented, the question you are to consider and determine is that touching the relation existing between the railway company and the deceased at the time the accident happened. It is not questioned that he was upon the train, but the point in dispute is whether he occupied the relation of a passenger to the company, so as to impose upon the latter the duties and obligations resting upon

a carrier of passengers, and which I have already defined to you. On part of the plaintiff it is claimed that the deceased was in fact a passenger, whether he had paid his fare or not, and upon the part of the defendant it is claimed that the conductor permitted him to remain upon the train without paying his fare, in consequence of the statements made by the deceased; that these statements were untrue; that thereby a fraud was committed by the deceased upon the company, and that the deceased could not, by fraudulent misstatements, obtain a free ride upon defendant's train, and then hold the company responsible to him the same as though he was a passenger paying fare. If the deceased in fact had money with him, with which he could have paid his fare, but, instead of paying the same, he intentionally misstated his situation to the conductor, and by false representation induced the latter to allow him to remain on the train, then it could not be said that he was rightfully upon the train, but he would be there in fraud of the rights of the company, and the legal relation of carrier and passenger would not in such case exist between him and the company. The company would then owe him no other duty than not to willfully or recklessly injure him, and, as there is no evidence in this case which would justify you in holding that the accident and consequent death of Henry Condran was due to recklessness or willfulness on part of the company, it follows that in case you find that said Condran fraudulently misstated the facts of his situation to the conductor, and as a consequence was allowed to remain on the train without paying his fare, then your verdict must be for the defendant. On the other hand, if the deceased had in fact paid his fare, or if, being without means, he fairly stated his condition and situation to the conductor, and the latter, in consideration of the statements made him, permitted Condran to remain on the train, then the relation existing between Condran

So in Nebraska the statute makes the carrier an insurer of its passengers unless it is shown that the injury was caused by the gross negligence of the person injured or his violation of some rule of the carrier brought to his notice. *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642; *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578.

On the other hand the South Carolina statute providing for liability for failure to give signals at crossings expressly excepts persons who are guilty of gross or willful negligence. *Hale v. Columbia & G. R. Co.* 84 S. C. 232.

The statute under consideration in *CONDHAN v. CHICAGO, M. & ST. P. R. Co.* has been construed by the Iowa court as follows:

In *Hunt v. Chicago & N. W. R. Co.*, 28 Iowa, 363, it was held that the section of the statute in question conferred no rights upon any one other than employees, but in *Rose v. Des Moines Valley R. Co.*, 39 Iowa, 246, it was held to apply to passengers as well as employees.

In *Murphy v. Chicago, R. I. & P. R. Co.*, 45 Iowa, 665, the court says the statute indicates no purpose to exonerate the injured person from the necessity of exercising reasonable care in order that he may recover. Its evident purpose is to extend the liability of railroads to the injury of employees, for which at common-law they were not liable.

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A person who takes an assignment of a ticket that is not assignable cannot recover if injured while traveling on it since he does not bear the relation of passenger to the company. *Way v. Chicago, R. I. & P. R. Co.* 64 Iowa, 51, 52 Am. Rep. 431. But upon a second appeal of that case it was held that under the statute the company was liable for injury to a person on its train without right if the injury was caused by the gross negligence or mismanagement of the employees in charge of the train. *Way v. Chicago, R. I. & P. R. Co.* 73 Iowa, 468.

Since there is nothing in the statute about gross negligence it is a little difficult to understand the latter decision. The action was for injuries received in consequence of bringing two parts of the train together for the purpose of coupling them so violently that plaintiff was thrown and injured. In the opinion the court said: "It may be conceded that, as the intestate was in the caboose without right, defendant owed him no special duty, and that its employees were not bound to ascertain whether he was there before commencing the work in which they were about to engage. Neither were they required to govern their conduct with reference to the possibility of his being there. But the caboose was liable at any time to be occupied by passengers, and the employees were required to take that fact into account in the performance of

and the company would be that of passenger and carrier."

The only assignments of error which this court can notice are those which challenge the soundness of this charge. The overruling of the motion for a new trial cannot be assigned for error. Nor does the making and overruling of such a motion serve to bring to the attention of this court any of the grounds assigned for a new trial not otherwise properly saved and assigned as errors.

The rule is well settled that where one gets on a passenger train with the deliberate purpose not to pay his fare, and adheres to that purpose, or if, being on the train, and having money with him with which he could pay his fare, he falsely and fraudulently represents to the conductor that he is without means to pay his fare, and by means of such false representations induces the conductor to permit him to remain on the train without paying his fare, the relation of carrier and passenger and the obligations resulting from that relation are not thereby established between him and the company, and the company owes him no other duty than not to willfully or recklessly injure him. *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 250; *Chicago & A. R. Co. v. Michie*, 88 Ill. 481; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 84, 28 Am. Rep. 618; *Chicago, B. & Q. R. Co. v. Mehlmark*, 131 Ill. 64; *McVeety v. St. Paul, M. & M. R. Co.* 45 Minn. 269, 11 L. R. A. 174; *Robertson v. New York & E. R. Co.* 22 Barb. 91; *Union Pac. R. Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475; *Prince v. International & G. N. R. Co.* 64 Tex. 146; *Gulf. C. & S. F. R. Co. v. Campbell*, 76 Tex. 175; *Way v. Chicago, R. I. & P. R. Co.* 64 Iowa, 48, 73 Iowa, 468.

The law will do nothing to stimulate and encourage fraud and dishonesty, and that would be the effect of holding that a railroad company owed to one riding on its train under the conditions named the duties and obligations it owes to a passenger who has honestly paid his fare. Railroad companies are as much entitled to protection against fraud as natural persons. It is a matter of common knowledge, of which the court will take judicial notice, and of which the public are bound to take notice, that railroad

passenger trains are operated to carry passengers for hire. They are not eleemosynary agencies. It is equally well known that the authority of a railroad conductor does not extend to the carrying of passengers without the payment of the regular fare. But, if he had such authority, his assent obtained by the fraudulent means mentioned would confer no rights. One riding on a train by fraud or stealth, without the payment of fare, takes upon himself all the risk of the ride, and if injured by an accident happening to the train, not due to recklessness or willfulness on the part of the company, he cannot recover.

It is contended by counsel for the plaintiff in error that this rule has been modified or abrogated by section 2002 of McClain's Annotated Code of Iowa, which reads as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or omission of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

We have examined the Iowa cases to which we were cited by counsel (*Ross v. Des Moines Valley R. Co.* 89 Iowa, 246; *Way v. Chicago, R. I. & P. R. Co.* 64 Iowa, 48, 73 Iowa, 468); and, also, the cases of *McAllister v. Burlington & N. W. R. Co.* 64 Iowa, 395; *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602; and *Richards v. Chicago, St. P. & K. O. R. Co.* 81 Iowa, 426,—and, without going into an extended statement or analysis of these cases, we will say that we think they establish the doctrine that this statute has made no modification of the rule as we have stated it, and as it was given to the jury by the learned judge who tried the case in the circuit court.

The judgment of the Circuit Court is affirmed.

their duty, and govern their conduct with reference to it. If they performed their duty in a manner so unusual or reckless as to endanger the lives or safety of persons who might be rightfully in the caboose, they were guilty of negligence; and if, as the direct consequence of such negligence, the deceased was injured, the company is liable, notwithstanding the fact that he was in the caboose without right; for, by the statute referred to above, (Code, § 1307), it is made liable for "all damages sustained by any person in consequence of the neglect of agents or by any mismanagement of engineers or other employees."

Although the principle of that decision is not clearly expressed it seems to be this:

The railroad company owes a high degree of care

to passengers. It owes much less care to persons on its train without right. A breach of either duty is negligence with reference to the one to whom it is due, which under the statute will make the company liable for damages. Neglect which will give a passenger a right to recover may not make the company liable to the person on its train without right. But if the company is reckless or grossly negligent it may be held to be negligent even with respect to the latter person and so under the statute be liable to him in damages. This interpretation if correct harmonizes the *Condran* and *Way* cases, but it leaves the rule in such cases practically where it was before the statute was passed.

— H. P. F.

MASSACHUSETTS SUPREME JUDICIAL COURT.

E. M. NASH *et al.*, Trustees, etc.,
v.
MINNESOTA TITLE INSURANCE &
TRUST CO.

(163 Mass. 574.)

1. One who merely answers the inquiries of a stranger or courteously volunteers information in a matter which does not concern him cannot be held liable to an action for fraud on account of misstatements if he did not intentionally mislead, but answered honestly to the best of his ability.
2. Liability for making statements known to be false in the sense in which it is supposed they would be generally understood cannot be avoided on the ground that they were made without any purpose to do injury or cause loss to anybody who might rely upon them.
3. The understanding and intention of a person in regard to the meaning of an alleged misrepresentation which was acted on in a transaction between other parties may be proved by him in an action against him for fraud in making the statement.
4. Damages for false representation as to the title of property of another person, on the faith of which it was purchased, include only the difference between the value of the property as it was and the value as it would have been if the representation was true.
5. Rescission or attempted rescission of a contract of purchase made on the faith of false statements by a third person as to the title will not make him liable in an action for fraud beyond the difference between the actual value of the property and its value as it would have been if the representation was true.
6. The liability of a third person for fraud in inducing a contract is not defeated by the rescission or attempted rescission of the contract so long as no satisfaction for the injury is obtained from the other contracting party by restoration, recovery of consideration, or otherwise.
7. Mitigation of damages for fraud in representing the title of mortgaged property to be perfect, on the faith of which mortgaged bonds were purchased, when in fact there was a prior mortgage thereon, cannot be claimed by virtue of the tender of a discharge on the trial of the action after the expiration of a long time when the market for the bonds may have changed.
8. A letter by the president of a corporation reciting a statement of fact by a third person the truth of which it assumes is admissible in a subsequent suit against the cor-

poration in which the existence of such fact becomes an issue.

(June 12, 1895.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action to recover damages for alleged fraudulent representations which induced plaintiffs to purchase certain worthless bonds, which resulted in a verdict in plaintiffs' favor. *Sustained.*

These actions were brought to recover the sums which had been paid by plaintiffs for bonds issued by George Walter Davis, upon real estate in Minneapolis, and which plaintiffs claimed to have purchased because of the fraudulent representations by the defendant company.

The claim of the plaintiffs was that the tract of land upon which the bonds were secured was worth only from \$30,000 to \$50,000, and that the making of the bonds and the mortgage securing them was part of a scheme by one A. H. Hedderly, the owner of the land and Davis by which the property was to be transferred to Davis for the fictitious value of \$300,000, and that Davis was to issue bonds to the amount of \$150,000 secured by the property, and sell them for the benefit of Hedderly. A letter which became the basis of this suit was secured from defendant, of which the following is a copy:

"Minneapolis, Minn., Feb. 6, 1890.

"Mr. George W. Davis, Minneapolis, Minn.

"Dear Sir:—We have in our possession the original documents printed in the advertisement of your bonds secured by mortgage to this company, as trustee upon the Hedderly Tract in this city. We indorse the estimates of value contained therein made by Messrs. Marsh & Bartlett, I. C. Seely, Jones, McMullan & Company, and E. A. Harmon, all of whom are known as men of integrity and sound judgment touching real estate value.

"That we consider the title good in you will appear from the fact that we have engaged to issue our policies of title insurance to the several holders of your mortgage bonds to the aggregate amount of \$150,000, fully protecting such holders against loss or damage arising from any defect in said title or prior incumbrance thereon.

"From our knowledge of the mortgaged property, and from its situation and prospects, we are of the opinion that the mortgaged property is adequate security for the amount of your proposed loan.

"Very truly yours,

"Minnesota Title Insurance & Trust Co.,

"J. U. Barnes, President."

The documents referred to in the first sentence of the letter were certificates giving estimates of the value of the mortgaged property at about \$250,000, signed by the persons mentioned in the letter. The pamphlet containing the advertisement also referred to in the letter contained the statement that the present owner Davis bought the property for an investment,

NOTE.—The above case is probably the most important one to be found on the question as to liability for misrepresentations without intent to mislead, made by volunteers or strangers to the transaction respecting which the statements were made as distinguished from parties to a contract who make misrepresentations respecting its subject-matter.

For false representations as ground of liability in general, see *notes to Meeks v. Garner* (Ala.) 11 L. R. A. 196; *Dawe v. Morris* (Mass.) 4 L. R. A. 156; *Deming v. Darling* (Mass.) 2 L. R. A. 743; *Davis v. Nuzum* (Wis.) 1 L. R. A. 774.

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having put in \$150,000 over the amount of the bonds.

After the first trial of the action, Jeremiah Plympton who was a party to it died, and his bonds were sold to one E. D. Sibley. The evidence given by him was sought to be introduced at the second trial to which defendants excepted upon the ground that having sold his bonds he could not recover under a declaration based on a rescission against Davis.

On the trial the issue was raised whether or not one James M. Keith had acted as the agent of Davis in selling bonds to any of the plaintiffs, and plaintiffs introduced in evidence a letter from the president of the defendant to Keith, which contained the following language: "George W. Davis . . . says he sold through you \$32,000 of bonds," etc.

Further facts appear in the opinion.

Messrs. A. A. Strout, William H. Coolidge, and Edward L. Rand, for defendant.

Moral fraud is necessary to support an action for deceit. There is no presumption of fraud. The defendant is therefore entitled to show absence of fraudulent intention.

Fraud is the gist of the action of deceit.

Stewart v. Wyoming Cattle Ranch Co. 128 U. S. 338, 32 L. ed. 439; *Tryon v. Whitmarsh*, 1 Met. 1, 85 Am. Dec. 339; *Stone v. Denny*, 4 Met. 151; *Holt v. Stewart*, 154 Mass. 445; *Joliffe v. Baker*, L. R. 11 Q. B. Div. 255; *Derry v. Peek*, 14 App. Cas. 337; *Angus v. Clifford* [1891] 2 Ch. 449; *Lord v. Goddard*, 54 U. S. 18 How. 198, 14 L. ed. 111; *Chester v. Comstock*, 40 N. Y. 575, note; *Marsh v. Falker*, 40 N. Y. 562; *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *Erie City Iron Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 508; *Cowley v. Smyth*, 46 N. J. L. 880, 50 Am. Rep. 432; *Page v. Parker*, 40 N. H. 47; *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Humphrey v. Merriam*, 33 Minn. 197.

Actual fraud, as distinguished from mistake and negligence, must be proved. Dishonesty of belief is the criterion, not whether there were no reasonable grounds for belief.

Pearson v. Howe, 1 Allen, 207; *Derry v. Peek* and *Angus v. Clifford*, *supra*; *Le Lievre v. Gould* [1893] 1 Q. B. 491; *Hammatt v. Emerson*, *supra*; *Wilson v. York & M. R. Co.* 11 Gill & J. 58; *Garesché v. MacDonald*, 103 Mo. 1; *Dilworth v. Bradner*, 85 Pa. 238; *Allison v. Jack*, 76 Iowa, 205; *Salisbury v. Howe*, 87 N. Y. 123.

So, statements made carelessly without regard to their probable interpretation by others, even if false, actually or in their apparent sense, will not sustain an action for deceit in the absence of fraudulent intent.

Derry v. Peek and *Angus v. Clifford*, *supra*; *Smith v. Chadwick*, 9 App. Cas. 187, 201, per Lord Blackburn; *Glanier v. Rolls*, L. R. 42 Ch. Div. 486.

In such cases no action lies, even on the ground of negligence, unless the defendant was under some contract or obligation to the plaintiff to exercise care in the matter in which the representation was made.

Le Lievre v. Gould, *supra*.

As moral fraud is the gist of the action of deceit, it must be proved affirmatively; it will not be presumed.

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Jones v. Howland, 8 Met. 377, 41 Am. Dec. 525; *Hatch v. Bayley*, 12 Cush. 27; *Briggs v. Humphrey*, 5 Allen, 314; *Beatty v. Fishel*, 100 Mass. 448; *Kline v. Baker*, 106 Mass. 61; *Gregg v. Sayre*, 33 U. S. 8 Pet. 244, 8 L. ed. 933; *Nichols v. Pinner*, 18 N. Y. 295; *Marah v. Falker*, 40 N. Y. 562; *Grimbold v. Gebbie*, 126 Pa. 353; *Quinebaug Bank v. Brewster*, 30 Conn. 559; *Shinnabarger v. Shelton*, 41 Mo. App. 147; *Le Lievre v. Gould*, *supra*.

Where intention is material, evidence of intent is admissible.

Angus v. Clifford, *supra*; *Brown v. Massachusetts Title Ins. Co.* 151 Mass. 127; *Fisk v. Chester*, 8 Gray, 506; *Thacher v. Phinney*, 7 Allen, 146; *Snow v. Paine*, 114 Mass. 520; *Seymour v. Wilson*, 14 N. Y. 567; *Pope v. Hart*, 35 Barb. 630; *Weed v. Case*, 55 Barb. 534; *Thurston v. Cornell*, 38 N. Y. 231; *Edwards v. Currier*, 43 Me. 474; *Wheelton v. Wilson*, 44 Me. 11; *Norris v. Morrill*, 40 N. H. 395; *Hulett v. Hulett*, 37 Vt. 581; *Berkey v. Judd*, 22 Minn. 287; *Garrett v. Mannheim*, 24 Minn. 193; *Watkins v. Wallace*, 19 Mich. 57; *Phelps v. George's Creek & C. R. Co.* 60 Md. 536; *Vansickle v. Brown*, 68 Mo. 627, 23 Cent. L. J. 271.

The fact that a statement is made in an informal writing does not exclude evidence of the writer's intention.

Com. v. Pope, 8 Dana, 418; *Foster v. Dickerson*, 64 Vt. 233; *Gifford v. Thomas's Estate*, 62 Vt. 84; *Smith v. Crego*, 54 Hun, 22; *Hazard v. Loring*, 10 Cush. 267; *Delaney v. Towns*, 1 Allen, 407; 6 Harvard Law Rev. 325, 417.

The doctrine of estoppel has no application to exclude evidence of intention in an action for deceit.

Low v. Bouverie [1891] 3 Ch. 83.

There was no positive affirmation that the title was good in the sense of perfect, as in *Burns v. Dookray*, 156 Mass. 135, but a mere statement that the title was good in Davis. "Good" is by no means a synonym of perfect, although in the exact phrase "good title" it may have that technical meaning. The actual representation as to title was true according to the law of Minnesota, which must govern.

Adams v. Corriston, 7 Minn. 456; *Loy v. Home Ins. Co.* 24 Minn. 315, 31 Am. Rep. 346; *Rogers v. Benton*, 39 Minn. 39; *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 339, 3 Am. Rep. 711.

The general measure of damages in an action for deceit is the difference between what the plaintiff did receive and what he would have received had the representation of the defendant been true.

Morse v. Hutchins, 102 Mass. 439; *Wright v. Roach*, 57 Me. 600; *Vail v. Reynolds*, 118 N. Y. 297; *Pryor v. Foster*, 180 N. Y. 171; *Carr v. Moore*, 41 N. H. 181; *Shinnabarger v. Shelton*, 41 Mo. App. 147.

This rule is the same whether damages are demanded from a party to a contract or from a third person who has been guilty of deceit.

Stiles v. White, 11 Met. 856, 45 Am. Dec. 214; *Krumm v. Beach*, 96 N. Y. 398; *Northrup v. Hill*, 57 N. Y. 351, 15 Am. Rep. 501; *Page v. Parker*, 43 N. H. 363, 30 Am. Dec. 172.

The right of rescission for fraud exists only where a contractual relation exists. Fraud in-

ducing the contract is not enough, if the party to the contract is not implicated in it.

Pulsford v. Richards, 17 Beav. 87; *Re Felgate's Case*, 2 DeG. J. & S. 456; *Masters v. Iberson*, 8 C. B. 100; *Root v. Bancroft*, 8 Gray, 619; *White v. Graves*, 107 Mass. 825, 9 Am. Rep. 38; *Martin v. Campbell*, 120 Mass. 128; *Fort Dearborn Nat. Bank v. Carter*, 152 Mass. 84; *Fairbanks v. Snow*, 145 Mass. 153; *Masters v. Miller*, 4 T. R. 320; *Wyeth v. Morris*, 18 Hun, 388.

A rescission has no effect on the damages in these cases.

Hoadley v. Northern Transp. Co. 115 Mass. 804, 15 Am. Rep. 106; *Hedden v. Griffin*, 186 Mass. 229, 49 Am. Rep. 25; *Grant v. Mellen*, 184 Mass. 335.

If the plaintiffs have waived their rescission as against Davis, or if said rescission is not good in law; in other words, if there has actually been an affirmance of the contract by them,—then the bona fide purchase of the Bartol mortgage by the defendant, and the discharge of it offered to the plaintiffs, should have been received in evidence in mitigation of damages.

Fisher v. Prince, 8 Burr. 1363; *Moon v. Raphael*, 2 Bing. N. C. 315; *Plevin v. Henshall*, 10 Bing. 24; *Pierce v. Benjamin*, 14 Pick. 856, 25 Am. Dec. 396; *Delano v. Curtis*, 7 Allen, 470; *Dahill v. Booker*, 140 Mass. 303, 54 Am. Rep. 465; *The Bigelow Co. of New Haven, Conn. v. Heintze*, 68 N. J. L. 69; *Rutland & W. R. Co. v. Bank of Middlebury*, 83 Vt. 639; *Yale v. Saunders*, 16 Vt. 243; *Churchill v. Welsh*, 47 Wis. 89; *Kaley v. Shad*, 10 Met. 317; *Dow v. Humbert*, 91 U. S. 294, 23 L. ed. 368; *Toole v. Lawrence*, 59 N. H. 501; *Cornell v. Jackson*, 3 Cush. 506; *Baxter v. Bradbury*, 20 Me. 280, 37 Am. Dec. 49; *Farmers Bank of North Carolina v. Glenn*, 68 N. C. 35; *Reese v. Smith*, 12 Mo. 344; *King v. Gilson*, 32 Ill. 348, 33 Am. Dec. 269; *Knowles v. Kennedy*, 82 Pa. 445; *Hillyer v. Dickinson*, 154 Mass. 502; 2 Greenl. Ev. § 253.

Messrs. Robert M. Morse and J. W. Keith, for plaintiffs:

It is not necessary that the statement relied on in the letter of February 6 should have been the sole or even the predominant motive which induced the plaintiffs to purchase these bonds.

If that representation was an operating cause upon the minds of the plaintiffs, that particular inducement need not have been greater than any other inducement that might have led the plaintiffs to make the purchase.

Matthews v. Bliss, 23 Pick. 48; *Safford v. Grout*, 120 Mass. 20; *Windram v. French*, 8 L. R. A. 750, 151 Mass. 547; *Roberts v. French*, 10 L. R. A. 656, 153 Mass. 60.

The statement in regard to the title, while it was not a direct affirmation that there was no incumbrance on the property, was intended to produce the belief among purchasers of the bonds that the title was perfect and it was rightly construed as a representation to that effect.

Powers v. Fowler, 157 Mass. 318.

This representation was evidently intended to mislead upon a material point and it can be availed of by any one to whom it was made who was induced by it to make a purchase.

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Chatham Furnace Co. v. Moffatt, 147 Mass. 403.

The fact, if it be a fact, that defendant had no intention to deceive the plaintiffs by the letter of February 6, 1890, was immaterial and inadmissible.

Com. v. Coe, 115 Mass. 481; *Spaulding v. Knight*, 116 Mass. 148; *Forbes v. How*, 102 Mass. 427, 3 Am. Rep. 475; *Parsons v. Topliff*, 119 Mass. 245; *Nash v. Minnesota Title Ins. & T. Co.* 159 Mass. 437.

One who is induced to enter into a contract by the fraud of another has a right to rescind the contract on account of that fraud.

Holbrook v. Burt, 22 Pick. 546; *Milliken v. Thorndike*, 103 Mass. 332; *Nealon v. Henry*, 181 Mass. 153; *Bassett v. Brown*, 105 Mass. 551; *Snow v. Alley*, 144 Mass. 546, 59 Am. Rep. 119; *Morse v. Woodworth*, 155 Mass. 233.

A party cannot escape liability by attempting to make good his statement after the other party has acted.

Reese v. Dennett, 145 Mass. 25.

The rule that the measure of damages was the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented to be.

Morse v. Hutchins, 102 Mass. 439.

Rescission annihilates the contract and puts the parties in the same position as if it had never existed.

Ballou v. Billings, 136 Mass. 309; *Hedden v. Griffin*, 186 Mass. 229, 49 Am. Rep. 25; *Grant v. Mellen*, 184 Mass. 335.

Knowlton, J., delivered the opinion of the court:

These cases have once before been considered by this court (see 159 Mass. 437), and the principal question then raised was whether there was any evidence of fraud on the part of the defendant. It was held that the defendant's statement in regard to the title, taken in connection with the context of the letter and the circumstances under which it was written, purported to be a representation that the defendant had examined the title to the mortgaged real estate, and had found it to be perfect. The property was subject to a prior mortgage of \$30,000, as the defendant's officers well knew. On this part of the case the only question was whether there was any evidence of fraud to submit to the jury, not whether there might be explanations which would relieve the defendant from the imputation against it. At the last trial the defendant offered to show that the words were not used in the sense in which they were understood by this court, and that its officers acted honestly, and that there was no intention on their part to state anything falsely. The evidence was rejected, and the ruling was, in substance, that in view of the admitted facts that the defendant's officers knew of the existence of the prior mortgage, and that this letter was to be used to induce persons to buy the mortgage bonds, the representation was, as matter of law, fraudulent. The exception to this ruling presents the question, what must be proved to establish a charge of an actionable, false, and fraudulent representation? On the precise question now before us the law of England has been finally

settled by the case of *Derry v. Peek*, 14 App. Cas. 337, in which it was held unanimously, that in an action of deceit there can be no recovery unless fraud is proved. In delivering the principal opinion, Lord Herschell said: "I think the authorities establish the following propositions: First. In order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly. Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief of the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth; and this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly. If fraud be proved, the motive of the persons guilty of it is immaterial. It matters not that there was no intention to cheat or to injure the person to whom the statement was made." In other parts of the opinion, and in the opinions of the other law lords in the same case and in other cases which have since been decided, it is made clear that by the law of England mere ignorance or negligence or stupidity on the part of the person making the representations does not constitute fraud if he intends honestly to tell the truth, although his statements understood according to their seeming meaning, may be ever so misleading. *Glazier v. Rolls*, L. R. 42 Ch. Div. 436; *Angus v. Clifford* [1891] 2 Ch. 449; *Le Lievre v. Gould* [1893] 1 Q. B. Div. 491. In this particular the decisions in this commonwealth are of similar import. *Tryon v. Whitmarsh*, 1 Met. 1, 35 Am. Dec. 339; *Page v. Bent*, 2 Met. 371; *Pearson v. Howe*, 1 Allen, 207; *King v. Eagle Mills*, 10 Allen, 548; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; *Fisher v. Mellen*, 103 Mass. 503; *Holt v. Stewart*, 154 Mass. 445. See also, *Page v. Parker*, 40 N. H. 47; *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Marsh v. Falker*, 40 N. Y. 562; *Chester v. Comstock*, Id. 575, note; *Cowley v. Smyth*, 46 N. J. L. 880, 50 Am. Rep. 432. There is a good reason for this rule. The general test to determine whether there is a liability in an action of tort is the question whether the defendant has by act or omission disregarded his duty. In applying this test it is always necessary first to inquire what the defendant's duty is. In an action of deceit, the defendant is ordinarily sued as one whose only relation to the transaction is that of a gratuitous informer, who had no interest in the subject to which the representations related. On the necessary allegations of the declaration he may be assumed to have answered inquiries put by a stranger, or to have volunteered statements out of apparent friendship. Under such circumstances, although he thinks that his statements will be acted upon by the inquirer, he has no higher duty than to

answer honestly and in good faith. If one makes a statement for a consideration as a part of a contract, it is his duty to be accurate, and ignorance of mistake will not relieve him from the consequences of an error. In seeking a remedy from him for a mistake so made, the plaintiff in his declaration states his relation to the transaction, and sues in contract. But one who merely answers the inquiries of a stranger, or courteously volunteers information in a matter which does not concern him, is in a position analogous to that of a gratuitous bailee of property, from whom a less degree of care is required than from a bailee for hire. He must not intentionally mislead; but if he answers honestly, to the best of his ability, he does his whole duty. If he is an ignorant, stupid man, and on that account the inquirer is led astray, it is not his fault, but the fault or misfortune of the person who relies upon him. It would be unjust to visit upon him the consequences of his ignorance in a matter in which he had no interest. If he happens to have an interest in the subject to which his representations relate it is a matter of which the law takes no cognizance in an action of deceit. It is not necessary to allege or prove it, and proof of it does not affect the rights of the parties unless the proof goes far enough to create a liability of another kind. Of course, one will be presumed to have intended his language to be understood according to its usual meaning, and in ordinary cases, in the absence of a reasonable explanation of his mistake, his testimony that he meant something different from what he said will have but little, if any, weight. But inasmuch as the question involved is what was his state of mind, and his actual intent as distinguished from his apparent intent, he is entitled to explain his language as best he can, if it is susceptible of explanation, and to testify what was in his mind in reference to the subject to which the alleged fraud relates. In this respect his expressions, whether spoken or written, are not dealt with in the same way as when the question is, What contract has been made between two persons who were mutually relying upon the language used in their agreement? *Brown v. Massachusetts Title Ins. Co.* 151 Mass. 127; *Thacher v. Phinney*, 7 Allen, 146; *Hazard v. Loring*, 10 Cush. 267; *Snow v. Paine*, 114 Mass. 520, 526; *Edwards v. Currier*, 43 Me. 474; *Norris v. Morrill*, 40 N. H. 395-401; *Gifford v. Thomas's Estate*, 62 Vt. 84, 85; *Seymour v. Wilson*, 14 N. Y. 567; *Thurston v. Cornell*, 38 N. Y. 281; *Phelps v. George's Creek & C. R. Co.* 60 Md. 536; *Berkey v. Judd*, 22 Minn. 297. In the present case we need not determine whether the excluded evidence on this subject was very important. It is obvious that, if the defendant's officers knew that their statement in regard to the title was false in the sense in which they supposed it would generally be understood, it is immaterial whether or not they had a purpose to do injury or cause loss to anybody who might rely upon it. It is enough to furnish the foundation for a liability if they used language in regard to the title which they intended should be understood as a rep-

resentation that the title was perfect, when they knew it was not perfect. *Com. v. Coe*, 115 Mass. 481; *Spaulding v. Knight*, 116 Mass. 148; *Forbes v. Howe*, 102 Mass. 427, 3 Am. Rep. 475; *Nash v. Minnesota Title Ins. & T. Co.* 159 Mass. 487. But a majority of the court are of opinion that it was competent for them to testify what their understanding and intention were in regard to the meaning of the representation, and that the presiding justice gave too broad an interpretation to our former decision in the case.

The next exception relates to the rule of damages. The presiding justice ruled that, on a rescission of the contract for fraud, the plaintiffs could recover back from this defendant the whole consideration paid for the bonds. That is the rule where the suit is between the original contracting parties. The reason of the rule is that on a rescission of a contract the contract is avoided *ab initio*, and the rights of the parties in reference to the subject-matter of it are as if no contract had ever been made. *Snow v. Alley*, 144 Mass. 546, 59 Am. Rep. 119; *Nealon v. Henry*, 181 Mass. 153; *Milliken v. Thorndike*, 103 Mass. 882; *Bassett v. Brown*, 105 Mass. 551; *Bailou v. Billings*, 186 Mass. 807-309. But the defendant in this case is a stranger to the consideration, and his relation to the contracting parties is not such as to make this reason applicable. The rule of damages in an action against a tortfeasor is that the plaintiff shall recover an amount commensurate with the wrong done him. In a suit for a fraud in a sale of personal property, the measure of damages in common cases is the difference between the actual value of the goods and their value as it would have been if the representation had been true. This will ordinarily make good the loss of the defrauded party. *Morse v. Hutchins*, 102 Mass. 489; *Page v. Parker*, 48 N. H. 363, 80 Am. Dec. 173; *Northrop v. Hill*, 57 N. Y. 351-357, 15 Am. Rep. 501. That is the rule in cases like the present, and the important question before us is whether there is anything in the facts disclosed that warrants the application of a different rule. It is clear that mere fraud of a third party which induces the purchase of goods will not give the purchaser a right to rescind the contract. If the seller is not a party to the fraud, the contract must stand: *Root v. Bancroft*, 8 Gray, 619; *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38; *Martin v. Campbell*, 120 Mass. 126; *Fort Dearborn Nat. Bank v. Carter*, 152 Mass. 84-88; *Pulford v. Richards*, 17 Beav. 87-95; *Masters v. Ibberson*, 8 C. B. 100. It is clear therefore, in such a case, that the injured party can recover damages for the injury only under the common law. Looking, then, only at the relations of the parties to this suit to each other, without regard to the conduct of the seller of the bonds, it will be conceded that there is no right of rescission and no right to recover back the consideration. If we assume, as we well may on the facts of this case, that the seller was a party to the fraud, and knowingly received the benefit of it, there is a right of rescission and a right to recover back the consideration in favor of the plaintiff as against him. But

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that right grows out of the conduct of the seller of the bonds in practicing the fraud, and it does not bring the defendant corporation into any relation to the consideration, nor make it a party to the contract, nor create any new rights in favor of the plaintiff against it. *Wyeth v. Morris*, 13 Hun, 338; *Marston v. Curtis*, 163 Mass. 290. As a preliminary to the right to sue for the consideration, there must be a return or a tender of return of the property that will put the other party *in statu quo*. The plaintiff, having made a tender of the bonds to Davis, the seller of them, who refused to receive them, made a similar tender to the defendant. There is a manifest inconsistency between an attempt to get back the consideration from Davis on the ground that the property in the bonds was returned to him by reason of the rescission and an attempt to turn over the property to the defendant without the consent of Davis, and thereby to make it accountable for the money originally paid to Davis. In rescinding a contract, and in enforcing rights growing out of such rescission, one would expect to look only to the other party to the contract. The nature and effect of rescission are such that they can have no consequences except as against the other party to the contract. The only injury which the law recognizes as done to the plaintiffs by the defendant in this case was by a false representation that the title to the property was perfect. Whatever the plaintiffs may have suffered from other causes, their loss from this cause will be made up to them if the defendant pays the difference between the value of the bonds as they were and their value as they would have been if the title had been perfect. We do not think the plaintiffs' rescission or attempt to rescind the contract on account of the fraud defeats their right to recover these damages from a third party so long as they have failed to obtain satisfaction for their injury, either by a restoration or recovery of the consideration, or otherwise. The only case relied on by the plaintiffs in support of a different rule of damages is *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25. On a hasty reading of that case, it might seem to be an authority in favor of the plaintiffs' contention on this point, but a more careful examination will show that it is not. No such question as that now before us was raised or considered in that case. The question was whether the plaintiff, who had been induced by the fraud of an agent of a life insurance company to take out a policy of life insurance, could, on discovering the fraud six months afterwards, rescind the contract, return his policy, and recover back the premium paid. He had enjoyed protection for six months under a policy which the company could not avoid, and, if he had deceased before discovering the fraud, his administrator might have collected from the company the sum of \$10,000; but it was held that he was not thereby precluded from rescinding the contract and recovering back the consideration, less the value, if any, of the insurance which he had received under the contract. It was intimated in the opin-

ion, although not decided, that he could recover back the whole consideration, without any deduction for the protection which he had before rescinding the contract. The transaction was not a sale of goods, but a contract for the most part executory. So far as the contract was still executory at the time of the discovery of the fraud, he plainly should have a right to rescind. See *Fisher v. Metropolitan L. Ins. Co.* 160 Mass. 886; *Id.* 162 Mass. 236. What the rule would be if such a policy remained in force a much longer time before discovery of the fraud was not stated, but no question was made in the case in regard to the right to recover of the agent who committed the fraud to the same extent as if the suit had been against the principal. Under the facts of that case, such a question could not successfully have been raised by the defendant. The money which was obtained by the fraud was paid into his hands by the plaintiff. On a rescission of the contract, the contract was annihilated, and, after a demand, the guilty agent could not justify under it either his payment of the money to his principal, or a longer detention of it by himself. Plainly, the plaintiff was entitled to recover back from him the money which was paid into his hands, less the deduction, if any, which ought to be made for the insurance which the plaintiff had before discovering the fraud.

The defendant contends that it should have been permitted to show, in mitigation of damages, that it had procured an assignment of the mortgage, and that it tendered a discharge of it to the plaintiffs at the trial; but we are of opinion that the ruling on this point was correct. The defendant may hold and use its mortgage in any lawful way, but the plaintiffs ought not to be compelled to receive the discharge of it in mitigation of their damages after the expiration of so long a time. If the mortgage were discharged, it would not, as matter of law, limit their recovery to nominal damages. If there had been no incumbrance, they might long ago have sold the bonds on better terms than can be obtained now. Moreover, the commission of the fraud, if fraud is proved, was a willful wrong, and the case is analogous to a willful conversion of property and an offer to return it in mitigation of damages after its condition has changed and its value has depreciated. *Stickney v. Allen*, 10 Gray, 352; *Dahill v. Booker*, 140 Mass. 308-310, 54 Am. Rep. 465; *The Bigelow Co. of New Haven, Conn. v. Heintze*, 58 N. J. L. 69; *Yale v. Saunders*, 16 Vt. 243; *Rutland & W. R. Co. v. Bank of Middlebury*, 32 Vt. 639. Practically it might be difficult in this case to measure the amount that should be allowed now on account of a discharge of the mortgage in mitigation of damages, and we are of opinion that we ought not to compel the plaintiffs to accept the tender or to make an allowance in the assessment of damages as if they had accepted it.

The evidence of J. Plympton was rightly received. The declaration in his case was sufficient to justify a recovery of damages on the theory on which his case was presented to the jury. The letter of September 8, 1890, 28 L. R. A.

from Barnes to James M. Keith, was competent. It was not only a statement that Davis said he sold bonds through Keith, but it was an assumption that what he said was true. It implied that the information had been communicated in such a way and under such circumstances as to be trustworthy, and, as against the defendant, it was in the nature of an admission that the sale had been made. As Davis said it had.

We think there is no occasion to consider more particularly the questions argued by the defendant. Such of them as are not covered by what we have already said will not be likely to arise at another trial.

Exceptions sustained.

Holmes, J., dissenting:

I am unable to agree with the decision reached by a majority of the court on the first point discussed by them. I will not in this place go into any extended discussion of general principles. If I were making the law, I should not hold a man answerable for representations made in the common affairs of life without bad faith in some sense, if no consideration was given for them, although it would be hard to reconcile even that proposition with some of our cases. But the proposition, even if accepted, seems to me not to apply to this case. The proper meaning of the words used by the defendant has been settled by this court already. 159 Mass. 437. The representation was not made in casual talk, but in a business matter, for the very purpose of inducing others to lay out their money on the faith of it. When a man makes such a representation, he knows that others will understand his words according to their usual and proper meaning, and not by the accident of what he happens to have in his head, and it seems to me one of the first principles of social intercourse that he is bound at his peril to know what that meaning is. In this respect it seems to me that there is no difference between the law of fraud and that of other torts, or of contract or estoppel. If the language of fiction be preferred, a man is conclusively presumed in all parts of the law to contemplate the natural consequences of his act, as well in the conduct of others as in mechanical results. I can see no difference in principle between an invitation by words and an invitation by other acts, such as opening the gates of a railroad crossing (*Brown v. Boston & A. R. Co.* 157 Mass. 899), or an intentional gesture, having as its manifest consequence, according to common experience, a start and a fall on the part of the person towards whom it was directed, in either of which cases I suppose no one would say that a defendant could get off by proving that he did not anticipate the natural interpretation of the sign. Of course, if the words used are technical, or have a peculiar meaning in the place where they were used, this can be shown; if by the context or the subject-matter or the circumstances the customary meaning of the words is modified, this can be shown by proof of the circumstances, the subject-matter, and the contract; but, when none of these things appears, a defendant cannot be heard to say that for

some reason he had in his mind and intended to express by the words something different from what the words appear to mean and were understood by the plaintiff to mean, and are interpreted by the court to mean, whether the action be in tort or contract.

Neither, in my opinion, are there any peculiar safeguards set up about the action for deceit. That action was given by the common law for any false statement of present facts of which the defendant took the risk, and which was followed by damage. He might take the risk at different points in different cases. A false warranty used to be laid as a deceit in tort for a false and fraudulent representation. *Clift, Ent. p. 932, pl. 40; Lib. Pl. p. 40, pl. 54, 55; Y. B. 11 Edw. IV. pl. 10*. So even an implied warranty. *Brown v. Edgington, 2 Mann. & G. 379*. See 11 *Edw. IV. chap. 6b; Keilway, p. 91, pl. 16*. Yet it was not necessary to lay the *scienter*, or, if you laid it, to prove it, for the plain reason, as *Shaw, Ch. J.*, puts it, in substance, that the defendant is answerable for the facts, however honest he may have been. *Norton v. Doherty, 8 Gray, 372, 373, 63 Am. Dec. 758; Schuchardt v. Allen, 68 U. S. 1 Wall. 359, 368, 17 L. ed. 642, 646; Williamson v. Allison, 2 East, 446; Gresham v. Postan, 2 Car. & P. 540; Denton v. Ralphson, 1 Vent. 365, 366*. In the last century an alternative form in assumpsit was introduced (*Stuart v. Wilkins, 1 Dougl. 18, 21; Lawrence, J., 2 East, 451*), and it may be that now we should require the warranty to be alleged, which has the advantage of telling the defendant more exactly what the case is against him. *Cooper v. Landon, 103 Mass. 68*. But there is no doubt about the common law. I am of opinion, as I have stated, that in a case like the present a man takes the risk of the interpretation of his words as it may afterwards be settled by the court. I am authorized to say that the chief justice agrees with the foregoing dissent.

Hollis Bowman PAGE

Grace V. COOK.

(.....Mass.....)

A promissory note on demand "payable when payor and payee mutually agree" is due within a reasonable time if the payor will not agree.

(June 21, 1895.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court after ordering a verdict for defendant in an action to recover upon a promissory note. *Judgment for plaintiff.*

The note which was sued on in the following form:

"\$500.

Boston, May 1, 1891.

"On demand, after date, I promise to pay to the order of Hollis Bowman Page, Five hundred dollars, payable when payor and payee mutually agree.

Value received.

"No.

Due.

Grace V. Cook."

NOTE—See similar case of *Smithers v. Junker (U. S. C. C. N. D. Ill.) 7 L. R. A. 264*.

The terms of the report were that judgment was to be entered for plaintiff for the amount of the note if the ruling of the court was wrong, otherwise judgment was to be on the verdict.

Messrs. Hesselstine & Hesselstine, for plaintiff:

It is incumbent upon the payor to agree within a reasonable time, because the indebtedness is one which should be met within a reasonable time. The words impose an obligation on the payee not to enforce the payment within an unreasonable time.

Where a debt is made contingent on the happening of some event, its enforcement cannot be made until that event happens, but in this case the debt was absolute from the moment the money was lent and the words concern simply the time of payment. The indorsement of the amount on the note shows that it was considered a debt by the defendant.

Sears v. Wright, 24 Me. 278; De Wolfe v. French, 51 Me. 420; Crooker v. Holmes, 65 Me. 195, 20 Am. Rep. 687; Works v. Hershey, 35 Iowa, 340.

Messrs. E. J. Jones and C. W. Cushing for defendant.

Morton, J., delivered the opinion of the court:

According to the literal construction of this note, although the defendant promises to pay the plaintiff the sum named when he demands it, he may escape the performance of his promise by refusing to agree with the plaintiff when it shall be paid. We think that it hardly could have been the intention of the parties to put it into the power of the defendant thus to avoid payment, and that it is more reasonable to construe it as meaning that it is payable when and after the payor ought reasonably to have agreed. *Hawkins v. Graham, 149 Mass. 284; Sloan v. Hayden, 110 Mass. 141; Black v. Bachelder, 120 Mass. 171; White v. Snell, 5 Pick. 426; Crooker v. Holmes, 65 Me. 195, 20 Am. Rep. 687; Works v. Hershey, 35 Iowa, 340; Lewis v. Tipton, 10 Ohio St. 38, 75 Am. Dec. 498*. The promise to pay is absolute. It is only the time of payment which is left to future agreement. Evidently, it is expected, from the tenor of the note, that the parties will agree, and that a time will be fixed, and that the note will be paid. But no time is fixed within which that agreement is to be made. The law will therefore imply a reasonable time. Besides, it is the payment, not the nonpayment of the note, for which the parties are providing. If the payor does not, within a reasonable time, agree when the note shall be paid, there is nothing unjust, nor at variance with the real meaning of the contract, in holding that the payee may thereupon demand payment, and, if the note is not paid proceed to collect it. The case of *Barnard v. Cushing, 4 Met. 280, 39 Am. Dec. 362*, is distinguishable. The question chiefly discussed in that case was whether the indorsement on the note constituted a part of it, and the court held that it did. The indorsement expressly provided, not only that the payees would receive the amount of the note when convenient for the promisors to pay, but that they would not compel its payment. In bringing suit, the payees proceeded, therefore, in direct violation of their agreement. Possibly, if the question arose now, a different

result might be reached from that arrived at in that case.

According to the terms of the report, the en-

try must be: Verdict set aside, and judgment for the plaintiff for amount of the note, with interest from the date of the writ.

KENTUCKY COURT OF APPEALS.

MERCHANTS NATIONAL BANK OF LOUISVILLE, Appt.,

J. M. ROBINSON & CO.

(.....Ky.....)

A bank cannot set off against a check by a depositor his unmatured debt to the bank although he was insolvent and had made an assignment for creditors when the check was presented and this was known to all parties.

(May 22, 1895.)

A PPEAL by defendant from a judgment of the Circuit Court for Jefferson County, Common Pleas Division, in favor of plaintiffs in an action brought to compel payment of a check drawn in their favor upon defendant by a third person who became insolvent owing the bank an unmatured claim which is sought to be set off on the deposit account. *Affirmed.*

The facts are stated in the opinion.

Messrs. Humphrey & Davis for appellants.

Messrs. Strother & Gordon, for appellees:

In Kentucky the giving of a check is an absolute assignment and appropriation of so much money in the bank to the holder of the check and upon the refusal of the bank (in funds to pay the check) to pay the same, the check holder can maintain an action against the bank for the amount of the check.

Smith v. Jones, 2 Bush, 106; *Lester v. Given*, 8 Bush, 358; *Weinstock v. Bellwood*, 12 Bush, 140; *Chambers v. Northern Bank of Kentucky*, 5 Ky. L. Rep. 124; *Deathridge v. Crumbaugh*, 8 Ky. L. Rep. 594; *Senter v. Continental Bank*, 7 Mo. App. 532; *Roberts v. Corbin*, 26 Iowa, 315, 96 Am. Dec. 146; *Fogarties v. State Bank*, 12 Rich. L. 518, 78 Am. Dec. 468; *Union Nat. Bank of Chicago v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185; *Fonner v. Smith*, 11 L. R. A. 523, 81 Neb. 107.

The bank cannot in cases of insolvency or under any other circumstances set off debts not due against the suit of the check holder.

Chambers v. Northern Bank of Kentucky, *supra*; *Exchange Bank v. Stone*, 8 Ky. L. Rep. 603; *Deathridge v. Crumbaugh*, *supra*; 13 Am. & Eng. Encyclop. Law, p. 578; Boone, Banking, § 65; *Commercial Nat. Bank v. Proctor*, 98 Ill. 558; *Merchants Nat. Bank of Chicago v. Ritzinger*, 20 Ill. App. 27; *State Sav. Assn. v. Boatmen's Sav. Bank of St. Louis*, 11 Mo. App. 292; *Fogarties v. State Bank*, *supra*; Morse, Banks & Banking, § 329; *Roberts v. Corbin*, *supra*; Dan. Neg. Inst. p. 551; *Fourth Nat. Bank of Chicago v. City Nat. Bank of Grand Rapids*, 68 Ill. 398; 11 Cent. L. J. 881; *McGrade v. German Sav. Inst.* 4 Mo. App. 880;

NOTE.—The question above presented can hardly arise except in states which recognize the right of the holder of a check to enforce against the bank. But in those states several decisions on this question of set-off have been made and are found in the note to *Nashville Trust Co. v. Fourth Nat. Bank of Nashville* (Tenn.) 15 L. R. A. 710.

Dickinson v. Coates, 79 Mo. 250, 49 Am. Rep. 228.

Guffy, J., delivered the opinion of the court:

On the 9th of June, 1892, J. M. Robinson & Co. instituted this action in the Jefferson court of common pleas against the Merchants' National Bank of Louisville, alleging in substance, that George W. Wicks & Co. executed and delivered to them, on the 2d day of November, 1891, their check on the defendants' bank, by which they directed said defendant to pay to plaintiffs or order, the sum of \$215.60, absolutely and without condition; that, on the 3d day of November, 1891, plaintiffs duly indorsed said check, and presented the same at the office of the defendant, and demanded payment thereof, when defendant refused to pay the same, and the same, or any part thereof, has not been paid, and said check was then duly protested for nonpayment; that at the time said check was drawn and presented for payment as aforesaid, and for many months before said date, said George W. Wicks & Co. were and had been customers and depositors of said bank, and on said 2d of November, 1891, there was on deposit at said bank to the credit of said George W. Wicks & Co., and belonging to them, a sum largely in excess of the amount of said check, to wit, the sum of at least \$1,800, which sum remained and was so on deposit in said bank on the 3d of November, 1891, and was so on deposit when said check was presented for payment; and that a refusal of the defendant to pay same was wrongful, and defendant thereby became and is indebted to plaintiffs in the said sum of \$215.60, with interest from the 3d of November, 1891, for which sum plaintiffs pray judgment. On the 19th of September, 1892, defendant filed its answer to said petition, containing two paragraphs. The first paragraph, having been withdrawn, need not be noticed. The second paragraph of the answer averred in substance that the said George W. Wicks & Co. were insolvent at the time of the execution of said check, and, on the said 2d of November, made and executed a general deed of assignment for the benefit of their creditors, and ceased to carry on business, and have ever since been wholly insolvent; that the fact of said insolvency and assignment was known on the 2d of November, 1891, to the plaintiffs and to the defendant. Said answer also showed an indebtedness of George W. Wicks & Co. to the defendant at the time of the execution of said check of more than \$6,000, no part of which, however, was due at the time of the presentation of said check. Defendant further alleged that, on the 3d of November, before it had any notice of the existence of said check, or before same was presented, it determined to and did exercise its right to set off its indebtedness to said Wicks & Co. by reason of their deposit with it against the said debts due from Wicks & Co. to it, and it was claiming the said right at the time of the presentation

of said check to it, and has ever since claimed said right, and equitable right of set-off, and unless it is allowed to exercise same it will lose its said debt, exceeding \$6,000; and that the other parties to said indebtedness are all insolvent, and nothing can be made out of them, and prays that the cause be transferred to equity. A demurrer was sustained to the answer, and, defendant failing to plead further, judgment was rendered in favor of plaintiffs for the amount claimed, and to reverse that judgment this appeal is prosecuted.

The only question involved is the right of appellant to set off the indebtedness of Wicks & Co. to it against the amount due from the appellant to its depositor, Wicks & Co. No other defense is sufficiently pleaded. Counsel on each side have cited numerous authorities, and it may be true that there is some conflict of authorities in different states. Appellant insists that, inasmuch as the drawers of the check were and still are insolvent, it had a right to exercise the right of set-off, although the debts owing to it from Wicks & Co. were not due at the time the check was given and payment demanded, and refers to the cases of *Kentucky Flour Co. v. Merchants' Nat. Bank*, 90 Ky. 225, 9 L. R. A. 108, and *Bank v. Jackson*, 10 Ky. L. Rep. 1061. An examination of these cases will show that the contest was between the assignee, for the benefit of creditors of the depositors and the bank. An assignee for the benefit of creditors occupies no better position than his assignor, and in a contest between such assignee and a bank it was held that the bank might set off the debt due the assignor against a depositor with an unmatured note due it from such assignor, but a different rule prevails when the contest is between the holder of a depositor's check and the bank on which it is drawn. In the case in 90 Ky. pages 227 and 228, 9 L. R. A. 109,

relied on by appellant, the following language is used: "It is contended, however, that a bank stands in a different attitude from a mere individual, because its depositor would have the right to check out his deposits at any time prior to the assignment, and the bank would have no right to refuse it upon the ground that he was owing it upon an unmatured debt. If this be so, and it doubtless would be in case checks were given to third parties,—yet we fail to see how it can affect the question here."

It thus clearly appears, if the contest had been between the holder of the check of the Kentucky Flour Company on the appellee bank, the court would have adjudged in favor of the holder of the check. The case of *Graham v. Tilford*, 1 Met. (Ky.) 112 (not referred to by counsel), seems to be an authority in point against appellant's contention. In the case *supra*, it appears that McMurtry held an account on Graham, and assigned the same to Tilford, etc., who brought suit thereon. Graham answered and sought to set off the account with an unmatured note on McMurtry, which had been assigned to him before he had notice of the assignment by McMurtry to Tilford, etc., of the account on him. The insolvency of McMurtry was admitted, but the court held that Graham could not set off the demand against him with the note he held on McMurtry for the sole reason that at the time he had notice of the assignment by McMurtry of the account to Tilford, etc., the note he, Graham, held on McMurtry had not matured, but that, if the contest had been between Graham and McMurtry, the set off would have been allowed. The law of this state is that an unmatured debt cannot be set off against a bona fide assignee for value of a demand due from the defendant to the assignor.

The judgment of the court below is therefore affirmed.

TEXAS SUPREME COURT.

HOUSTON & TEXAS CENTRAL R. CO.,

Appl.

v.

G. Duke CRAWFORD.

(.....Tex.....)

1. An order directing possession of a railroad to be delivered by a receiver to a purchaser subject to the payment of such claims against the receiver as may be established before the court which appointed him, within a reasonable time, does not make the purchaser liable for any claims that are not thus established in the court.

2. Earnings of a railroad while operated by a receiver after sale and

NOTE—The power to give priority to operating expenses of a railroad in receivership over a mortgagee's claims against it has become too well settled for dispute, but the question involved in the above case as to the lien of claims of creditors against a railroad in the hands of purchasers after a receiver's discharge, based on his diversion of the earnings seems to be a novel one.

As to the power of a receiver of a purely private corporation, as distinguished from a railroad company, to create liens on its property, see note to *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* (C. C. S. D. Ill.) 16 L. R. A. 608.

conveyance are subject to an equitable lien for claims arising out of the operation of the road, and a diversion thereof by the receiver to betterments upon the property will make the new owner liable after the receiver's discharge for the amount of such earnings to prior creditors of the railroad company whose claims have not been paid by the receiver.

3. Failure to present to a federal court which appointed a receiver of a railroad company a claim against him, does not preclude an action in a state court after his discharge to enforce a liability of a purchaser of the railroad for a debt against the old company.

(May 27, 1895.)

QUESTIONS certified by the Court of Civil Appeals, First Supreme Judicial District, for the opinion of the Supreme Court in an action brought to recover damages for personal injuries alleged to have resulted from the negligence of a receiver while in possession of property which was subsequently transferred to defendant. *Answers favorable to plaintiff returned.*

The following is a copy of the statement and question certified:

To the Supreme Court:

The appellee brought this suit in the district

court of Harris county on March 22, 1893, against Charles Dillingham as receiver of the Houston & Texas Central Railroad Company, to recover damages for injuries received by him on the 17th day of May, 1892, while in the employ of the defendant as a switchman in the company's switchyard at Houston. On May 25, 1893, he filed a supplemental petition against the Houston & Texas Central Railroad Company and alleged that since the filing of the original petition said railroad had passed out of the hands of said receiver and was in the hands of the company, and during the time the railroad was in the hands of the receiver a very large amount of its earnings chargeable with plaintiff's claim for damages had, under the orders of the court in which the receivership was pending, been diverted into betterments of the property, and that the defendant had received the property charged with a lien in favor of plaintiff for his damages, and reiterating the allegations contained in his original petition he prayed for judgment against the defendant company.

Dillingham pleaded his discharge as receiver on the 10th day of April, 1893. The defendant company pleaded that Frederick P. Olcott had become the purchaser of said railroad at a sale thereof by a decree of the circuit court of the United States for the eastern district of Texas in a cause therein pending and in which said receivership was, and that said Olcott and his associates organized the defendant company August 1, 1899, for the purpose of owning and operating said railroad, which said Olcott conveyed to the defendant company on April 1, 1890, and which was turned over to the defendant company by the receiver by order of said court on April 10, 1893; and that the defendant received said railroad freed from all charges except as provided by the decree of said court directing the same to be delivered to it; and that plaintiff's claim was not a charge thereon.

On trial there was a verdict and judgment for damages against the company, and that appellee take nothing by his suit against the receiver, Charles Dillingham, from which judgment the defendant, the Houston & Texas Central Railroad Company, has appealed, and said appeal is now pending in this court.

At a regular term of the circuit court of the United States in and for the eastern district of Texas, at Galveston, in consolidated cause No. 198 in equity then pending in said court entitled Nelson S. Easton and James Rintoul, Trustees, and the Farmer's Loan & Trust Company, Trustee, *vs.* The Houston & Texas Central Railway Company *et al.*, which was a suit to foreclose certain mortgages on the properties of the defendant company and wherein receivers had been appointed and were in charge of and operating the railroad belonging to the defendant, the said circuit court rendered a final judgment and decree of foreclosure on the 4th day of May, 1888, and directed the sale of the Houston & Texas Central Railway and all the corporate rights and franchises of said railway company, adjudging that the purchaser or purchasers of said property at such sale should hold, possess, and enjoy the same, and all the rights, privileges, immunities, and franchises appertaining thereto, as fully and completely as the Houston & Texas Central Railway Com-

pany then held or enjoyed, or at the time of the making of the mortgage, or at the respective times of making the several mortgages in said decree foreclosed, held and enjoyed, or is, or was, entitled to hold and enjoy, the same, and further directed the manner in which the funds arising from such sale should be distributed.

The sale was made as decreed on September 8, 1888, and the master made due report thereof to said court on September 20, 1888, showing the sale of said Houston & Texas Central Railroad to Frederick P. Olcott. On December 4, 1888, said sale was confirmed by the court, and the master commissioner ordered to execute a deed for said property.

By the decree of said court rendered upon the petition of F. P. Olcott, the purchaser of said property, on December 24, 1890, the receiver was directed to deliver to said purchaser, or his assigns, the property aforesaid, subject to and charged with the obligations and liabilities, contractual or resulting from torts, or otherwise incurred by the receiver or receivers, as the same should be fixed and determined by said court, and subject to the right which the court reserved to charge upon the property, or any part thereof, the payment of any amount that should be found and determined by the court to be due and payable by reason of intervening petitions filed in said cause prior to the decree of foreclosure rendered May 4, 1888, and entitled to priority over the mortgage, and the bills in the case were retained for the purpose of investigating such obligations, liabilities, and petitions, and for such other purposes as might seem needful.

Suspensive orders were made in said cause by said court preventing the delivery of said railroad property by the receiver to the said Olcott pending appeal from a decree of the court upon the intervention of Stephen W. Carey *et al.* *vs.* The Houston & Texas Central Railway Company *et al.*, which orders were afterwards on March 29, 1893, vacated and set aside.

By a decree of said court entered April 4, 1893, amending its decree of December 24, 1890, and finally directing the receiver to deliver the possession of all of said property to the purchaser or his assigns, it was among other things ordered as follows:

"It is further ordered that all claims and demands of every nature, arising out of the operation and management of the properties purchased by F. P. Olcott at the sale made in the above-entitled cause, pursuant to the final decree of this court therein, in respect of which any lien upon the funds derived from said sale, or upon money or property which came to the hands of the receiver or receivers, or upon the property sold to said Olcott, is claimed, whether against said receiver or receivers or against the mortgagor company herein, shall be presented and prosecuted by intervention in this court prior to the first day of October, 1893; and all such claims and demands as may not be presented on or before the date last mentioned above, by intervention as aforesaid, shall be declared stale, and shall not be a charge upon, or enforced against the property herein ordered to be delivered to said Olcott, or his assigns, or said funds derived

from said sale, or said moneys or property which came to the hands of the receiver or receivers."

This decree further directed that notice of the order should be given by publishing the same once in two weeks for the period of three months prior to the first day of October, 1893, in the "Houston Post" and in the "Dallas Morning News," and by written and printed notices posted publicly in each station-house along the line of said railway. The surplus earnings and increase of the road during the receivership, after paying operating expenses, were appropriated to the improvement of the road, and exceeded the amount claimed by plaintiff and all other claims which accrued during the receivership.

On April 10, 1893, the receiver delivered the property to the purchasers, who legally conveyed and delivered the same to appellant, the Houston & Texas Central Railroad Company, a corporation which had been duly organized under the laws of the state of Texas.

The plaintiff received the injuries alleged by him on May 17, 1892, while he was in the employment of Receiver Dillingham.

The following question is certified for the decision of the supreme court:

Did the appellant receive said railroad from the receiver freed from the claim of the appellee?

Messrs. Baker, Botts, Baker & Lovett, for appellant:

The decree of foreclosure, under which the purchaser acquired the property, and the decree confirming the sale thereunder, constituted the measure of the purchaser's liability, and he cannot be burdened with any of the obligations of the old company, or with any of the costs and expenses incurred by the court in the administration of the property, unless charged therewith by the terms of the decree under which he bought. The conditions stipulated in the decree form part of the consideration of the purchase, and define the extent of the burdens assumed by the purchaser.

Texas & P. R. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81; *Olcott v. Headrick*, 141 U. S. 543, 35 L. ed. 851; *Jesup v. Wabash, St. L. & P. R. Co.* 44 Fed. Rep. 663; *Gluck & Becker, Receivers*, 423.

A court of equity, administering property committed to its custody pending foreclosure of mortgages thereon and sale thereof, may lawfully decree that the purchaser shall take such property free from all claims except such as shall be established in said court; and may lawfully prescribe a time within which all persons having claims against such trust fund, whether by reason of the obligations of the mortgagor, or by reason of claims against the court's receiver, or other expenses of administration, shall file their claims in said court, and that unless so filed such claims shall not be entitled to participate in the funds realized from such sale, and shall not be a charge upon such property in the hands of the purchaser or his assigns. It is in its nature a proceeding *in rem*; and upon notice of such proceedings all parties are bound by the disposition made by the court of the funds.

Texas & P. R. Co. v. Johnson, supra; *Lead-*
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ville Coal Co. v. McCreery, 141 U. S. 475, 35 L. ed. 824; *Gluck & Becker, Receivers*, p. 420; *Pine Lake Iron Co. v. LaFayette Car Works*, 53 Fed. Rep. 858.

The decrees of the circuit court of the United States, under which appellant holds the property, were legitimately and properly made by that court in the exercise of full jurisdiction of the subject-matter, and appellee having notice thereof, they constitute a complete and effectual bar to any action by him against appellant on account of his claim against such receiver.

The court denied the appellant the title, right, privilege, and immunity claimed by it under said judgments and decrees.

These decrees were effectual to deliver the property to the purchaser free from any liabilities whatever incurred in administration.

Texas & P. R. Co. v. Johnson, and *Jesup v. Wabash, St. L. & P. R. Co. supra*; *Central Trust Co. of New York v. St. Louis, A. & T. R. Co.* 59 Fed. Rep. 885.

The question is not affected by the Texas statute, approved April 2, 1887, relating to receivers.

Gen. Laws 1887, chap. 181, p. 119; *Fordyce v. Beecher*, 2 Tex. Civ. App. 29; *Kendall v. Creighton*, 64 U. S. 23 How. 105, 16 L. ed. 423; *Hyde v. Stone*, 61 U. S. 20 How. 175, 15 L. ed. 875; *Payne v. Hock*, 74 U. S. 7 Wall. 425, 19 L. ed. 260.

Nor is the question affected by the provisions of the Texas Statutes of 1887 (secs. 6, 14, 15), declaring, in effect, that the earnings of the property, while in the custody of the receiver, shall be applied first to the payment of costs and expenses of the receivership, including all liabilities incurred by the receiver, etc.

Gen. Laws 1887, chap. 181, p. 119; *Ryan v. Hays*, 62 Tex. 42.

This is a personal judgment against the Houston Texas Central Railroad Company for a tort which the proof shows that company did not commit; and it fails to show any contractual relations between the parties out of which the company's liabilities could grow; hence it is not liable, unless made so by express statute.

Farmers Loan & T. Co. v. Central Railroad of Iowa, 7 Fed. Rep. 587; *Davis v. Duncan*, 19 Fed. Rep. 477.

When property is in the custody of any court for administration under a receivership, it is the duty of all persons claiming to be interested, in it, or its earnings, or the proceeds of sale, to go into that court and set up their rights.

Central Trust Co. of New York v. East Tennessee, V. & G. R. Co. 30 Fed. Rep. 895; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Brown v. Brown*, 71 Tex. 357; *Dillingham v. Anthony*, 8 L. R. A. 694, 73 Tex. 47.

Mr. F. F. Chew, Sr., for appellee.

Brown, J., delivered the opinion of the court:

The circuit court of the United States for the eastern district of Texas, sitting at Galveston, placed the property of the Houston & Texas Central Railroad Company in the hands of Charles Dillingham, as receiver, who took possession of and operated it under the orders

of that court. On the 4th day of May, 1888, the said court foreclosed mortgages upon said road, and ordered the same to be sold. On the 8th day of September, 1888, the sale was made, F. P. Olcott being the purchaser, the sale was confirmed by the court, December 4, 1888, and the master was ordered to make deed to the purchaser. December 24, 1890, upon petition of the purchaser, Olcott, the said court ordered the receiver to deliver the possession of the property to him, "subject to and charged with the obligations and liabilities, contractual or resulting from torts, or otherwise, incurred by the receiver or receivers, as the same should be fixed and determined by said court, and subject to the right which the court reserved to charge upon the property, or any part thereof, the payment of any amount that should be found and determined by the court to be due and payable by reason of intervening petitions filed in said cause prior to the decree of foreclosure rendered May 4, 1888, and entitled to priority over the mortgage; and the bills in the case were retained for the purpose of investigating such obligations, liabilities and petitions, and for such other purposes as might seem needful." The execution of this order was suspended by order of the court during the pendency of an appeal by Carey *et al.* from an order on an intervention in said cause, until the 4th day of April, 1893, when a final order was made for the delivery of the property to the purchasers which last order provided that "all claim, and demands, of every nature, arising out of the management and operation of the properties purchased by F. P. Olcott at the sale made in the above-entitled cause pursuant to the final decree of this court therein, in respect to which any lien upon the funds derived from said sale, or upon money or property which came to the hands of the receiver or receivers, or upon the property sold to said Olcott, whether against the receiver or receivers, or upon the property sold to said Olcott, is claimed, whether against the said receiver or receivers, or against the mortgage company, shall be presented and prosecuted by intervention in this court prior to the 1st day of October, 1893; and all such claims and demands as may not be presented on or before the date last mentioned above, by intervention as aforesaid, shall be declared stale, and shall not be a charge upon or enforced against the property herein ordered to be delivered to said Olcott or his assigns, or said funds derived from said sale, or said moneys derived from said sale, of property which came to the hands of said receiver or receivers." On the 10th day of April, 1893, the receiver delivered to the purchaser the property, who conveyed and delivered the same to the defendant, a corporation organized under the laws of Texas. March 22, 1893, Crawford filed a suit in the district court of Harris county against Charles Dillingham, as receiver, to recover damages for injuries alleged to have been received while in his employ as receiver of the Houston & Texas Central Railroad, the injuries being inflicted on the 17th day of May, 1892,—after the sale to Olcott, and its confirmation, but before delivery of the property. After the delivery of the

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property to the Houston & Texas Central Railroad Company, Crawford made it a party to the suit, alleging that it had purchased the road charged with his claim, and that the revenues and earnings of the railroad while in the hands of the receiver were applied to the making of permanent improvements upon the railroad. It is not stated whether the receipts of the road thus invested were derived from its operation after the sale, or before. The statement accompanying the question contains this language: "Surplus earnings and increase of the road during the receivership, after paying operating expenses, were appropriated to the improvement of the road, and exceeded the amount claimed by the plaintiff, and all other claims which accrued during the receivership." We presume that this refers to receipts before as well as after the sale.

Question: Did the appellant, the railroad company, receive said railroad from the receiver freed from the claim of the appellee?

Three questions arise out of the foregoing statement, necessary to be considered in answering the question submitted: First. Is the purchaser liable in this case, under the orders of the United States circuit court? Second. Is the purchaser liable to the plaintiff, under the facts, independent of the orders of the circuit court? Third. If the purchaser is liable to plaintiff, is the claim barred by a failure to present the claim to the United States circuit court?

As a general rule, the purchaser of a railroad at a sale made under an order of the court holding the custody of the property by a receiver takes the property free from claims against the receiver arising out of the operation of the road; but the court ordering the sale may impose upon the purchaser liability for such debts, as a part of the consideration of his purchase. *Hicks v. International & G. N. R. Co.* 62 Tex. 41; Beach, Receivers, § 735. A purchaser under such order can only be held liable according to its terms. In this case the order directing that possession be delivered to the purchaser prescribed that he should take the property subject to the payment of such claims against the receiver as might be established before that court within a given time. This was a condition of liability, and the purchaser cannot be held by virtue of the order alone, except for the claims so ascertained and allowed. *Olcott v. Headrick*, 141 U. S. 548, 35 L. ed. 851. It follows that the purchaser cannot be held in this case under the orders of the court, the plaintiff not having presented his claim in accordance with the orders imposing the liability.

The second question presents greater difficulty. We have carefully examined the authorities, and find no case like this, nor in any text-book a discussion of the question. We must therefore determine it upon general principles applied by courts of equity in analogous cases. From the statement it appears that the sale was made and confirmed in 1888, and in the order of confirmation the master is directed to make deed of conveyance to the purchaser. In the subsequent orders there is no mention made of the matter of making a deed, from which we conclude that the deed was made at the time of confirmation, in pursuance of that

order, and also that the purchase money was paid,—perhaps arranged as a credit on the mortgages, which was legitimate. *Ryan v. Hays*, 62 Tex. 50. The sale, confirmation, payment, and deed clearly placed the title in the purchaser; and the court thereafter, in continuing the property in the hands of the receiver, held it as the property of the purchaser. The old company and the mortgagees, under whose mortgage the foreclosure was had, no longer had any right in the property. Their rights were in the proceeds of sale. When a railroad is in the hands of a receiver by virtue of orders of a court of competent jurisdiction, the claims arising out of the operation of the road by the receiver, whether under contract or for tort, have right to payment out of the revenue accruing from the operation of the road, superior to the lien of prior mortgages, or other debts, and in case the funds arising from that source be by the receiver invested in permanent and valuable improvements upon the property, and the railroad be, without sale, returned to the owner, such owner will be liable for all such claims against the receiver, to the extent of the funds so invested. Id. 42; *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421. The plaintiff was entitled to have the earnings of the road, while operated by the receiver after the sale and conveyance to the defendant, applied to the satisfaction of his claim; and this fund was diverted from its proper application, the payment of this claim and invested in betterments upon the property of the defendant. The improvements made by the receiver after the sale to Olcott, and the confirmation of that sale, added to the value of the property, over and above what it was at the date of the purchase. All improvements made before the sale were included in, and paid for in, the price bid by Olcott; but subsequent improvements were not so included, and not so paid for by him. These improvements, being made with earnings of the road under the management of the receiver, were the results of a diversion of that fund from the payment of claims against that receiver, which claims had a prior equitable lien upon that fund; and the railroad company, the defendant, having received the benefit of that fund, is liable to the plaintiff, to the extent of its investment in such betterments after Olcott's purchase, the same as if it had been the original owner of the property which had been turned back under the order of the court without a sale.

The plaintiff had the right to sue the receiver in the state courts, under the act of congress, without the consent of the circuit court which appointed him, which jurisdiction could not be directly or indirectly taken from the state court by the United States circuit court. If the court that appointed the receiver had retained jurisdiction of the property, and continued its receiver until the termination of the suit in the state court, the judgment of the latter must have been enforced by the former; but having discharged its receiver, and turned over the property to the purchaser, its jurisdiction ceased, and the state court had the power to proceed to adjudicate the rights of the parties and enforce its own judgment according to the laws of the 36 L. R. A.

state. *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421; Id. 151 U. S. 81, 38 L. ed. 81. The plaintiff's claim was not affected by a failure to present it to the court which appointed the receiver.

We answer the question submitted, that, under the facts stated, *the defendant is liable to the plaintiff to the extent that improvements were made with funds derived from the operation of the road after the title was vested in Olcott, who purchased at the sale.*

MUTUAL LIFE INSURANCE CO. OF NEW YORK, *Plff. in Err.*,

Elizabeth K. SIMPSON.

(.....Tex.....)

Breach of warranty that the insured had never had "headaches, severe, protracted or frequent," is established by proving that he had had frequent sick headaches for many months prior to the contract at irregular intervals, being accompanied by vomitings and pain in the region of the chest and lasting from six to eighteen hours, although these headaches did not indicate a vice in his constitution or have any bearing on his general health or continuance of life.

(June 14, 1895.)

ERROR to the Court of Civil Appeals, First Supreme Judicial District, to review a judgment affirming a judgment of the District Court for Harris County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of life insurance. *Reversed.*

The facts sufficiently appear in the opinion. *Mr. George Goldthwaite, with Messrs. Ewing & Ring, for plaintiff in error:*

The answers of the assured in the application for insurance having been incorporated in the policy as part of its consideration, the literal truth was warranted and the policy avoided by their falsity, without regard to the materiality thereof to the risk; wherefore upon the undisputed evidence that assured had had headaches contrary to his warranty in that particular, the company was entitled to the verdict as matter of law.

Equitable L. Assur. Soc. of the United States v. Hazelwood, 7 L. R. A. 217, 75 Tex. 338; *Mittemaurice v. Mutual L. Ins. Co. of New York*, 84 Tex. 61; May, Ins. §§ 156, 300; *Mutual L. Ins. Co. of New York v. Nichols* (Tex.) 24 S. W. Rep. 910.

The assured did not only warrant that he had not been an habitual drinker of intoxicants, but that, according to his conduct, action, or habit in the past, he had never drunk at all. This is the natural and obvious meaning of the language, made manifest from the context, and it was overwhelmingly shown to be false.

NOTE.—For other cases somewhat similar to the above, see *White v. Providence Sav. L. Assur. Soc. of New York (Mass.)* 27 L. R. A. 386; *Mutual Ben. L. Ins. Co. v. Robison* (C. App. 8th C.) 22 L. R. A. 325; *Manufacturers' Acc. Indemnity Co. v. Dorgan* (C. App. 6th C.) 22 L. R. A. 620.

Mutual L. Ins. Co. of New York v. Nichols, *supra*; *Mutual L. Ins. Co. of New York v. Tillman*, 84 Tex. 85; *Equitable L. Assur. Soc. of United States v. Hazelwood*, *supra*; May, Ins. § 800.

While it may be true that occasional indulgence is not habitual drinking, yet the charge was erroneous and misleading; it was not applicable to the issue tendered by the answer, or the case made by the evidence.

Western U. Teleg. Co. v. Kendzora, 77 Tex. 257; *Wegner Bros. v. Biering*, 78 Tex. 89; *Giddings v. Baker*, 80 Tex. 808; *Comminge v. Stevenson*, 78 Tex. 645; *Houston & T. O. R. Co. v. Rider*, 62 Tex. 270.

The first cardinal rule as to construction of contracts is to ascertain the intent; the second is to apply to words their "ordinary and popular meaning" in arriving at the intent; the third is to arrive at the intent from the whole of the agreement.

Lawson, Cont. §§ 886-889.

The insurance contract is no exception; the competency of the parties to make the truth of the statements by the assured a warranty is established by the consensus of authority, and is not to be doubted. The effect of the warranty is not an open question in this court.

Equitable L. Assur. Soc. of United States v. Hazelwood, 7 L. R. A. 217, 75 Tex. 345; May, Ins. § 300.

The question propounded was specific, unambiguous, and falsely answered by the unconverted evidence.

Providence L. Assur. Soc. v. Rentlinger, 68 Ark. 528; *Mutual L. Ins. Co. of New York v. Arhelger* (Ariz.) 23 Ins. L. J. 606; *Standard L. & Acc. Ins. Co. v. Martin*, 138 Ind. 376.

Mcurs. Baker, Botts, Baker & Lovett, for defendant in error:

Questions in the application for life insurance, and answers thereto, as to whether the applicant ever had "headaches, severe, protracted or frequent," and as to the "particulars of any illness, the date, duration, and remaining effects thereof," and as to whether the applicant is in "perfect health, and so far as he knows or believes," have reference only to such diseases or ailments as indicate a vice in the constitution, or are so serious as to have some bearing upon the general health and the continuance of life, or such as according to common understanding would be termed a "disease," and not to a mere ailment or illness not of a character to indicate a vice in the constitution, or so serious as to have some bearing upon general health or continuance of life, such as to common understanding would be called "disease."

Cook, Life Ins. §§ 27, 28; *Connecticut Mut. L. Ins. Co. v. Union Trust Co. of New York*, 112 U. S. 250, 28 L. ed. 708; *Knickerbocker L. Ins. Co. v. Trefz*, 104 U. S. 197, 26 L. ed. 708; *Peacock v. New York L. Ins. Co.* 20 N. Y. 298; *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274; *Cushman v. United States L. Ins. Co.* 70 N. Y. 72.

Courts look with disfavor upon forfeitures, and will construe all the conditions of the contract and the obligations imposed, liberally in favor of the insured, and strictly against the insurer.

Equitable L. Assur. Soc. of United States v. 28 L. R. A.

Hazelwood, 7 L. R. A. 217, 75 Tex. 338; *Alabama Gold L. Ins. Co. v. Johnston*, 80 Ala. 467, 60 Am. Rep. 112; *Snyder v. Farmers Ins. & Loan Co.* 18 Wend. 92.

The questions and answers in the application, in reference to drinking wines, spirits, or malt liquors, have no reference to a single or incidental use of such intoxicants; and the questions and answers in the application in reference to former habit of drinking wine, spirits, or malt liquors have reference to formal habitual drinking thereof, and not to occasional drinking thereof, nor to occasional excessive indulgence and intoxication, provided such former drinking was not "habitual" in the ordinary meaning of that term.

Cook, Life Ins. § 86; *Knickerbocker L. Ins. Co. of New York v. Foley*, 105 U. S. 350, 26 L. ed. 1055; *Meacham v. New York State Mut. Ben. Ass.* 120 N. Y. 237; *Van Valkenburgh v. American Popular L. Ins. Co.* 70 N. Y. 605; *John Hancock Mut. L. Ins. Co. v. Daly*, 65 Ind. 6.

A statement that the applicant is in "good health" may be regarded as equivalent to a statement that he is free from disease. But even regarded as a warranty, such a statement is not falsified by proof of the existence of a mere temporary ailment, unless it be such as to indicate a vice in the constitution, or be so serious as to have some bearing upon the general health and the continuance of life, or such as, according to common understanding, would be called a disease.

Cook, Life Ins. §§ 27, 28; *Knickerbocker L. Ins. Co. v. Trefz*, 104 U. S. 197, 26 L. ed. 708; *Connecticut Mut. L. Ins. Co. v. Union Trust Co. of New York*, 112 U. S. 250, 28 L. ed. 708; *Goucher v. Northwestern Traveling Men's Ass.* 20 Fed. Rep. 596; *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 44 Am. Rep. 372; *Higbie v. Guardian Mut. L. Ins. Co.* 58 N. Y. 603; *Galbraith v. Arlington Mut. L. Ins. Co.* 13 Bush, 29; *Illinois Masons Ben. Soc. v. Winthrop*, 85 Ill. 537; *Peacock v. New York L. Ins. Co.* 20 N. Y. 298; *Cushman v. United States L. Ins. Co.* 70 N. Y. 72.

The truth of statements by the insured as to his use of intoxicating liquors is, generally speaking, one of fact. But the expressions used in this connection have to some extent received judicial construction. Thus, a statement by the insured that his habits are temperate is declared not to imply total abstinence; and so a statement that he never uses intoxicating liquors is not falsified by proof of a single or incidental use, the expression having reference to a customary and habitual use.

Cook, Life Ins. § 86; *Knickerbocker L. Ins. Co. of New York v. Foley*, 105 U. S. 350, 26 L. ed. 1055; *Northwestern Mut. L. Ins. Co. v. Muskegon Nat. Bank*, 122 U. S. 501, 30 L. ed. 1100; *Van Valkenburgh v. American Popular L. Ins. Co.* 70 N. Y. 605; *Meacham v. New York State Mut. Ben. Ass.* 120 N. Y. 237; *John Hancock Mut. L. Ins. Co. v. Daly*, 65 Ind. 6; *Anna L. Ins. Co. v. Ward*, 140 U. S. 76, 35 L. ed. 371.

Alexander, Special Judge, delivered the opinion of the court:

This was a suit by Elizabeth K. Simpson against the plaintiff in error, to recover on a life insurance policy insuring the life of her

husband, William Simpson, in the district court of Harris county, in which she recovered judgment on a trial before a jury, which was, on appeal, affirmed by the court of civil appeals; and on application of the insurance company, a writ of error has been granted. The insurance company defended on the ground, among others, that there was a breach of the warranties made by the assured on the faith of which the policy was issued, and that it was thereby avoided. The record discloses that, preliminary to the insurance, and as a basis thereof, inquiry was made of the applicant for insurance, as follows: "Have you ever had any of the following diseases?" Then follow inquiries as to a variety of ailments, some of which are universally known to be fatal, or likely to affect the duration of life, such as "consumption," "spitting or coughing of blood," "paralysis," "apoplexy," and "disease of the heart." There are, also, inquiries made as to certain other physical disabilities, not necessarily or probably coming within the category above mentioned, such as "frequent or difficult urination," "dizziness," "palpitation of the heart," "shortness of breath," "headaches, severe, protracted, or frequent." To the inquiry as to the last-mentioned, the assured answered: "No."

It is conceded that the answers were warranties, and, if untrue, that the policy was avoided, without reference to their materiality as to the risk. The evidence shows that for many months prior to the contract, at irregular intervals, but frequently, the assured had what is designated in the evidence as sick headache; that it was severe, accompanied by vomitings, and a pain in the region of the chest, which disability continued from six to eighteen hours, but after sleep, which followed the vomitings, a normal condition existed. It also appears that all of these spells were preceded by excessive work and fatigue, and loss of sleep, which are assigned by the witness, plaintiff below, as the cause thereof, and it sufficiently appears that the assured was otherwise a man of robust health.

The district court charged the jury to find for plaintiff, "unless . . . the assured, in his application and examination, upon which the policy was issued, touching his drinking wine, spirituous and malt liquors, and to what extent, and his former habit of drinking wines, spirituous and malt liquors, answered falsely, or unless they believed that in such application, touching whether assured ever had diseases, such as headaches, severe, protracted, or frequent, and the particulars and duration of same, and as to his being in perfect health, the said assured answered falsely, in which case you will find for defendant. But you are charged that temporary illness of assured, in the course of everyday life, brought on by excessive exercise or overwork, is not embraced in said application, nor is an occasional drink of spirituous, vinous, or malt liquor embraced in the said application; but the answers in said application have reference to such diseases or ailments as indicate a vice in the constitution, or are so serious as to have some bearing on the general health, and such as, 28 L. R. A.

according to general understanding, would be called a disease. And you are charged that the questions and answers, respecting the drinking of spirituous, vinous, or malt liquors by assured, and former habits, mentioned in said application, have no reference to an occasional drink taken, nor to occasional indulgences, unless such drinking was habitual." This charge is approved by the court of civil appeals as a correct exposition of the law of the case. There is no complaint in the application for writ of error that this charge is on the weight of the evidence.

It is not deemed necessary to set out the charges requested and refused, or the assignments of error complaining of the charge and the refusal of charges. They are sufficient to require a determination as to whether there was material error in the instructions of the court. Justice Ramsey and the writer agree that the part of the charge which instructs the jury that the answers of the assured have reference to such diseases or ailments as indicate a vice in the constitution, or are so serious as to have some bearing on the general health and on the continuance of life, was a material error, prejudicial to defendant, for which the judgment of the court of civil appeals should be reversed. We are not unmindful of the well-recognized rules as to the construction of contracts of insurance,—that forfeitures are not favored, and that generally, in cases where there is doubt or ambiguity, that construction should be adopted most favorable to the assured,—the reasons for which are obvious, and need not be recounted. On the other hand, when the language of contracting parties is plain and unambiguous, and there is no reason for misunderstanding the purport thereof, effect must be given to it, enlarged or limited only by the nature of the subject to which it is applied. Said the United States Supreme Court, speaking by Justice Jackson, in the case of *Imperial F. Ins. Co. of London Eng. v. Ocos County*, 151 U. S. 462, 88 L. ed. 235. "It is settled by this court that when an insurance contract is so drawn as to be ambiguous, as to require interpretation or to be fairly susceptible of two different constructions, . . . that construction will be adopted which is most favorable to the assured. But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense." As said by the court of appeals of New York (*Mack v. Rochester German Ins. Co. of Rochester, N. Y.* 106 N. Y. 560), as quoted by Judge Jackson: "It tends to bring the law itself into disrepute when, by astute and subtle distinctions, a plain case is attempted to be taken without the operation of a clear, reasonable, and material obligation of the contract."

The charge of the court and the opinion of the court of civil appeals virtually assume that, because the inquiry is about diseases, it is necessarily and always about diseases

which either indicate a vice in the constitution, or are so serious as to have some bearing on the general health and on the continuance of life; and this, notwithstanding the specific inquiries may be as to physical disabilities or ailments which, according to common understanding, are diseases, but which, nevertheless, are not understood to indicate the conditions enumerated in the charge. This seems to reverse a common rule of the construction of language. If it be true that when an inquiry about diseases is made, it means only such as are mentioned in the charge, notwithstanding the specific inquiries are about ailments not usually indicating such conditions, the well-established distinctions between warranties and representations would be useless, for then there would be a breach of warranty only when the matter warranted was both false and material to the risk. The word "disease" may include, and is often used to designate, ailments more or less trivial. Medical science, as expounded by its experts, has not definitely determined all of the physical ailments which indicate a vice in the constitution, or have a direct tendency to shorten life. Through abundant caution the insurance company may, if it elects, inquire about any ailment, and take a warranty concerning it, lest it might affect the risk, although it cannot be known that it will.

The length of this opinion precludes more than a brief reference to some of the cases cited by defendant in error and discussed by the court below. In the *Cushman Case*, 70 N. Y. 73, from the opinion in which the language of the charge under discussion seems to have been copied, it is noticeable that the court says that "it must be generally true that before an ailment can be called a disease, it must be" such as is indicated in the language of the charge. The case was one upon conflicting evidence as to whether assured had ever had disease of the liver, or any serious disease, and it was decided that the defendant was not entitled to have a nonsuit entered, and that whether there were such diseases was properly submitted to the jury, and this is all that the case decides. In the case of *Knickerbocker L. Ins. Co. v. Trefz*, 104 U. S. 197, 26 L. ed. 708, the assured, to questions about various diseases, answered, "Never sick," and it distinctly appears that he was never sick of any of the diseases inquired about, and, notwithstanding an apparent disclaimer by the court, the case obviously was in part determined upon the fact that the assured was a foreigner, unfamiliar with the English language. In *Connecticut Mut. L. Ins. Co. v. Union Trust Co. of New York*, 112 U. S. 250, 28 L. ed. 708, the inquiry was about an affection of the liver, and we think it is distinguishable from an inquiry about "headaches, severe, frequent, or protracted." To avoid misconstruction, we state that we do not think, if the disability inquired about was not inherent, 28 L. R. A.

but was produced by extraordinary conditions, such as those described in the record, that the answer to the question should be held untrue.

For the purpose which will appear, we state that the following further inquiries were made of the assured, to which his answer follows: "Do you ever drink wines, spirits, or malt liquors? No. To what extent? Not at all. Former habit of drinking wine, spirits, or malt liquors? Not at all." Justice Ramsey desires it stated that, in his opinion, that part of the charge which instructs the jury that an occasional drink of liquor is not embraced in the application, and the questions and answers have no reference to an occasional indulgence, unless such drinking was habitual, was material error, for which the judgment should be reversed. He holds that the questions must be considered together, and that the obvious purpose of the questions was to ascertain whether the assured, at the time, or in the past, had been addicted to the use of intoxicating liquors, and the extent thereof, and that the charge precluded the jury from giving proper consideration to the evidence about the drinking of the assured, and that the meaning of these questions and answers should have been submitted to the jury, unrestrained by these limitations in the charge. The writer is of the opinion that, since the question of former habit was properly submitted, and since there was no evidence of the falsity of the answers to the first two questions, if there was error in this part of the charge, it was harmless.

It is not believed that the other complaints of error are well founded, nor is it considered necessary to discuss them.

For the error first indicated, the judgment of the Court of Civil Appeals is reversed, and the cause is remanded.

Hume, Special Chief Justice, dissenting:

I am of opinion that this case was properly determined by the court of civil appeals. Conceding all that is claimed as to the distinctive force of a warranty, it is still true that the situation and purposes of parties to it must be considered, just as they are in cases of contracts in other forms.

The purpose of a life insurance company is to secure risks on sound lives. It is interested in knowing that the applicant for insurance is not affected with infirmities that will hasten the event against which it insures.

It inquires about his "diseases." I think that according to common understanding a disease is an affection that takes hold of its victim, abides with him, impairs or menaces his functional vitality and lessens the probabilities of the average duration of his life.

The charge upon which the case is reversed seems to me to be warranted by the evidence upon both points named in the opinion.

OHIO SUPREME COURT.

SALT CREEK VALLEY TURNPIKE CO., *Pf. in Err.*,William PARKS *et al.*

(50 Ohio St. 568.)

***Sections 4914, 4916, and 4918 of the Revised Statutes, so far as they authorize the probate court to declare a turnpike road abandoned and vacated as a toll road, and thereby to become a free road, without the intervention of a jury, or the right of appeal, whereby such jury could be had to determine whether the road, or a part thereof, has been out of repair for the preceding six months, within the statutory meaning, are in conflict with: (1) Section 5, article 1, of the Constitution: "The right of trial by jury shall be inviolate." (2) Section 18, article 1, of the Constitution: "Every person, for an injury done him in his land and goods, shall have remedy by due course of law." (3) The provision in section 1, article 14, of the Amendments of the Constitution of the United States, that no person shall be deprived of property without due process of law.**

(October 31, 1898.)

ERROR to the Circuit Court for Hocking County to review a judgment declaring that defendant's toll road had been vacated and abandoned. *Reversed.*

The facts are stated in the opinion.

Messrs. Weldy & Buerhaus and O. W. H. Wright, for plaintiff in error:

Sections 4914-4918, Revised Statutes, are unconstitutional, under the provisions of article 1, Constitution of 1851, § 5: "The right of trial by jury shall be inviolate."

Work v. State, 2 Ohio St. 297, 59 Am. Dec. 671; *Miller v. State*, 3 Ohio St. 488; *Norton v. McLeary*, 8 Ohio St. 205; *Reckner v. Warner*, 22 Ohio St. 275; *Anderson v. McKinney*, 24 Ohio St. 471; *Butt v. Green*, 29 Ohio St. 671; *Prevert v. Finckrock*, 81 Ohio St. 626; *Howell v. Fry*, 19 Ohio St. 556.

The sections are also void under article 1, section 12: "No conviction shall work . . . forfeiture of estate."

Messrs. S. H. Bright and Robert F. Price, for defendant in error:

Defendant willfully abandoned its turnpike, as must be conclusively presumed from the record; and it now complains of the loss of what it had knowingly abandoned.

The state says to the incorporators: "We will grant you the right to take toll from every one who passes over the highway, if you will make and keep in repair thereon a 'turnpike.' If, however, you neglect to keep it in repair for the period of six months so that the public

shall not have the benefit of good roads, then you shall turn it over to the public and cease to take toll.

This is not taking private property nor interfering with vested rights. The title of the corporation has terminated by the terms of the contract.

Bl. Com. p. 484; *Webb v. Moler*, 8 Ohio, 548; *Beach, Priv. Corp.* §§ 26, 28; *Taylor, Corp.* § 459.

No one seriously doubts the right of the state to revoke a franchise for the nonuser or misuser of the same.

Beach, Corp. § 54; *State v. Farmers College*, 32 Ohio St. 487; *notes to State v. Atchison & N. R. Co.* 8 Am. St. Rep. 164; *People v. O'Brien*, 2 L. R. A. 255, 111 N. Y. 1.

The real complaint is as to the disposition provided for the road in the latter clause of section 4918.

But if this latter provision were held to be unconstitutional still the other provisions might stand.

Its right to take toll would be extinguished. *State v. Frame*, 39 Ohio St. 399; *Cincinnati v. Bryson*, 15 Ohio, 625; *Exchange Bank of Columbus v. Hines*, 8 Ohio St. 1.

The presumption is always in favor of the validity of the law.

Cincinnati, W. & Z. R. Co. v. Clinton County Comrs. 1 Ohio St. 81; *Goshorn v. Purcell*, 11 Ohio St. 641; *Ireland v. Palestine, B. N. P. & N. W. Turnp. Co.* 19 Ohio St. 369.

The right of the company to take toll was a franchise (*Seymour v. Milford & C. Turnp. Co.* 10 Ohio, 476), and not property, and neither its taking nor destruction was prohibited by said section 19 of article 1 of the Constitution.

Exchange Bank of Columbus v. Hines, supra.

It was the company's contractual duty to keep the pike in repair, and it was a common-law ground of forfeiture not to do so.

Beach, Corp. § 54, after figure 4, and *note 3*; also § 32.

The constitution does not require forfeited rights to be paid for.

This statute from its language would seem to be only a rule of evidence, declaring that certain facts shall be taken as conclusive proof that a company has abandoned its pike; and it affects no substantial right or equity of the company, because these facts were already a ground of forfeiture.

Reckner v. Warner, 22 Ohio St. 275; *Lewis v. McElvain*, 16 Ohio, 347; *Johnson v. Bentley*, Id. 97; *Beach, Corp.* § 32.

By their abandonment or forfeiture of the pike they lost all their rights therein, and were entitled to no compensation.

Railroad Co. v. Parmlee, 1 Ohio C. Ct. Rep. 239; *Corwin v. Cowan*, 12 Ohio St. 629; *McCombs v. Stewart*, 40 Ohio St. 647; *Day v. Pittsburg, Y. & O. R. Co.* 44 Ohio St. 406; *State v. Maine*, 27 Conn. 641; *Douglas v. Boonsborough Turnp. Road Co.* 22 Md. 219, 85 Am. Dec. 647.

The "jury" referred to in the constitution was the common-law jury, and the "rights" to such trial, were those that existed under the common law.

*Headnote by the COURT.

NOTE.—For right to jury in quo warranto proceedings, see *Buckman v. State* (Fla.) 24 L. R. A. 608, also *Atty-Gen. v. Sullivan* (Mass.) *ante*, 455.

The present case seems to be the first to turn on the constitutional right to jury trial in a proceeding to forfeit a franchise.

38 L. R. A.

Work v. State, 2 Ohio St. 296, 59 Am. Dec. 671; *Reckner v. Warner*, 22 Ohio St. 291.

We deny that plaintiffs in error had such right at common law, even though the action were the exercise of eminent domain.

Willyard v. Hamilton, 7 Ohio, pt. 2, p. 115, 80 Am. Dec. 195; *Massie v. Stradford*, 17 Ohio St. 597; *Hagany v. Cohen*, 29 Ohio St. 83; *State v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253.

Dickman, J., delivered the opinion of the court:

William Parks and others, the defendants in error, filed their petition in the probate court of Hocking county, Ohio, against the plaintiff in error, the Salt Creek Valley Turnpike Company. In it they allege that they are freeholders of Hocking county; that the defendant is a corporation organized under the laws of Ohio, and claims to own the toll road known as the "Salt Creek Valley Turnpike," situate in Hocking county, and also claims the right to take, and is taking, toll thereon. They further allege that for more than six months last past, to wit, for the period of two years, the road has not been kept in repair, but that the defendant has negligently suffered and allowed the same to be and remain during all of such time, and is now, uneven, infirm, and unsubstantial, and less than sixteen feet in width of artificial bed, and so narrow, in most of its length, as not to permit the passing of wagons thereon; that most of the repairs made to the road during such time have been of sand and inferior creek gravel, both of which materials were and are entirely unfit and unsuited for such purpose; that the bridges and culverts on the road are, and have been during such time, out of repair, so as to inconvenience and endanger persons and animals traveling thereon. The prayer of the petition is that the defendant be notified as required by law, and that upon hearing the road may be adjudged and declared abandoned and vacated as a toll road. To the petition there was a demurrer, which was overruled, and the turnpike company excepted to the ruling. The company thereupon filed an answer, and therein said: First, it admits that it is a corporation organized under the laws of Ohio, and claims to own, and does own, the toll road described in the petition, and claims the right to take, and is taking and exacting, toll thereon; second, it denies each and every other allegation in the petition. The company demanded a jury trial. The demand was overruled, and to that ruling the company excepted. The cause came on for hearing, and the court, having heard the evidence and argument of counsel, found that the road in the petition described had been, for more than six months next preceding the filing of the petition, out of repair, as therein stated, and the same was declared abandoned and vacated as a toll road. The company gave notice of its intention to appeal the cause to the court of common pleas. It also moved for a new trial, for the reasons, among others, that the court erred in overruling the demurrer filed, that the finding and judgment were against the law applicable to the case, and 23 L. R. A.

that the court erred in overruling the demand of the company for a jury trial. The motion for a new trial was overruled, and exception taken. The cause was appealed to the court of common pleas, and also carried up on error. The appeal was dismissed by that court, on the ground that it had not jurisdiction, and the judgment on error, was affirmed. The cause was then taken to the circuit court on petition in error, and the judgments of the probate and common pleas courts were by that court affirmed. This court is asked to reverse the judgment of the circuit court.

The proceedings to have the Salt Creek Valley Turnpike declared abandoned and vacated were instituted under sections 4914-4918 of the Revised Statutes. Those sections provide as follows: "Sec. 4914. Any turnpike or plank road in the state upon which toll has been or may be authorized to be taken, which has been or may hereafter be out of repair for the period of six months, shall be deemed and held abandoned; and upon such abandonment being declared, as hereinafter provided, it shall be unlawful for any company or person owning or claiming to own such road, or any person owning or claiming to own the right to take tolls thereon, or any person in behalf of such company or person, to take, demand, or receive toll for the use of such road, or so much thereof as may be so declared abandoned. Sec. 4915. Any twelve or more freeholders of a county in or through which any toll turnpike or plank road, or any part thereof, has been or may hereafter be constructed, may present to the probate court of any county in which such road or part thereof is situate, their petition, stating that such road or part thereof has not been kept in repair for the preceding six months, and praying that the same may be declared abandoned and vacated as a toll road; to which petition the company or persons owning or claiming to own such road, and all persons owning or claiming to own the right to take toll thereon, shall be made defendants. Sec. 4916. On the filing of such petition the court shall fix a time for the hearing thereof, not less than thirty days nor more than forty days thereafter, and issue a notice in writing to the defendants, stating the filing of such petition, and the day fixed for hearing thereof, and requiring the defendants to appear and answer, which notice shall be served in the same way as a summons in civil cases; and on the hearing of such petition, if the court find that the road or part thereof has been out of repair as aforesaid, the court shall declare the same abandoned and vacated as a toll road." Section 4917 provides for giving notice by publication, if any one of the defendants is a nonresident of the state. "Sec. 4918. When a toll road, or part thereof, has been heretofore or shall be hereafter declared abandoned and vacated as aforesaid, it shall thereafter become a free road, to be kept in repair as provided in chapter ten."

If any company fail to keep in repair its road outside the limits of a municipal corporation for five days, successively, or fail to build or rebuild any of the bridges or cul-

verts across any or all of the streams crossing its road for a period of six months, the company, under the statute, will become liable to any person injured for the damages sustained by reason of such road or bridge being suffered to remain out of repair by the neglect of the company; and no toll can be lawfully demanded and received at the gates between which the defective place or bridge is located until the parts of the road found defective by duly-appointed inspectors are fully repaired, or such order is made by the appellate court, as to repairs and collection of tolls, as it may deem just. Sections 8484, 8485, Rev. Stat. But the immediate object of the proceedings against the plaintiff in error was to totally destroy its right to demand and receive toll, and to convert its turnpike into a free road. The right to take toll upon a turnpike is a franchise (*Seymour v. Milford & C. Turnp. Co.* 10 Ohio, 476), and, when properly exercised, becomes a useful and valuable right,—a source of income, and the means of reimbursing the company for keeping the road in repair for safe and convenient use; and this franchise, which, in the case at bar, it is sought to extinguish, is to be regarded as property, in the enlarged sense of the term. By statute, all turnpikes under the control of individuals or corporations, and held as property or as a franchise, is liable to sale upon execution, "in the same manner as other property." Section 8580, Rev. Stat. The purchaser of any such road, upon the confirmation of the sale, will be entitled to hold and exercise all the corporate franchises purchased at such sale. Section 8583, Id. When there is an unsatisfied judgment against a turnpike company, a levy may be made upon the right of the company to take toll, "which right the officer shall advertise and sell as personal property." Section 8585, Id. The laws relating to the foreclosure of mortgages upon real estate are applicable to the foreclosure of mortgages upon turnpikes and plank roads; and the purchaser at foreclosure sale of any such road will acquire, and be entitled to exercise, all the corporate franchises purchased, as fully as they belonged to such company before such sale, in any name that may be assumed by such purchaser. Sections 8493, 8494. It is thus manifest that the legislature has induced the franchise of taking toll upon turnpikes with the attributes of property, and has exercised its power of subjecting such franchise to execution at law and sale in chancery proceedings, as it has other property. The term "property," as said in *Caro v. Metropolitan Elec. R. Co.* (14 Jones & S. 188; filed January, 1880), 19 Am. L. Reg. N. S. 884, is of the largest import, and embraces every mode in which it may be applied to public use, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments. It is an elementary principle that "property consists in the free use, enjoyment, and disposal of all one's acquisitions, without any control or diminution, save by the laws of the land." 1 Bl. Com. 188. Property held by an incorporated company stands upon the same foot-

ing with that held by an individual, and a franchise cannot be distinguished from other property. "A franchise is property, and nothing more. It is incorporeal property, and it is its character of property, only, which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment." Daniel, J., in *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507, 534, 12 L. ed. 585, 546.

When the turnpike was declared abandoned and vacated as a toll road by the probate court, under the operation of the statute, the road was to become a free road, and its franchise to collect toll was thereby virtually forfeited. The judgment was predicated upon a finding by the court that the road had been out of repair for the preceding six months, but no jury was impaneled or allowed to inquire and determine whether the road was sufficiently out of repair to justify the inference that the company had abandoned it. There might be an omission to keep it, in every respect, in perfect repair, for six months, and yet the road might not be so much out of repair as to furnish a reasonable presumption that it had been abandoned by the company. The road should be in so unfit a condition for all kinds of public travel as fairly to lead to that conclusion. But, to determine the existence of a state of facts upon which to base a destruction of property rights and interests, strict regard should be had, in the investigation, to the methods and safeguards prescribed by the constitution. It is therefore urged in behalf of the turnpike company that certain of the sections of the statute under which the proceedings were instituted to declare the road abandoned and vacated are in conflict with section 5, article 1, of the Constitution: "The right of trial by jury shall be inviolate." In none of those sections is any provision made for a jury trial, or for the right to appeal, whereby such jury could be had. The facts to be determined, namely, to what extent and how long the road had been out of repair, involved the destruction of a valuable corporate right of the company, and its answer filed in the probate court contained a denial of all allegations as to its failure to keep the road in repair. With such an issue, we think the constitution entitled the company to a jury trial. In *Howell v. Fry*, 19 Ohio St. 556, there was a summary proceeding before the probate court, under the Act of February 26, 1843 (Swan & C. Stat. 618), on complaint of an administrator against a party charged with embezzling and carrying away certain articles of property belonging to the estate. To the extent that the statute professed to authorize the court to render judgment for the value of the property, where there was a controversy between the parties, it was pronounced unconstitutional, and this court said: "If the defendant denied the truth of the charge, he had a constitutional right to a jury trial, and could not be deprived of that right by this summary proceeding, in which no provision is made for a jury trial, or for the right of appeal. The statutory provision authorizing a judgment can only be sus-

tained as constitutional and valid in so far as it applies to a case where the defendant does not controvert the truth of the complaint."

The section in the present constitution, preserving inviolate the right of trial by jury, is found in the Constitution of 1802, and in the same words. It is a guaranty of the continuance of a right recognized in the great charter, and substantially embodied in the constitutional compact of every state, as the great safeguard of life, liberty, and property. At common law, the want of reparation of highways, when visited with fine, penalty, and forfeiture, was the subject of inquiry by a jury. In England, the inhabitants of the several parishes at large are, *prima facie*, and of common right, bound to repair all highways lying within them, unless, by prescription or otherwise, they can throw the burden upon particular persons. For the nonrepair of highways, including turnpike roads, indictments are preferred against the respective parishes in which they are situate, and the parishes are subjected to fines, penalties, and forfeitures, as the jury, by their verdict, find the defendant guilty of failing to keep the highways in proper repair. Woolrych, *Ways*, chaps. 6, 11. In this country, indictment is an appropriate remedy against towns for want of repair; and the obligation imposed upon them to maintain and repair highways, as prescribed by statute, is very much the same as at common law,—convenience and safety being the essential conditions of a well-maintained highway, both at common law and by statute. But whether or not any given highway fulfills these conditions is a mixed question of law and fact, to be determined by the jury upon the circumstances of each particular case, under proper legal instructions from the court. *Angell & D. Highways*, §§ 259, 275; *Com. v. Newburyport*, 103 Mass. 129; *Bragg v. Bangor*, 51 Me. 533. And in determining the want of reparation, if there be any, it is especially within the province of a jury, rather than of the court, to view the premises, consider the geographical features of the country, the location of the road, the difficulty of keeping it in a better condition without an unreasonable expense, the season of the year, the kind and amount of travel having occasion to pass over the road, with other considerations of a kindred character.

The determination of the issues in the probate court being properly within the domain of a jury, and as the result of the court's finding the road to have been out of repair for the preceding six months was that the franchise of the company to take toll was adjudged, under the statute, to have been extinguished, it may well be asked whether the company was not, in contravention of the constitution of the state and of the United States, thereby deprived of its property "without due course of law," or its equivalent, "due process of law," when denied the privilege of a jury trial. If the legislature is vested with the power, under the constitution, to authorize a probate court to destroy valuable property rights of a turnpike company because its road has been out of repair

for the period of six months, it may be inquired, why may not the legislature authorize that court to do the same thing, although the road has not been out of repair longer than one day? For it is not the abatement of a nuisance that is the subject of inquiry, but the taking and destruction of private property without a trial by jury. It would be very difficult to frame a definition of the term "due course of law," or "due process of law," which would be accurate, complete, and appropriate, under all circumstances. But it is very obvious that everything which takes the form of an enactment is not therefore to be deemed the law of the land, or due course or process of law. If this were so, then decrees and forfeitures, in all possible forms, and acts confiscating the property of one person or class of persons or a particular description of property, upon such view of public policy, where it could not be said to be taken for a public use, would be the law of the land. In *Risser v. Hoyt*, 53 Mich. 185, the Act of 1883 to prevent preferences among creditors, and to distribute the debtor's property equally, was held to be void, as violating (1) the constitutional provision which secures the right of trial by jury, since it looks to a summary disposition of cases which necessarily turn on questions of fact; and (2) the prohibition against taking property without due process of law. Under section 2 of the Act, the court was empowered to proceed summarily upon the filing of a creditor's petition, and appoint a receiver who should take possession of all the debtor's property, and marshal and distribute the same among the several creditors. *Champlin, J.*, in delivering the opinion of the court, said: "It was against the enactment of new laws which ignored the proceedings according to the course of the common law, and provided summary methods of determining legal rights, that the protecting shield of the constitution was required. The true criterion is, Does the act destroy or materially impair the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury? The nature of the controversy between the parties, and its fitness to be tried by a jury according to the rules of the common law, and not the nature of the tribunal, nor the summary mode of proceeding therein, should decide the question. . . . Under section 2 of this Act, two facts, at least, must concur, before the debtor can be deprived of his property: (1) He must owe three or more debts; two, at least, amounting, in the aggregate, to not less than \$200. (2) He must have done some act, or omitted to do some act, which this section prescribes shall entitle two or more creditors to file a petition. These acts are treated as a fraud upon the rights of other creditors, and constitute the gist of the proceedings. Such issues, involving the elements of fraud both as to the debtor and creditor alleged to have been preferred, are such as are peculiarly appropriate for a jury, and the right to have such trial cannot be taken away by a summary proceeding of this kind. . . . From what has been said concerning the deprivation of the right of trial

by jury, it is apparent that the act deprives parties of their property without due process of law." In the federal courts it is the accepted doctrine that while, in actions *in rem* in admiralty, property may be divested from an owner without the verdict of a jury, yet, in any proceeding at common law, even proceedings *in rem*, a citizen of the United States cannot be divested of his property except by verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court. In cases of seizures on land, involving condemnation and forfeiture, the right of trial by jury is not infringed, for although, in such cases, the proceeding must be in general conformity to the course in admiralty, issues of fact, on the demand of either party, must be tried by a jury. *The J. W. French* (U. S. Dist. Ct. E. D. Va., filed October 1882), 13 Fed. Rep. 916; *Union Ins. Co. v. United States*, 73 U. S. 6 Wall. 765, 18 L. ed. 882; *Armstrong's Foundry*, 73 U. S. 6 Wall. 769, 18 L. ed. 884; *Morris's Cotton*, 75 U. S. 8 Wall. 507, 19 L. ed. 481. It is not to be claimed that trial by jury is necessarily implied in the phrase "due course of law," or "due process of law." Within the meaning of the constitution, there may be due process of law in proceedings in chancery, in the general system of procedure for the levy and collection of taxes; and, under the Constitution of 1802, the value of private property taken for public uses could rightfully be assessed by commissioners. *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Willard v. Hamilton*, 7 Ohio, pt. 2, p. 115, 80 Am. Dec. 195. But, upon reason and the weight of authority, we are of opinion that in the case at bar the plaintiff in error was entitled to a jury in the probate court; that to deprive the turnpike company of the right to demand and receive toll for the use of its road, without a trial by jury, would be to take its property without due course or process of law; and that sections 4914, 4916, and 4918 of the Revised Statutes, under which the defendants in error instituted proceedings to have the company's road declared abandoned and vacated, so far as they contain no

provision for a jury trial, or an appeal, whereby such trial may be had, are in conflict with sections 5 and 16, article 1, of the Constitution of Ohio, and section 1, article 14, of the Amendments of the Constitution of the United States.

But while the right to demand and receive toll cannot be extinguished without a finding by jury trial that the turnpike has been so out of repair, within the statutory meaning, as properly to be deemed and held abandoned, it is urged that, in addition to the franchise to collect toll, the plaintiff in error also owns the road, its bridges and culverts, the very gravel on the road, etc.; and it is claimed in the record, though not in the brief of counsel, that to declare the turnpike a free road, and subject its other property to the free use of the public, without the consent or reimbursement of the company, would be to take private property for public use without first making compensation therefor in money, and hence in violation of section 19 of article 1 of the Constitution. When it is found expedient to convert a toll road into a free road, a mode is prescribed by statute whereby county commissioners may purchase the toll road at a price not exceeding the statutory appraisal, and pay the company in money, or in bonds to be issued as specified in the statutes. Section 8498a, Rev. Stat., *et seq.* It becomes, therefore, a question for consideration, how far, if the franchise to collect toll may be extinguished after a jury trial, the other property of the turnpike company may be subjected to the free use of the traveling public without compensation therefor to the owners. But that question, with the insufficiency of facts disclosed in the record, we cannot satisfactorily consider in the case at bar.

With the views herein expressed, we are of opinion that the judgments of the Circuit Court, Court of Common Pleas, and Probate Court should be reversed, and the petition in the probate court dismissed for want of jurisdiction in that court.

Judgment accordingly.

Williams, J., dissents; *Spear, J.*, *dubitant*.

CALIFORNIA SUPREME COURT.

W. H. ROBINSON, *Respt.*,

v.

SOUTHERN PACIFIC CO., *Appt.*

(106 Cal. 541, 526.)

1. The right to ride to "destination or any intermediate station and from any intermediate station to the depot

NOTE.—Right of passenger to stop over.

There is remarkable uniformity in the decisions upon this question. All the actual decisions seem to agree that there is no right to stop over on an ordinary ticket reading from one point to another in the absence of special agreement or of regulations of the carrier which permit it.

The contract to carry a passenger is in the absence of any agreement to the contrary an entire contract. Neither party can insist on its performance

of destination," declared in Civ. Code, § 490, to be given by a railroad ticket, cannot be construed to give merely the right to begin the journey at an intermediate station, but includes the right of stop-over.

2. The repeal of Civ. Code, § 489, if conceded, does not extend to section 490, merely because the latter expresses the effect of a railroad ticket which shall be given "on being tendered

in fragments. *Churchill v. Chicago & A. R. Co.* 97 Ill. 890.

If the ticket is silent as to stopping over it will not entitle the holder to any stop-over privileges. *Drew v. Central Pac. R. Co.* 61 Cal. 425.

There is no right to stop off in the absence of special agreement, or some rule or regulation of the carrier permitting it. *Stone v. Chicago & N.W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458.

The purchase of a ticket entitles the holder to

the fare therefor fixed as provided in the preceding clause."

3. The exemption of a previously chartered railroad company from a statutory provision respecting the sale and effect of tickets does not extend to a foreign corporation subsequently created which leases the road of the former.
4. The junction of a ferry and railroad is an intermediate station within Civ. Code, § 490, giving the right to stop over, where a ticket is sold for transportation over both ferry and railroad.
5. If there are two or more regular stopping places for trains in a city, where passengers are allowed to enter and leave trains, either of them may be chosen as the place to stop off, under Civ. Code, § 490, although no station-house is there located.
6. A first cousin of one of the parties is not within the terms of a statute prohibiting a judge from acting who is related to one of the parties within the third degree where the statutes provide that in the collateral line the degrees are counted by generations from one of the relatives up to the common ancestors and from the common ancestor to the other relation excluding one, including the other, and counting common ancestor but once.

continuous passage merely. *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671.

A ticket giving a right to passage from one station to another does not give a right to pass over the distance in separate trains. *Oil Creek & A. R. R. Co. v. Clark*, 72 Pa. 231.

A ticket for transportation on a railroad between certain termini which is silent as to the time when or within which it is to be used does not authorize the holder to stop over at any point between such termini and resume his journey on the next or any following train; the contract involved in the sale and purchase of such a ticket is an entire one and not divisible. It is a contract to carry the owner through to the point of destination as one continuous service and not by piece-meal to suit his convenience or pleasure. *Roberts v. Koehler*, 30 Fed. Rep. 94. In that case after his ticket had been taken up by the conductor the passenger left the train without the conductor's consent and afterwards attempting to resume his journey without any evidence of right to do so.

In *Pennsylvania R. Co. v. Parry*, 22 L. R. A. 261, 55 N. J. L. 551, the court in considering the question of the right of a passenger traveling on a branch road to take a train on the main road other than those regularly connecting with the branch trains, says: "It is established by the course of judicial decisions that when a person who purchases a railway ticket to a certain place takes his start in a particular train that goes to his destination he cannot without the permission of the railway company while the train is reasonably pursuing the duty of the carrier leave it and take another train and complete his journey under the same contract. The reason is that the contract is entire and neither he nor the company can be required to perform it in fragments."

There is no right to stop over. *McClure v. Philadelphia, W. & B. R. Co.* 34 Md. 535, 6 Am. Rep. 345; *Wyman v. Northern Pac. R. Co.* 34 Minn. 210; *Hamilton v. New York Cent. R. Co.* 61 N. Y. 100; *Hatten v. Newark & J. C. R. Co.* 39 Ohio St. 375.

But in *Ward v. New York Cent. & H. R. R. Co.*, 56 Hun, 253, it is said by the court that it is not prepared to decide that the holder of a unlimited ticket which contains no provisions for a continuous passage was not entitled to stop over and con-

7. A railroad company cannot deprive a passenger who pays the regular rates for a ticket to a certain destination entitling him to go by a certain route, of his right given by statute to stop over at an intermediate point on such route by giving him a ticket purporting to entitle him to transportation to either the point of destination or the intermediate point.

(October 8, 1894.)

A PPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train. *Affirmed*.

The facts are stated in the opinions.

Mr. E. L. Craig, with *Messrs. Foshay Walker and Baker, Wines & Dorsey* for appellant.

Messrs. Thomas V. Cator and James G. Maguire, with *Mr. C. M. Jennings*, for respondent.

Garoutte, J., delivered the opinion of the court:

This action is brought to test the right of the

continue his journey on the same ticket,—especially where it appears that it was the custom of the road to allow stop-overs.

Rule in case of coupon tickets.

But in case of coupon tickets it is held that each coupon constitutes a separate contract performance of which may be claimed at any time within the life of the ticket.

If a ticket is made up of coupons to entitle the holder to passage over different roads, each coupon will be regarded as a separate ticket for the purpose of determining stop-over privileges, and the stop-over privilege may be exercised at division stations without the consent of the company and the journey may also be resumed at a way station covered by the coupon and it need not necessarily be done at the division station. *Auerbach v. New York Cent. & H. R. R. Co.* 39 N. Y. 251, 42 Am. Rep. 290; *Little Rock & Ft. S. Railway v. Dean*, 43 Ark. 529, 51 Am. Rep. 584.

The separate parts of a coupon ticket represent different contracts which in the absence of anything in the contract to the contrary may be used at different times. *Brooke v. Grand Trunk R. Co.* 15 Mich. 332.

In the absence of a contract for a continuous passage only or through transportation the holder of a coupon ticket is not bound to continue his passage without intermission when once begun, but may stop off at the end of each line for a reasonable time without losing his right to resume it, while the holder of an ordinary ticket cannot temporarily discontinue his passage when once begun without losing his right to resume it unless otherwise agreed. *Nichols v. Southern Pac. Co.* 13 L. R. A. 55, 23 Or. 123.

If the ticket gives the right to stop over at places named in the coupons and the conductor takes off both coupons bearing the name of the place at which the passenger wishes to stop and gives only a train check in exchange, which the conductor of the subsequent train refuses to honor, the company is liable, although the passenger did not notify the first conductor of his intention to stop, since it is the company's duty to take notice of his right to stop and ascertain his intention before depriving him of the opportunity to do so. *Palmer*

manded by the conductor, he refused to pay it, basing his refusal upon the facts stated. But, notwithstanding his statement of these matters to the conductor, he was ejected from the train.

The only question involved in this litigation is, Was the respondent entitled to a stop-over privilege at the city of Oakland? He claims this stop-over right under section 490 of the Civil Code, and that section reads as follows: "Sec. 490. Every railroad corporation must provide, and, on being tendered the fare there-

for fixed as provided in the preceding section, furnish to every person desiring a passage on their passenger cars a ticket which entitles the purchaser to a ride, and to the accommodations provided on their cars, from the depot or station where the same is purchased to any other depot or station on the line of their road. Every such ticket entitles the holder thereof to ride on their passenger cars to the station or depot of destination, or any intermediate station, and from any intermediate station to the depot of destination designated in the ticket, at any

An excursion ticket gives no right to stop over. No such right exists except by means of a stop-over check or the regulations of the company. So if one purchases an excursion ticket and uses it as far as the train goes after which he waits for another train to his destination he will not be permitted to travel on the second train. *Terry v. Flushing*, N. S. & C. R. Co. 13 Hun, 359.

Special rates or contracts.

The carrier may stipulate that the passage shall be in one continuous trip. *Barker v. Coffin*, 31 Barb. 556.

One who purchases a ticket entitling him by the rules of the company regulating the rates of fare to a continuous passage through and avails himself of the reduction in price allowed to such passengers cannot insist in being taken up as a way passenger at a station at which he has stopped over without permission. *Cheney v. Boston & M. R. Co.* 11 Met. 121, 45 Am. Dec. 190.

The mere fact that upon inquiring for tickets the passenger is shown two, one of which is called a limited ticket and provides for a continuous passage, and the other one at a higher price contains no such condition, raises no implication that the latter gives any stop-over privileges; and if it is taken there will be no right to stop over except as it may be arranged for with the conductor as in other cases. *Kelsey v. Michigan Cent. R. Co.* 28 Hun, 430.

If a through ticket is sold at a lower rate than the sum of the local rates it cannot be used from station to station along the route with a privilege of stop-over at the pleasure of the holder. *Shedd v. Troy & B. R. Co.* 40 Vt. 88.

Rules and custom of carrier.

A rule of a railroad company requiring tickets to be used on the day of their date is reasonable. *Johnson v. Concord R. Corp.* 46 N. H. 213, 88 Am. Dec. 190.

Stop-over privileges must be exercised in accordance with the regulations of the railroad company and not according to the notions of the passenger. *Dunphy v. Erie R. Co.* 10 Jones & S. 128.

Railroads may prescribe a regulation that a person wishing to stop over must procure a stop-over check. *Breen v. Texas & P. R. Co.* 50 Tex. 48.

If a passenger chooses to stop over it is not unreasonable to require him to procure his ticket to be so indorsed as to make it a voucher to the conductor having charge of the subsequent train. *Beebe v. Ayres*, 22 Barb. 275.

A regulation of a railroad requiring passengers desiring to stop over to procure stop-over tickets is reasonable, and if, by mistake, the wrong check is given, the conductor on the subsequent train is not bound to honor it but may put the holder off the train leaving him to his action for damages for the act of the first conductor. *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 284, 41 Am. Rep. 23.

The fact that at the time a ticket was purchased a custom of a railroad company permitted stop-over privileges will not prevent the company from changing the rule so as to defeat the right of stop-

over on such ticket, although the ticket is thereby rendered worthless. *Johnson v. Concord R. Corp.* 46 N. H. 213, 88 Am. Dec. 190.

Effect of delay of train.

As a general rule when a passenger who holds a ticket from one point to another selects his train and enters upon his journey he has no right to leave the train at a way station and afterwards enter another to prosecute his journey without procuring a ticket or paying fare from the way station. If, however, the company is not prosecuting the journey in a reasonable time, as if there is a wreck which delays the train, the passenger may leave the train and continue his journey on another under his original contract without paying additional fare. *Wilsey v. Louisville & N. R. Co.* 38 Ky. 611.

Through train must be taken.

If a passenger accepts a ticket containing the condition that it is not "good to stop off" he is bound to take a train which will carry him to his destination, and if for the purpose of getting stop-over privileges he takes a train which does not go as far as his destination he will not be permitted to resume his journey after having reached the destination of the train and stopped there. *Johnson v. Philadelphia, W. & B. R. Co.* 63 Md. 107.

If the ticket only entitles the holder to a continuous passage he must ascertain what trains stop at his destination and take one of those and he cannot take another and then stop off and resume his journey on a train which will stop. *Keilett v. Chicago & A. R. Co.* 22 Mo. App. 366.

A ticket which is good for a continuous passage only does not entitle a passenger who voluntarily takes passage upon a train which he must be held to have known would not convey him to his destination, and leaves that train at an intermediate point to be carried the remainder of the journey on the train on which he ought to have been in the first instance. *Gulf, C. & S. F. R. Co. v. Henry*, 16 L. R. A. 518, 84 Tex. 678.

After the ticket has been taken up on a train which only goes to an intermediate station the passenger cannot go upon another train and insist on the right to passage on it to his destination. *Townsend v. New York Cent. & H. R. R. Co.* 56 N. Y. 205, 15 Am. Rep. 419.

No stop-over without ticket.

After the passenger has delivered up his ticket he cannot leave the train and demand passage on another one. *Cleveland, C. & C. R. Co. v. Bartram*, 11 Ohio St. 457.

Time within which stop-over must be used.

A stop-over ticket is not good after the expiration of the time for which it is limited. *Wentz v. Erie R. Co.* 3 Hun, 241.

Right to take up ticket.

The conductor is not entitled to take up the ticket and demand payment of fare in addition. *Vankirk v. Pennsylvania R. Co.* 78 Pa. 66, 18 Am. Rep. 404.

H. P. F.

time within six months thereafter. Any corporation failing so to provide and furnish tickets, or refusing the passage which the same calls for when sold, must pay to the person so refused the sum of two hundred dollars." The briefs of counsel contain an elaborate discussion of various legal principles that are claimed to be germane to the question here presented, and those principles which we deem necessarily involved in the final determination of this litigation we will take up and discuss *seriatim*.

1. Appellant insists that the true construction of section 490 is: "Such ticket entitles the holder, at any time within six months after the issuance of the ticket, to ride from the depot where he purchased the ticket to the depot of destination named in the ticket, or to any intermediate station, or, if he so elects, he may start from any intermediate station, instead of where he bought the ticket, and ride to the depot of destination designated in the ticket." Notwithstanding the statute appears to be plain and explicit upon its face, it is insisted that the conjunctions "and" and "or" are convertible terms, and that the conjunction "and," as it appears in the section should be read "or." There are times when it is entirely manifest from the context that the intention of the law-making power can only be given effect by holding these terms convertible. And this rule of construction is adopted for the very purpose of giving that force and effect to the text which plainly appears from the context was intended to be given it by the author of its creation, but this license of construction is only to be exercised upon the lines indicated, and in all other cases these two words are to be read and construed as they stand upon the page. Ordinarily, they are in no sense interchangeable terms, but, upon the contrary, are used in the structure of language for the purpose entirely variant. "There is a world of difference between the little words 'and' and 'or.'" *State v. Beaulaigh*, 93 Mo. 497. We see nothing here demanding the construction claimed. It is not plainly manifest that the legislature so intended. It is not manifest at all. The clause is full of meaning, reading it as it appears to the eye, and is entirely consistent with other portions of the section. If we should interpret "and" as "or" an entirely different meaning would be given the provision. This would be judicial legislation, pure and simple. Appellant contends for the construction claimed because it is said that formerly so-called "competitive points" were favored, and the object of the statute was the prevention of greater charges from intermediate stations to competitive points than were charged for longer distances from one competitive point to another. In view of the fact that the legislature provided in the immediately preceding section (489) that the amount of passenger fares should be regulated according to the distance traveled, there would seem to be no necessity for further legislation upon that question. That evil, whatever it may have been, was called to the attention of the legislature, and cured by said section. The only effect upon the statute, by appellant's construction, is to give a passenger the right to board a train at an intermediate station, and ride to the point of destination upon a ticket

purchased at some station which, from the place of destination, is beyond the intermediate point. We see no demand for legislation of the character outlined by appellant's construction of the statute. The circumstance of a passenger purchasing a ticket from one point to another, and then only actually using it for a portion of the distance, would not seem to be an event of such common occurrence as to demand the needs of legislative action. Again, while not desirous of prejudging matters not necessarily involved in the consideration of the present case, we might remark that no legal rule now presents itself to our minds which ever denied a passenger the right to use a ticket of the character here contemplated from an intermediate station to the point of destination. *Auerbach v. New York Cent. & H. R. R. Co.* 89 N. Y. 281, 42 Am. Rep. 290. And, if such was the law prior to the passage of section 490, we are justified in saying that the legislature, in enacting that provision, was not doing an idle thing, and we must assume the provision was created for other purposes. Appellant's position as to the construction of section 490 of the Civil Code is not tenable.

2. It is insisted that section 490 of the Civil Code, upon which plaintiff relies for his stop-over right, was repealed by section 22 of article 12 of the State Constitution, and this claim of repeal is based upon the additional claim that the constitutional provision cited places the full and exclusive power of fixing railroad transportation charges within this state in the railroad commissioners. It is insisted that the repeal of section 490 is occasioned by the repeal of section 489; thus this constitutional provision repealed section 489,—a section which pertains to the regulating and establishment of rates for freights and fares,—and that section 490 is so dependent upon section 489 that it cannot stand alone, and the fall of section 489 therefore necessarily carries with it the destruction of section 490. We will not discuss the interesting question as to whether or not the repeal of section 489 was occasioned by the adoption of that portion of the constitution referring to the election, powers, and duties of railroad commissioners, but, for the purposes of the case alone, will concede that such repeal was had. The single question then remains, Did the repeal of section 489 result in the repeal of section 490? Chief Justice Shaw, in discussing a similar principle, said in the case of *Warren v. Charleston*, 2 Gray, 84: "When the parts of a statute are so mutually connected and dependent, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently, if some parts are unconstitutional and void, all the provisions, which are thus dependent, conditional, or connected, must fall with them." The rule is well stated in the foregoing quotation, and the principle there declared has been recognized and declared the true one by the courts of many states. Measured by this doctrine, can section 490 stand the test? Is it manifest that the legislature intended that such section should stand or fall with section 489? Is section 490 so closely connected with and so entirely depend-

ent upon the preceding section that its very life ends at the moment when that section is no more? Would section 490 have been enacted by the legislature if section 489 had never been placed upon the statute book? These interrogatories are answered by appellant, and to the legal soundness of those answers our attention shall now be addressed.

Section 489 provides that railroad corporations must fix and publish their rates of charges for freightage and fares from one depot to another on their various lines of road in this state, and declares a graduated scale of charges according to distance. It further provides that the maximum charges shall not exceed ten cents per mile for each passenger, nor fifteen cents per mile for each ton of freight transported upon its road, and also affixes a penalty for the violation of any of these provisions. Section 490 declares that the railroad company must provide, and, on being tendered the fare therefor fixed as provided in the preceding section, furnish to every passenger desiring passage on their passenger car, a ticket which entitles the purchaser to certain rights and privileges which we have already considered; and this section also affixes a penalty for the violation of any of its provisions. In all portions thereof, save a single one, the section is entirely disconnected from and independent of section 489. With this single exception, it appears to be full of its own vitality, and possessed of ample strength within itself to stand out alone; a law, as independent and complete as any other section within the lids of the code. But, it is said in the language of defendant, to hold that section 490 is not dependent upon section 489, is to ignore the words of the section itself, namely, "on being tendered the fare therefor fixed as provided in the preceding section." This clause forms the connecting link between the sections, and upon the sole strength of that link depends the repeal or nonrepeal of section 490. It is claimed that it was the legislative intent that a passenger, in order to enjoy the rights and privileges granted by section 490, should tender the amount of fare fixed by the corporation, in accordance with section 489, and, that section being repealed, that it is impossible to make a tender of the fare therein provided; that a tender of the fare fixed by a later act of the legislature, or the tender of a fare fixed by the corporation itself in the absence of any law upon the subject, would be unavailing, and that consequently no rights and privileges can flow to the passenger under section 490. It is insisted, in other words, that the fare tendered must be the fare fixed according to section 489, notwithstanding that section may have been repealed, and in substance replaced by other legislation. We think appellant's interpretation of the section, as evidenced by the foregoing line of reasoning, too rigid and literal to satisfy well-settled rules of statutory construction. The subject-matter of these two sections has nothing in common. The sections relate to distinct and independent matters of legislation. Section 489 is in no way dependent upon section 490. There is no mutuality in their connections and dependencies. Section 490 could have been repealed, and the vitality of section 489 would

not have been affected in the slightest degree. In accord with appellant's contention, we have conceded that section 489 is repealed by implication by certain provisions of the constitution. In order to declare a repeal by implication, it must be entirely apparent, by a comparison of the two provisions, that the subject-matter of section 489 is completely covered by the constitutional provision, and the repeal can be supported upon no other ground. In other words, the constitutional provision is a substitute for the section. It seems to follow that the question here presents itself in no different form, and involves no different principle, than though section 489 had been amended upon the lines embraced within the repealing clause of the constitution. If section 489 were still a live section, covering the general subject-matter embraced within it at the beginning, no matter how changed and modified, no matter how drastic the treatment by amendment, surely defendant would still be bound by its provisions. Hence, appellant's contention reduces itself to the single claim that the present law upon the question is not embraced in the "preceding section," and that the particular point of location of the law upon the statute book is the all-controlling element. Such a construction would result in the sacrifice of substance to the merest form. The gist of section 489 is the requirement that railroad corporations fix their rates, and fix them in accordance with certain rules there declared, and within certain limits, and, to a certain extent, regulate fares and freights; and a reference to this section in section 490 is simply a recognition of that fact, and nothing more. The words, "as provided in the preceding section," might almost be termed surplusage. Their only possible purpose is to make more certain that which was already certain. Strike them from the section, and nothing of weight or substance is taken away. The construction would be the same with or without them. There surely is not that magic in them which holds the power of life and death over the entire section. The fare to be tendered, in order to give the passenger a right to his ticket, is the lawful fare; and it is immaterial whether that fare be fixed by the "preceding section," or by other provisions of the code, or by the corporation in the absence of law, or by the constitution itself. It is the fare regulated by law, and if there be no law regulating the fare, then it is the regular fare charged by the corporation. At the date of the enactment of section 490, it happened that fares were regulated by the preceding section 489, and hence the reference. There is nothing to indicate that the enactment of these two sections partook of the character of a contract between corporations upon the one side, and the people, through its legislative body, on the other, whereby corporations were granted valuable privileges and benefits under section 489 in consideration of reciprocal valuable privileges and benefits extended to the traveling public under section 490. It is further apparent that such conditions did not surround the creation of these sections, for we find the substance of section 489 to have been the law of this state for many years prior to the adoption of the codes. Stat. 1861, p. 625. We conclude that

it was not the intention of the legislature that these two sections should be taken as a whole, that section 490 should stand only while section 489 stood, and that the fall of section 489 should likewise mark the fall of section 490. We see no reason why the legislature should do such a thing, and such an intention is not manifest from the context. The repeal of section 489 does not result in the repeal of section 490.

3. The Central Pacific Company leased to the Southern Pacific Company certain railroads for the period of ninety-nine years, and also assigned to the Southern Pacific Company certain leases it held of other roads. These leases included all the rolling stock, telegraph lines, steamboats, wharves, piers, and all other property, both real and personal, used in connection with these roads, together with the appurtenances thereto belonging, with the right to possess, use, maintain, and operate and enjoy said property. The leases held by the Central Pacific Company were assigned "with the right to take, hold, operate, maintain, and enjoy said railroads and other property in the same manner as the Central Pacific Company holds, operates, enjoys, and maintains the same under said leases." It is now claimed that section 490 of the Civil Code, upon which plaintiff relies to give him the privilege of "stop-over," does not apply to the defendant, the Southern Pacific Company, because it does not apply to its lessor, the Central Pacific Railroad Company, and section 288 of the Civil Code is relied upon to show its nonapplicability to the Central Pacific Railroad Company. That section provides: "No corporation formed or existing before twelve o'clock, noon, of the day upon which this Code takes effect, is affected by the provisions of part IV. of division 1 of this Code, unless such corporation elects to continue its existence under it as provided in section 287; but the laws under which such corporations were formed and exist are applicable to all such corporations, and are repealed subject to the provisions of this section." The Central Pacific Railroad Company has not elected to continue its existence under the law found in part IV. of division 1 of the Civil Code; and, section 490 being found therein, it would appear that that corporation was not bound by its provisions for this language is comprehensive, and, judged by its face alone, has no uncertain meaning. But it is claimed by appellant that section 490 is highly penal in its character. If this be true, the power of the legislature to create penal statutes, and thereupon enact that they should be only applicable to corporations created subsequent to a certain time, may well be doubted. Such an exception would appear to be beyond the limits of legitimate legislation. This court said in the case of *Pasadena v. Stimson*, 91 Cal. 238: "A law is constitutional and general when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction. It is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those

who stand in precisely the same relation to the subject of the law." But we will not enter into a detailed examination of section 288, with the object of determining its true force and effect as to either of these positions. For the purposes of this case, we will concede that by reason of that section the provisions of section 490 do not apply to the Central Pacific Company. That much conceded, is its lessee, the Southern Pacific Company, by virtue of its leases, assignments, etc., likewise unaffected by the provisions of that section? The Southern Pacific Company is a foreign corporation, and was organized under the laws of the state of Kentucky in March, 1884—more than ten years after the enactment of sections 288 and 490 of the Civil Code; and, aside from any rights, privileges, or exemptions passing to it by virtue of these leases and assignments, it only exists in this state, and is enabled to do business in this state, by virtue alone of those provisions of the Code, which we have conceded, have no binding force and effect upon the Central Pacific Company. We are unable to appreciate the importance and gravity with which appellant surrounds its contention in this regard. A corporation organized and carrying on its business under a certain set of laws, leases and assigns all or portions of its property to another corporation, organized and carrying on its business under another and different set of laws. Do such leases, assignments, and transfers give the second corporation the right to thereafter conduct its business under the laws which were only applicable to the first corporation? Such contention can have no support in the law. Prior to its transactions with the Central Pacific Company, the Southern Pacific Company, in the conduct of its business, was bound by the provisions of section 490 of the Civil Code, and no man or corporation, by contract or otherwise, possessed the power to relieve it in the conduct of its business from whatever restrictions or burdens were imposed by that section. These restrictions and burdens were imposed upon it by legislative power, and it is to that power alone it must look to be relieved of them. When organized and ready to do business in this state, part IV., division 1, of the Civil Code, formed the law regulating its conduct and defining its rights and duties; and now, by the sole virtue of a business transaction with another corporation, it is claimed that this entire body of law has become nugatory, and, in effect, repealed, as to such corporation. This law cannot be evaded in that way. It is not the legal method recognized for effacing a law from the statute books. The Southern Pacific Company was organized to conduct a general railroad business. If it had built its own roads, it would have been bound by the provisions of section 490, and its status as to the law is not changed by reason of the fact that it preferred to lease rather than build. Let us assume that it has constructed and is the owner of certain roads in connection with those it has obtained from the Central Pacific Railroad Company. The result follows that one distinct and separate body of law governs its conduct as to certain portions of its business, and other portions thereof are

controlled by another separate and independent body of law. It needs but a glance at the various provisions of the Code to see that such conditions would lead to inextricable confusion. If appellant's position be sound, its converse is equally sound, and a transfer by the Southern Pacific Company of its roads (if it has constructed any) to the Central Pacific Company would bring that corporation within the binding effect of section 490, as well as all other provisions of part 4 of the Code, *volens volens*. This practice would not only effect results never contemplated by the legislature, but would effect them in a way absolutely forbidden by sections 287, 288, for those sections mark the only road that leads to such results. It is not necessary that we enter into a microscopic inspection of the writings evidencing the contracts between these corporations, for the purpose of determining all the properties and rights that actually passed thereby. It is sufficient to say that some things are not the subject of lease. This lessor could not lease the law. The law could not pass under those instruments, however apt words were used to indicate such a purpose. The legislature extended to each of these corporations the right to conduct its business in a certain way. That right, in each instance, was embodied in a separate and distinct set of laws. It was a purely personal right. It was in no sense an asset of the corporation which could be bought and sold. It was nothing that could be transferred. If the Central Pacific Company could transfer it to the defendant, it could likewise transfer it to a private individual, and this would be an absurdity. This right which is claimed to have passed to the lessee is a very intangible thing. It certainly is not the privilege which the lessor possessed of bringing itself within the provisions of the Code, for the lessee was already within those provisions. Prior to the lease the lessee was subject to the burdens of section 490. How any transfer of interest from the lessor could operate to relieve the lessee of burdens already resting upon it is not perceptible. Appellant terms this act an exemption. The only exemption the Central Pacific Company enjoyed was its exemption from the operation of general laws pertaining to corporations coming under the provisions of the civil code. It had the right to exist and do business under certain laws, but this right was not transferred to the defendant. It could not be transferred. The Central Pacific still exists, and has the right to do business. It can build new roads (perchance, it did not dispose of all its old ones), and operate them as it has ever done in the past. If this right has been transferred, the corporation no longer exists, for it constitutes its life. Neither is it possible that this right could be transferred *pro tanto*, nor that it may vest in both corporations at the same time. If section 490 does not apply to defendant, no part of the Code pertaining to corporations applies. We then have a corporation organized since the adoption of the codes conducting its business under laws created prior to that adoption, and such a condition of things is directly opposed to the provisions of section 288. It would be the achievement of astonishing results by the practice of a legerdemain

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that has no place in the law, and the recognition of a doctrine striking at the very root and source of legislative power. Appellant, in this respect, relies firmly upon the case of *Gilmore v. Utica*, 121 N. Y. 561. That was a street assessment case, and the judgment rendered in no way was dependent upon that portion of the decision here relied upon by appellant. The decision was not placed upon that ground, and the matter appears to have been but incidentally touched upon. The facts are briefly these: A street railroad corporation was organized and did business under a general law which provided that "every such corporation incorporated under, or constructing, extending, or operating a railroad constructed or extended under the provisions of this act," shall pave between its tracks, and two feet on each side thereof. A second corporation, organized under a law containing no similar provision, leased its roads to the other corporation, and the court said: "But the Utica Belt Line Street-Railway Company (lessee) was not operating its road under that act. By a lease authorized by chapter 305 of the Laws of 1885, it had succeeded to all the rights of the Utica Street-Railroad Company, and was operating the road in the right of that company, and hence that section has no pertinency." We have not the Laws of New York of 1885 before us, and consequently do not know exactly what may be the subject of lease under those statutes. If the language quoted goes to the length of holding that a lessee of a railroad corporation takes with the property leased the right to control and use it subject alone to the law operating upon the lessor corporation, we do not indorse it as sound. It would seem in this case that, as the road involved was not one constructed under the provisions of the act under which the lessee was incorporated, by the very terms of the act itself the lessee was not required to do the paving, and possibly the court viewed the question from that standpoint.

4. It is contended that section 490 has no application to this case, because the railroad begins at Oakland pier, within the corporate limits of the city of Oakland. Therefore, the point referred to in the complaint, instead of being an intermediate station, is the initial point; Oakland being the station at which the railroad begins, and there being no railroad between San Francisco and Oakland pier, but a ferry only. It seems very clear that, as to a trip from San Francisco to Alameda via Oakland, Oakland is an intermediate station; and the fact that the defendant has two or more stopping places in Oakland, where, for the accommodation of the public, passengers are allowed to enter and leave its local trains, can make no difference. At whichever of these stopping places a passenger chooses to get off, he stops at Oakland; and under the law, as we construe it, he has the right, if he has made a reasonable demand for the privilege, to afterwards resume his journey to Alameda.

5. It is next contended that the line traveled by plaintiff was not the most direct route, and that passengers are allowed to take the more circuitous route on condition that they make a continuous passage. It is sufficient for present purposes to say that the ticket purchased

by plaintiff in this case was an unlimited ticket, and subject to no such conditions. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: **DeHaven, J.; Harrison, J.; Fitzgerald, J.; Beatty, Ch. J.**

Van Fleet, J.:

I concur in the judgment. I think that section 489 of the Civil Code is, by clear and necessary implication, repealed by section 22 of article 12 of the Constitution. But I am not strongly impressed with the position of appellant that section 490 is so dependent upon section 489, to which it refers, as that the repeal of the latter necessarily involved and carried with it the repeal of the former. I do not think there is any such dependence manifest from either the subject-matter or the provisions of those two sections. To my mind, the reference in section 490 to the preceding section is merely in its nature incidental, and not such a bond of union as to make the life of the one measure that of the other. The vital question in the case, in my judgment, and the one giving rise to the greatest difficulty, is whether section 490 was ever intended or designed by the legislature to give to the passenger a stop-over privilege, or the right to a stop-over ticket. Upon this question, after a somewhat extended examination of the case and the arguments presented, I am not prepared to say that the conclusion reached in this opinion of the court is not the correct one.

McFarland, J.:

I dissent, and, if other duties permit, will hereafter express my views of the case in an opinion. At present I will merely give my conclusions on two points:

1. I think that the ticket purchased by respondent, on its face, and especially when considered in connection with the reasonable regulations of appellant of its business on the various routes from San Francisco to Oakland, Alameda, and other points near the bay, which regulations were well known to respondent, merely gave to the latter the right to go either to Oakland or Alameda, not to both, and when he elected to get off at Oakland the life of the ticket was ended.

2. A "stop-over" ticket is a thing well known, not only in railroad circles, but to the general public,—so well known as to have gone into the common dictionaries of the language. It is a ticket which gives one a right "to stop at a station beyond the time of the departure of the train on which one came, with the purpose of continuing one's journey on a subsequent train." Webster's Dict., under head "*Stop*." Now, section 490 does not use the phrase "stop-over," nor does it, in my judgment, use any equivalent words to denote an intention to give to the holder of an ordinary ticket the right to break up his trip into two or twenty different journeys on different days, on two or twenty different trains. I think that the authorities are to the point that a ticket which merely designates in general terms a trip from one point to another means a continuous trip between those points, and such is surely the law where there are by-laws

or regulations of the railroad company to that effect, especially where they are known to the purchaser of the ticket. See *Com. v. Power*, 7 Met. 596, 41 Am. Dec. 478 *et seq.*; 1 Redf. Railways, pp. 92 *et seq.*, and cases there cited; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 284, 41 Am. Rep. 28; *Cody v. Central Pac. R. Co.* 4 Sawy. 114, Fed. Cas. No. 2,940; *Gale v. Delaware, L. & W. R. Co.* 7 Hun, 670. This being the general law, there is no language in section 490 sufficient to show an intent to change it so as to make all tickets stop-over tickets. There is no necessity of substituting "or" for "and" where it occurs in the section. The language of the section merely provides for a ticket upon which the holder can ride from the "station where the same is purchased" to the point of destination, and also from any intermediate station to the point of destination, but not that he may stop over at any intermediate station, or at all intermediate stations, and proceed afterwards, piecemeal, on other trains, as he may choose. Whether or not the intention was to remedy a certain subsisting evil, as contended for by appellant, there is clearly no intention expressed of providing for stop-over tickets.

There are other points in the case, as to some of which I agree with respondent, and as to others with appellant. I think that the judgment should be reversed.

Per Curiam:

In this case, objection was made by respondent, at the oral argument, to the qualification of *Mr. Justice Van Fleet* to sit in the case, upon the ground that he is related to one of the parties by affinity within the third degree as provided by section 170 of the Code of Civil Procedure. The fact upon which the objection is based is that the said justice became by marriage, and is thus by affinity, a first-cousin, or cousin-german, of one of the stockholders of the corporation appellant. But such relation is not within the third degree. Section 1893 of the Civil Code provides as follows: "In the collateral line the degrees are counted by generations from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins-german in the fourth, and so on." As no other rule is elsewhere declared in any of the Codes, and as the four Codes are to be construed as one statute (Pol. Code, § 4480), section 1893 must be taken as establishing the degrees of relationship by consanguinity or affinity, and other sections of the Codes referring to such degrees must be construed as passed in view of section 1893. *People v. De la Guerra*, 24 Cal. 73, and one or two previous cases, were decided before the adoption of the codes, and under the rule that statutes in derogation of the common law must be strictly construed. Section 4 of each of the codes provides as follows: "The rule of the common law, that statutes in derogation of the common law are to be strictly construed, has no application to

this code. The code establishes the law of this state respecting the subjects to which it relates." We are satisfied, therefore, that *Justice Van Fleet* is not disqualified to sit in this case, and the said objection is overruled.

Van Fleet, J., did not participate in the foregoing.

A petition for rehearing was subsequently filed in response to which, on November 7, 1894, the following opinions were handed down:

McFarland and Van Fleet, JJ.:

The judgment heretofore entered herein is vacated and set aside, and the cause ordered to a rehearing before the court in banc.

Beatty, Ch. J.:

I concur in the foregoing order, but would desire to limit the reargument to a single point, viz., the first point discussed in the dissenting opinion of *Mr. Justice McFarland*, or, in other words, to the question whether a ticket conferring the right to ride to either Oakland or Alameda gives the holder a right to stop off at one place, and afterwards resume his journey to the other place.

Fitzgerald, J.:

I concur in the foregoing order granting a rehearing, but desire to state that my opinion remains unchanged upon the three principal points heretofore decided. I am satisfied that section 490 of the Civil Code is still in force, that it applies to the Southern Pacific Company, and that it gives stop-over privileges. But upon a point which was not touched in the oral argument, and but slightly and inadequately discussed in the briefs, I am in serious doubt. I refer to the question whether the ticket purchased by the plaintiff, and which, by its terms, entitled him to go to either Oakland or Alameda, gave him the right, after electing to stop at Oakland, to afterwards go to Alameda. Upon this point only I think the court should have further argument.

De Haven, Harrison, and Garoutte, JJ.:

We dissent from the order granting a rehearing in this case.

After the rehearing **Beatty, Ch. J.**, on January 5, 1895, delivered the following opinion:

The three principal questions arising in this case were very fully and elaborately argued by counsel, both orally and in the printed briefs filed prior to its submission, and they were as carefully considered in the opinion of the court heretofore filed, wherein it was held: First, that section 490 of the Civil Code is still in force; second, that it confers stop-over privileges upon the holders of the tickets therein provided for; and, third, that the defendant is subject to its provisions. As to these points our views remain unchanged, and nothing further need be said concerning them. The rehearing, indeed, was ordered with special reference to a question which, although it had been stated in the briefs, had not been discussed at the oral argument, and had been but

slightly considered in the opinion of the court. This question, to which the reargument was practically confined, may be briefly stated as follows: Did the plaintiff, by purchasing and accepting a ticket which in terms and in fact gave him the alternative right to go to Oakland or Alameda, become thereby entitled to go to Oakland, stop off there, and afterwards resume his journey to Alameda? When this question is considered in the light of the principles established by our former decision, and with reference to the facts stated in the opinion and other facts appearing in the record, it is of comparatively easy solution. The defendant had a ferry and railroad line which it was operating between the foot of Market street, in San Francisco, and the city of Alameda, and which passed through the city of Oakland, where there was a station at which passengers were accustomed to enter and leave its cars. The fact that defendant had another and more direct line of road (and ferry) between the same termini did not relieve its statutory obligation to fix (either alone or in conjunction with the railroad commission) a regular passenger rate by the longer route. The right to operate the road and the obligation to fix such regular rate are correlative. It had in fact complied with the statute, and fixed the rate at fifteen cents, and this was well known, not only to the plaintiff, but to the public generally. Such being the case, the plaintiff, desiring to go from San Francisco to Alameda via Oakland, tendered the regular fare, and demanded the ticket which it was the duty of the defendant to furnish. He received a ticket in the form set out in our original opinion, which was the only ticket the defendant was accustomed to issue to passengers desiring to go by either of two routes to Oakland or either of two other routes to Alameda. But the fact that the ticket gave the plaintiff his choice of these various routes and different destinations made it none the less effective as a ticket from San Francisco to Alameda via Oakland. What he wanted was a ticket of that particular kind, with all the lawful privileges thereto attached, and it was not in the power of the defendant to deprive him of such privileges by offering him other privileges in exchange. This conclusion does not involve the consequences that are apprehended by counsel for appellant. We do not hold, and it does not follow, from the views herein expressed or from anything decided or said by way of argument in our original opinion, that there can be no ticket sold on any line of road which is not a stop-over ticket. We only hold that there must be a regular passenger rate established from one depot to another, and that a passenger who tenders the regular fare is entitled to a ticket to his place of destination, which ticket, under the law, gives him a right to stop over at an intermediate station. And the railroad company cannot demand the regular rate, and at the same time deny the privilege which the law confers upon all who pay such rate. If in consideration of an abatement from the regular established rate a passenger voluntarily accepts an excursion or other limited ticket, an entirely different case is presented. Here the regular established fare was tendered and accepted,

and a ticket issued, which was the only ticket a passenger from San Francisco to Alameda via Oakland could obtain,—the only ticket provided by the defendant. This being so, the defendant cannot be permitted to say that it was not the ticket which the statute obliged it to provide and issue, and this is more especially true in view of the fact that it contained nothing which in terms denied or assumed to curtail the rights conferred by the statute.

But it is said that the ticket is not the contract; that it is a mere token or voucher, and that it is the duty of the passenger to inform himself of the rules and regulations of the carrier, which really determine his rights. This is, perhaps, true to a certain extent. But the passenger is not bound to take notice of any rule or regulation which contravenes the law of the land. So far as the law fixes the terms of the contract, it cannot be varied by rules of the company, known or unknown, unless assented to by the passenger. We have held that under the law of California the ticket issued by a railroad company upon receipt of the regular fare from one depot to another gives the holder the right to stop over at an intermediate station, and to resume his journey at any time within six months; and, if this is so, it matters not how well it may be known to a particular passenger that this right is contested or denied by the company. He nevertheless acquires, by payment of the regular fare, all the rights which the statute gives him. The passenger who is informed of the claim and practice of the carrier is in no worse posi-

tion than one who is not informed. So far as the law goes, it protects all alike. These views are conclusive of the question submitted for reargument, and for the reasons here stated, and those set forth in the original opinion, *the judgment and order of the Supreme Court are affirmed.*

We concur: **Garoutte, J.; Harrison, J.; Van Fleet, J.; Fitzgerald, J.; De Haven, J.**

McFarland, J.:

I dissent. There was nothing in the argument on the hearing which in the least changes my mind as to these propositions: (1) That section 490 of the Civil Code does not require a railroad company to "provide" or "furnish" a stop-over ticket, under either the legal or the common meaning of that word; and (2) that the ticket which appellant did "furnish" respondent was not, on its face, a stop-over ticket, but merely gave him the right to go either to Oakland or Alameda,—not to both; and that he well knew the meaning and purpose of the ticket when he accepted it. This action is not for refusing respondent the kind of ticket he wanted, but for refusing to do something for which the ticket he accepted did not provide. In my opinion, the judgment can be affirmed only upon the theory that, if respondent had paid the proper fare, he could ride, and get off, and get on again, as often as he pleased, upon any sort of a ticket, or without any ticket at all.

MICHIGAN SUPREME COURT.

Harlow P. DAVOCK *et al.*

v.

Charles W. MOORE, *Plff. in Certiorari.*

(.....Mich.....)

1. **The Act of February 27, 1895, to establish a board of health for the city of Detroit is not inoperative for failing to supply the means of carrying out its requirements or to provide any revenue for the board, as it provides that the board shall make an estimate annually to the controller, and his duties when estimates are made to him are provided for by the charter.**
2. **Members of a board of health of a city are not local or municipal officers within Const., art. 15, § 14, providing for election of such officers, but the board is a state agency.**
3. **A municipality is only an instrumentality of the state in respect to a public duty imposed upon it by the legislature and no right of**

NOTE.—As to local self-government, see also *State v. Holsem (Ind.)* 14 L. R. A. 506; *State v. Denny (Ind.)* 4 L. R. A. 65; *State v. Denny (Ind.)* 4 L. R. A. 79; *Evansville v. State (Ind.)* 4 L. R. A. 98; *Com. v. Plaisted (Mass.)* 2 L. R. A. 142.

For quarantine regulations, see *Hurst v. Warner (Mich.)* 26 L. R. A. 434, and *note*.

For powers and liabilities of municipalities in time of epidemics, see *Thomas v. Mason (W. Va.)* 26 L. R. A. 727, and *note*.

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local self-government is involved in the discharge of such duty.

4. **The consent of a municipality or its local officers or boards is not necessary to the validity of a tax to raise money which a board of health requires for the preservation of the public health, under legislative authority.**
5. **An amendment to a bill which is germane to it is not within the restriction of Const., art. 4, § 23, as to the introduction of bills after the first fifty days of a session of the legislature.**
6. **Judicial notice is taken by the supreme court of Michigan that sufficient moneys will come into the hands of the treasurer of Detroit from the liquor fund to replace a loan of \$12,000 credited to the board of health.**
7. **The transfer of money from one fund of a city to another to pay a debt does not deprive the city of its property within the constitutional provision as to due process of law.**
8. **A city has no vested right in moneys obtained from liquor taxes but they are absolutely under the control of the legislature.**

(April 23, 1895.)

CERTIORARI to the Circuit Court for Wayne County to review a judgment issuing a writ of mandamus to compel defendant to issue his warrant for the payment of a check drawn by the board of health of the city of Detroit. *Affirmed.*

The facts are stated in the opinion.

Messrs. John Atkinson, H. H. Hatch, and John Miner, with Messrs. Atkinson & Haigh, for plaintiff in certiorari:

A patent ambiguity appears in the act, which wholly invalidates and avoids it.

The board are to annually prepare estimates of their expenditures and file the same with the city controller. When such sums so estimated are "raised as provided in this act," they are to be appropriated by the board.

A patent ambiguity, *Lord Bacon* defines to be "that which appears to be ambiguous upon the deed or instrument" and "which is never hidden by averment.

Fish v. Hubbard, 21 Wend. 651.

An inspection of the whole act shows that no provision has been made therein for supplying the means of support, except in the crisis of a great and imminent peril to the public health. The case presents a patent ambiguity, within the definition of *Bacon*.

Phillips, Ev. Cow. H. & E. notes, p. 746, note 516; *Hibbard v. People*, 4 Mich. 125; *People v. Smith*, 9 Mich. 193; *Atty-Gen. v. St. Clair County Suprs.* 11 Mich. 68; *People v. Maynard*, 15 Mich. 472; *People v. Lawton*, 30 Mich. 386; *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 688; *Risser v. Hoyt*, 53 Mich. 185; *Lloyd v. Chambers*, 56 Mich. 286, 56 Am. Rep. 378; *Re Chaffee's App.* 56 Mich. 244; *Re Hauck*, 70 Mich. 396; *Re Powers' App.* 29 Mich. 512.

It is the constitutional right of the citizen to hold and enjoy his property secure from the lawless grasp of the government. It is essential to valid taxation that legislative authority exists in every instance to justify the burden upon the citizen.

Cooley, Const. Lim. 638.

The burden of proof is upon the corporation to show the grant of power to levy a tax by express words or necessary implication.

Williams v. Detroit, 2 Mich. 574; *Port Huron v. McCall*, 46 Mich. 574.

The Act of March 15 does not profess to cure, amend, or supplement the Act of February 27.

The Act of March 15 purports to be an amendment of certain sections of the "Act to provide a charter for the city of Detroit," and must be read and construed in reference to the provisions of the act it purports to amend.

Conrad v. Nall, 24 Mich. 275.

The Act of March 15, so far as it undertakes to appropriate specifically the money received from liquor taxes, is unconstitutional and void, as being in contravention of section 1 of article 14 of the Constitution, which directs the disposition of all specific state taxes.

Youngblood v. Sexton, 32 Mich. 413, 20 Am. Rep. 654.

By the Act of March 15 the state undertakes to make an appropriation of these moneys to particular purposes, namely, to the contingent fund, metropolitan police fund, public health fund, and poor fund.

This can only be within the legislative power on the theory that the proceeds of the liquor tax is state money, and, therefore, the state may appropriate the same at its pleasure. If this reasoning is accepted, the liquor tax is void under the very case that affirmed it. The tax thereby becomes a specific state tax, levied for state purposes. The constitution declares the

purposes to which such tax shall be devoted beyond the power of legislative discretion.

Chambs v. Durfee, 100 Mich. 112; *Hance v. Durfee*, Id. 116.

But the liquor tax was designed and expected to be used for "the general purposes of local government." And any appropriation of them by the state to any particular purpose is at once an assumption, by the state, of control of the fund, and infringes the constitutional provision. More plainly is this true if the fund is devoted to a state board or to state purposes.

Ryerson v. Utley, 16 Mich. 276; *People v. Salem Twp. Board*, 20 Mich. 474, 4 Am. Rep. 400.

If the Act of March 15 is construed as referring to that of February 27 so as to amend or supplement it by additional clauses intended to be applicable to it, it falls under the inhibition of section 28: "No new bill shall be introduced into either house of the legislature after the first fifty days of a session shall have expired."

Holden v. Osceola County Suprs. 77 Mich. 205.

Mr. John D. Coneley, with Mr. John J. Speed, for defendants in certiorari.

Long, J., delivered the opinion of the court:

At the present session the legislature passed an act entitled "An act to establish a board of health for the city of Detroit." The act was approved by the governor, February 27, 1895, and took immediate effect. Under that act the board is to consist of four members, freeholders and electors, of the city of Detroit, to be appointed by the governor of this state, with the advice and consent of the senate. The members of the board of health so appointed by the governor at once entered upon their duties as a board of health. This act repealed all former acts providing for a board of health in the city of Detroit, and made it the duty of such former board to turn over to the new board all the property, records, and offices, hospitals and assets, of every name and nature, then in its possession or control, and the new board to pay the bills of the former board. Section 3 of the Act provides: "It shall be the duty of said board on or before the first day of March, in the year 1895, and on or before the 15th day of February in each following year, to file with the city controller an estimate of the amount of money which, in the opinion of said board, will be required for all purposes of expenditures by said board during the next fiscal year, and such sums so estimated, when raised as provided by this act, shall be appropriated by said board for the prevention of danger to the public health or other purposes contemplated by this act. In the presence of a great and imminent peril to the public health by reason of impending pestilence, the said board may report to the common council that in its judgment the security of the public health requires the expenditure of moneys in the then fiscal year in excess of the annual appropriation for the purposes of said board as above provided, and the common council may thereon cause to be placed to the credit of said board such sum of money as may be required in the judg-

ment of the council, such sum to be taken either from the contingent fund or the same may be raised by temporary loan, payable within such time as the council may determine, not exceeding three years and not exceeding in all the sum of \$100,000. The money so raised or borrowed shall be paid into the city treasury and shall constitute a fund to be known as the 'public health fund,' and the same shall be paid out on vouchers approved by the board of health and checks signed by the president and secretary of the board, drawn upon the city controller, who shall draw his warrant upon the city treasurer in favor of the person named as drawee in said check."

It appears that about \$1,600 of bills of the old board remained unpaid at the time that the new board entered upon its duties, and that there were no funds in the city treasury belonging to this board of health fund, said fund having been fully exhausted by warrants theretofore drawn. The legislature thereupon passed an act entitled "An act to amend sections two and four of chapter four, section fifty-nine of chapter seven, sections one, six, seven and eight of chapter ten, and section twenty-seven of chapter eleven of an act entitled, 'An act to provide a charter for the city of Detroit and to repeal all acts and parts of acts in conflict therewith, approved June 7, 1888.'" This act was approved March 15, 1895, and took immediate effect. Section 27 of that Act, as amended, reads as follows: "Moneys shall be transferred from one fund to another as hereinafter provided, and the moneys received and properly belonging to one fund shall not be credited to any other or different fund, excepting to the sinking fund, as above provided. Moneys received from liquor taxes shall be credited to the contingent fund, metropolitan police fund, public health fund and poor fund in such proportions as the common council shall direct. The controller, for convenience, shall have power to divide the several funds above constituted into special funds to defray special expenses belonging to the same class of expenses for the payment of which said several sums are above constituted. The common council shall provide for the maintenance of the board of health of said city and the payment of its expenses during the remainder of the fiscal year ending July 1, 1895, by borrowing by temporary loans such sums as may be certified to the common council by the said board to be necessary for the purposes aforesaid, said temporary loan to be repaid from the moneys received during the present fiscal year from liquor taxes, or if such receipt be insufficient, then from any other moneys in the city treasury. No tax roll shall be held to be void for the reason that an estimate of the amount of money necessary to be raised for any particular fund was not made by any officer, board or commission authorized or required by law to make an estimate for such purpose within the time specified by law for the making of such estimate, provided such estimate shall be transmitted to the common council in time for the same to be acted upon by the common council and board of estimates. The board

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of health of said city shall have control and possession of all city hospitals, buildings and offices pertaining to the health department of said city, and shall annually on or before the 15th day of February, make an estimate of the amount of money necessary to be raised for the maintenance of said board and for the preservation of the public health for the ensuing fiscal year, which estimate shall be certified to the common council; and it shall be the duty of said council to cause the amount of money mentioned in said estimate to be placed upon the tax rolls and raised by general tax at the same time as other sums are raised by general taxation for the next fiscal year: provided, that if the said estimate shall exceed fifty thousand dollars, only so much thereof in excess of fifty thousand dollars as shall be approved by the common council and board of estimates shall be levied in any one year: and provided further, that the council may, by transfer from the contingent fund as above mentioned, provide for the amount of money required to be raised for the purposes of the public health fund, or any part thereof, in lieu of raising the same by taxation. The city treasurer shall place to the credit of the board of health fund the sum of \$12,000 for the maintenance of said board for the remainder of the fiscal year ending June 30, 1895, and for the payment of any existing outstanding liabilities by transfer to the public health fund from any other funds in the city treasury, and the same shall be paid out on the checks of the board of health in the manner now provided by laws for payment from the public health fund. The common council may replace the moneys so transferred by temporary loan, to be repaid from liquor taxes paid into the credit of the contingent fund."

On March 18, the pay roll of the board was made up and approved by the board of health, and a check in the following form drawn in favor of the secretary of the board: "Pay from the public health fund, as provided by an act entitled 'An act to establish a board of health for the city of Detroit,' approved February 27, 1895, to the order of Charles S. Hathaway, eight hundred and fifty-six and sixty-three hundredths dollars. By order of the board of health. Harlow P. Davock, President. Charles S. Hathaway, Secy." This check was presented to the controller, the respondent here, and he was requested to draw his warrant on the city treasurer as provided by law for the payment of the check. The controller refused to draw the warrant, claiming that there were no funds, and that it was unlawful for him to draw his warrant as requested, though his attention was called to the amendment of the charter passed March 15, 1895.

It appears that the city treasurer informed the board that if the circuit court should direct the controller to draw his warrant upon the public health fund he would pay the same as provided by section 27 of the charter above quoted. The board thereafter presented a petition for mandamus to the Wayne circuit court to compel the controller to issue his warrant for the payment of this check. In his answer to show cause to that petition, the

controller answered substantially that he had been advised by counsel that these statutes were in contravention of the constitution and void, and that in view of such advice he deemed it not safe or proper to draw his warrant. He further returns that all the moneys and funds in the treasury of the city, or under the control of the city treasurer, were raised and appropriated to the several funds required by law before the approval of the Board of Health Act of February 27, 1895; that all said funds were appropriated for purposes other than the support and maintenance of the board of health created by that act; that the fund known before that time as the "board of health fund" was exhausted, and he was informed and believed that there was no money or funds in the custody or possession of the treasurer available for the support and maintenance of the board, or upon which he could legally draw any warrant for the payment of the check presented to him. He further returns that the city of Detroit has never recognized the petitioners as a legal health board, but that, on the contrary, the city has filed a bill in the circuit court in chancery to enjoin the petitioners from acting as such board of health, the treasurer from transferring funds under the statute mentioned, and the controller from drawing warrants upon such funds when transferred for the use of petitioners, and that subpoena has been served upon him. No claim is made that any injunction ever issued thereunder. Upon the hearing upon this petition and answer, the court below directed the writ to issue against the controller, commanding him to draw his warrant for the amount of the check presented. The cause comes here by writ of certiorari. The assignments of error are numerous, but may be discussed under a few heads.

1. By the first clause of section 8 of the Act of February 27 the board are to prepare annually estimates of their expenditures, and file the same with the city controller. When such sums so estimated "are raised as provided in this act," they are to be appropriated by the board. It is contended that no provision is made by the act itself to supply the means of carrying out its requirements, or to provide any revenue for the board, as the second clause of that section only confers power upon the council to raise additional sums of money by the issue of short-time obligations or to be taken from the contingent fund of the city, this clause being designed to meet a special exigency; that, therefore, the act must fail. While the act does not purport to be an amendment to the charter of the city of Detroit, this section refers in terms to the city controller and the common council of the city. The act does not attempt to define the powers and duties of the controller. It does provide that the board shall make an estimate annually to the controller. The city charter provides what steps shall be taken by the controller when estimates are made to him. Section 1, chap. 8, Act No. 488, Local Acts 1887. This section of the charter makes it the duty of the controller to report his estimates to the 28 L. R. A.

common council each year, the sums necessary to be raised for each fund, which the council may revise or alter, etc. The legislature evidently had in mind the duties of the controller in this respect, and the provision that "such sums when so estimated are raised as provided by this act" means the sums estimated by the board and reported to the controller. The language employed can mean nothing else, when we read the whole act. It does not purport to fix a method of raising this revenue different than that fixed by the city charter,—that is, the estimate made by the board to be reported to the controller, and by him returned to the common council, to go into the budget for that year.

2. It is contended that the act is in contravention of section 14, article 15, of the Constitution of this state, which provides that "judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." The argument is that the board created by the act is a state board, a state agency, and not a municipal board, and that most, if not all, the powers vested in it are local and municipal, and therefore forbidden by that section of the constitution. There can be no reason to doubt that the members of this board are "officers," within the meaning of that section, and, if their duties are purely municipal, their election or appointment could not be taken from the municipality, and placed in the hands of the governor. *People v. Huribut*, 24 Mich. 44, 9 Am. Rep. 103. We think, however, that the duties of the board are not purely municipal. Municipal corporations are of a two-fold character,—the one public, as regards the state at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for the citizens. The legislature under the present act is dealing with the city of Detroit as one of its agencies, to protect the public health, and prevent the spreading of pestilential, contagious, or infectious disease. It has empowered this board, whenever the state board of health have declared any town or city to be infected with contagious disease, in its discretion, to subject to quarantine all vessels arriving at the port of Detroit, from such infected place, for such time as said board may deem necessary for the protection of the inhabitants of said city; and this board may also prohibit or regulate the internal intercourse by land or water between the city of Detroit and such infected place, town, or city, and may direct that all persons who shall come into the city contrary to their prohibition or regulation shall be apprehended, etc. Clearly, it is apparent by the whole provisions of the act that it was the legislative intent to use the city as its agent in government, to prevent the spread of contagious disease.

In *People v. Mahaney*, 18 Mich. 481, the metropolitan police board act was upheld. Laws 1865, p. 679. The legislature by that act appointed the first board of police for the city of Detroit. It was contended there, as here, that the act was void, as it was sub-

versive of local self-government. It was said: "Besides the specific objections made to the act, as opposed to the provisions of the constitution, the counsel for respondent attacks it on general principles, and, especially, because violating fundamental principles of our system that governments exist by the consent of the governed, and that taxation and representation go together. The taxation, under the act, it is said, is really in the hands of a police board,—a body in the choice of which the people of Detroit have no voice. This argument is one which might be impressed upon the legislative department with great force, if it were true in point of fact. But, as the people of Detroit are represented throughout, the difficulty suggested can hardly be regarded as fundamental. They were represented in the legislature which passed the act, and had the same proportionate voice there with other municipalities in the state, all of which receive from that body their powers of local government, and such only as its wisdom shall prescribe within the constitutional limit. They were represented in that body when the present police board were appointed by it, and the governor, who is hereafter to fill vacancies, will be chosen by the state at large, including that city. There is nothing in the maxim that taxation and representation go together which requires that the body paying the tax shall alone be consulted in its assessment, and, if there were, we should find it violated at every turn in our system. The state legislature not only has a control in this respect over inferior municipalities, which it exercises by general laws, but it sometimes finds it necessary to interpose its power in special cases to prevent unjust or burdensome taxation, as well as to compel the performance of a clear duty. The constitution itself, by one of the clauses referred to, requires the legislature to exercise its control over the taxation of municipal corporations, by restricting it to what that body may regard as proper bounds. And municipal bodies are frequently compelled most unwillingly to levy taxes for the payment of claims, by the judgment or mandates of courts, in which their representation is quite as remote as that of the people of Detroit in this police board." In *People v. Hurlbut*, *supra*, the act provided for the appointment of a board of public works for the city of Detroit. The act named the first members of the board, and provided for subsequent appointments by the common council. 3 Sess. Laws 1871, p. 273. It was contended that this act was void, as it took from the municipality the power to appoint the members, whose duties were purely of a municipal character. The opinions in that case cover the whole ground contained in the present case, and the distinction is so clearly made between state and municipal agencies that it is unnecessary to more than refer to that case. *Mr. Justice Campbell*, at page 81, expressly restates the doctrine of *People v. Mahaney*, upholding the power of the governor to appoint the board of police commissioners for the city of Detroit, and says: "The only remaining question, therefore,

concerning the application of our former decision to the case, is whether the police board is a state or municipal agency. If the former, that decision concludes nothing now before us. If the latter, it ends one important part of the controversy. I think it is clearly an agent of the state government, and not of the municipality." He adds further: "The only confusion existing on this subject has arisen from the custom prevalent under all free governments of localizing all matters of public management, as far as possible, and of making use of local corporate agencies whenever it can be done profitably, not only in local government, where it is required by clear constitutional provisions, but also for the purposes of state. Illustrations of this might easily be multiplied. The whole system of state taxation, under our laws, is made to depend on the action of town and county officers, who made the assessments and collect most of the taxes. And the whole machinery of civil and criminal justice has been so generally confided to local agencies that it is not strange if it has sometimes been considered as of local concern. But there is a clear distinction in principle between what concerns the state and that which does not concern more than one locality, and, where the constitution has made no rule for their management, affairs belonging to state policy must be subject to immediate state control, if the legislature shall deem it necessary." *Judge Cooley*, on page 103 of the same case, calls attention to the distinction between the classes of officers whose duties are general and such as are municipal or local. He says: "For those classes of officers whose duties are general, such as the judges, the officers of militia, the superintendents of the police, of quarantine, and of ports, by whatever names called, provision has, to a greater or less extent, been made by state appointment. But those are more properly state than local officers. They perform duties for the state in localities, as collectors of internal revenue do for the general government; and a local authority for their appointment does not make them local officers, when the nature of their duties is essentially general. . . . The municipality as an agent of the government is one thing; the corporation, as the owner of property, is in some respects to be regarded in a very different light. . . ." In *People v. Detroit*, 28 Mich. 223, 15 Am. Rep. 302, it is said: "In *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, we considered at some length the proposition which asserts the amplitude of legislative control over municipal corporations, and we there conceded that when confined, as it should be, to such corporations as agencies of the state in its government, the proposition is entirely sound. In all matters of general concern there is no local right to act independently of the state; and the local authorities cannot be permitted to determine for themselves whether they will contribute through taxation to the support of the state government, or assist when called upon to suppress insurrections, or aid in the enforcement of the police laws. Upon all such subjects the state may exercise compulsory authority, and may enforce the per-

formance of local duties, either by employing local officers for the purpose, or through agents or officers of its own appointment. The same doctrine was declared in *People v. Mahaney*, 18 Mich. 481, and in *People v. State Treasurer*, 23 Mich. 503. It was also recognized in the statement that in the levy of taxes for purposes of general concern the municipal bodies cannot demand a right to be consulted, and their consent is immaterial. And we concur fully in the views which have been expressed by other courts in the cases to which our attention was called on the argument, that, as regards duties which the people in the several localities owe to the commonwealth at large, they cannot be allowed discretionary authority to perform them or not as they may choose. Such an authority would be wholly inconsistent with anything like regular or uniform government in the state." It was held in *People v. Reilly*, 53 Mich. 260, that the act authorizing the appointment of jury commissioners for the recorders' court by the governor was valid, and that the commissioners were not city officers, though acting within the locality. *Speed v. Detroit*, 100 Mich. 93; *People v. Macomb County Suprs.* 3 Mich. 475; *Wyandotte v. Drennan*, 46 Mich. 478. It is settled by these cases that, whenever the legislature imposes the performance of a public duty upon a municipality, such municipality is then but the instrumentality of the state. In the discharge of such duties, there is no right of local self-government involved. It is true that municipal corporations in this state have certain proprietary rights, and as to these they are free from state interference, as is well illustrated in *People v. Hurlbut*, *supra*. But municipal corporations have also certain duties imposed upon them which are of a governmental character, and those duties are performed by the local corporation body, as agents for the state, and such duties may be enlarged or diminished at the will of the legislature. The care of the public health is a police power. The several states of the Union possess a general police power, by which certain persons and property are subjected to all kinds of restraints and burdens in order to secure general health, comfort, and prosperity of the state. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. They belong emphatically to that class of objects which demand the application of the maxim, "*Salus populi suprema lex*;" and they are to be attained and provided for by such appropriate means as the legislature may devise. *People v. Phippin*, 70 Mich. 6; *Boston Beer Co. v. Massachusetts*, 97 U. S. 32, 24 L. ed. 991. Judge Cooley says: "The state may have its state board of health, but it will provide for local boards of health also; and, as their duties concern the community at large, their members are to be regarded as state, rather than local, officers." Cooley, *Taxn.* 2d ed. 62. In *Tay-*

lor v. Philadelphia Board of Health, 31 Pa. 73, 72 Am. Dec. 724, it is said: "The board of health of Philadelphia is a public corporation of the state, charged with public functions for the benefit of the state at large, and not simply for local purposes."

3. It is said that the act is unconstitutional, in that it authorizes the board of health to require money to be raised by an annual tax for local purposes without the consent of any of the local officers or of the boards of said city. The preservation of the public health is not a local purpose, and the consent of the locality is not material, where the function is a public or general one. *People v. Mahaney*, 13 Mich. 497.

4. It is next contended that the charter was introduced after the first fifty days of the session, in violation of section 23, article 4, of the Constitution. The amendment, however, was made in section 27 after the fifty days had expired. But the bill is not in conflict with this provision of the constitution for that reason. The added language is germane to the charter. The point is ruled by *Pack v. Barton*, 47 Mich. 520. In that case it appeared that the bill was introduced within the first fifty days for the organization of the township of Montmorency. It was, after the fifty days had elapsed, amended so as to make it a bill for the organization of the county of Montmorency. The territory embraced in the bill was the same. *Mr. Justice Cooley* said: "To attempt on this record to indicate the limits of constitutional power in the amendment of bills previously introduced, would be uncalled for and therefore unwarranted. No one disputes that whatever is in the proper scope of amendment is as much admissible after the fifty days as before, and this must embrace whatever is germane to the purpose which the bill had in view." See also *People v. McElroy*, 73 Mich. 446, 2 L. R. A. 6, and cases cited.

5. The claim is made that the provision in section 27 of the amendment to the charter is void, which directs the city treasurer to place to the credit of the board of health the sum of \$12,000, for the maintenance of the board for the remainder of the fiscal year, etc., by transfer from any other funds in the city treasury, and the same to be paid out by the checks of the health board in the same manner now provided by law, for payment from the public health fund, and that the common council may place the moneys so transferred by temporary loan to be repaid for liquor taxes paid in, to the credit of the contingent fund. It is contended that this provision is in violation of that portion of section 1, article 14, of the Constitution of the United States, which reads: "Nor shall any state deprive any person of life, liberty, or property, without due process of law." The funds were only to be transferred temporarily, and replaced by the moneys collected from the liquor taxes. The municipality is not deprived of the money belonging to any particular fund. It is in the hands of the city treasurer, and we may take judicial notice of the fact that sufficient moneys will come into the hands of the treasurer from the liquor fund to replace it. It is apparent

from the Act of February 27 that the legislature regarded the inhabitants of the city of Detroit, and of the state at large, in imminent peril by reason of the then impending pestilence, and that funds were necessary to enable the board to prevent its spread. The legislature had the right to impose the burden upon the city to defray the expense of the health board, and it cannot be said that the transfer of money from one fund to the other to pay a debt deprives the city of its property, within the meaning of the provisions of that section of the United States Constitution. It is apparent from the record before us that the city treasurer had sufficient funds on hand to make the transfer without detriment to the city, or to any objects to which those particular funds were appropriated, and the fund from which the moneys for the health board are to be taken is to be replenished by the moneys from the liquor taxes. The fund from this source is absolutely under the control of the legislature. While the property which a municipal corporation acquires in the exercise of its corporate powers is protected from legislative interference as vested rights, yet in provisions of the law for the revenue of the city, whatever form such provision may take, the city has no vested right; and the legislature may at any time, as far as the municipal corporation is concerned, change and modify, or altogether take away, the particular source of revenue. Tiedeman, Mun. Corp. § 12. Many and varied duties are imposed upon the health board under this act, but whether any of those duties are beyond the power of the legislature to grant to it, we need not now determine.

The various objections to the acts which have been made we have carefully examined, and find no reason for saying that the acts cannot be upheld. The court below was correct in directing the mandamus to issue to the controller to sign the warrant for the moneys demanded.

That action must be affirmed.

Grant, Montgomery, and Hooker, JJ., concurred with **Long, J.**

McGrath, Ch. J., dissenting:

The question involved in this case is of such vital moment that I cannot concur in the opinion of the majority, although my views may seem to conflict with cases in this court involving a similar question. The vice of a doctrine becomes more apparent as its application is carried beyond the exigencies of the case which caused its evolution in the first instance. The doctrine was first announced by this court in *People v. Mahaney*, 13 Mich. 481. The objections raised by the act in that case were (1) that the proposition to give the act immediate effect did not receive the necessary two-thirds vote; (2) that a subsequent act continued the respondent in office; (3) that the act violated section 20, article 4, of the Constitution; (4) that it violated section 25, article 4, of the Constitution; (5) that under the act there was no limit to the exactions of the board, whereas section 13, article 15, of the Constitution re-

quired the legislature to restrict the powers of taxation in cities; and (6) that the act violated the principle of no taxation without representation. The court, after discussing the other objections raised, says: "Besides the specific objections made to the act as opposed to the provisions of the constitution, the counsel for respondent attacks it on 'general principles,' and especially because violating fundamental principles of our system, that governments exist by the consent of the governed, and that taxation and representation go together. The taxation under the act, it is said, is really in the hands of a police board, a body in the choice of which the people of Detroit have no voice. . . . It cannot, therefore, be said that the maxims referred to have been entirely disregarded by the legislature in the passage of this act. But as counsel does not claim that, in so far as they have been departed from, the constitution has been violated, we cannot, with propriety, be asked to declare the act void on any such general objection. An unbroken series of decisions in this state has settled the rule of law that, before we can declare an act of the legislature invalid, its provisions must be found to conflict with the constitution." Section 14, article 15, of the Constitution was not referred to in the brief of counsel, nor was it alluded to in the opinion. Counsel did not claim that this section had been violated, and the court expressly refrained from discussing a provision of the constitution not pointed out or relied upon.

In *People v. Reilly*, 53 Mich. 260, a challenge was made to the array of jurors in a criminal case, upon the ground that they were selected by persons appointed by the governor. *Mr. Justice Sherwood*, referring to this section, says: "The commissioners appointed by the governor are not 'judicial officers,' in the sense in which those words are used in this section; and, if they were, they are not city or village officers, but county appointees, and are therefore not within the provisions of the section referred to. The defendant, under the operation of the law, is in no way deprived of his common-law jury, nor of any of its essential incidents. The mode and manner of selecting the jury has always been a subject of statutory regulation; and so long as the mode adopted requires good and lawful men of the vicinage of defendant, to be taken from the body of the county, the respondent has no cause for complaint on constitutional grounds, and this is secured by the statute complained of." *Justices Champlin and Cooley* concurred in the result reached, and *Mr. Justice Campbell* writes an opinion favoring the reversal of the judgment on other grounds.

In *People v. Hurbut*, 24 Mich. 44, 9 Am. Rep. 103, however, the court was brought face to face with section 14, article 15, of the Constitution, and it seems to me that the construction and effect given to that provision is utterly irreconcilable with the doctrine of the *Mahaney Case*. *Mr. Justice Christianity*, in that case, does not refer to the doctrine of *People v. Mahaney*, but, in discussing

the provision in question here, he refers to the use of the word "elected," "in reference to the local organization of counties, towns, and districts," and says that, "cities and villages being local organizations for like governmental purposes," it is difficult to resist the conclusion that an election by the electors of such localities was intended. Referring then to the question as to appointments under the same provision, he says: "But when we recur to the history of the country, and consider the nature of our institutions, and of the government provided for by this constitution, the vital importance which in all the states has so long been attached to local municipal governments by the people of such localities, and their rights of self-government, as well as the general sentiment of hostility to everything in the nature of control by a distant central power in the mere administration of such local affairs, and ask ourselves the question whether it was probably the intention of the convention, in framing, or the people, in adopting, the constitution, to vest in the legislature the appointment of all local officers, or to authorize them to vest it elsewhere than in some of the authorities of such municipalities, and to be exercised without the consent, and even in defiance of the wishes, of the proper officers, who would be accountable rather to the central power than to the people over whose interests they are to preside, thus depriving the people of such localities of the most essential benefits of self-government enjoyed by other political divisions of the state,—when we take all these matters into consideration, the conclusion becomes very strong that nothing of this kind could have been intended by the provision. And this conviction becomes stronger when we consider the fact that this constitution went far in advance of the old one, in giving power to the people which had formerly been exercised by the executive, and in vesting, or authorizing the legislature to vest, in municipal organizations a further power of local legislation than had before been given to them. We cannot, therefore, suppose it was intended to deprive cities and villages of the like benefit of the principle of local self-government enjoyed by other political divisions of the state. The convention must be supposed to have recognized, to some extent, existing things, and to have had reference to cities and villages with substantially such organizations, or upon such principles of self-government, as had generally become customary." *Mr. Justice Campbell* says: "Our constitution cannot be understood or carried out at all, except on the theory of local self-government, and the intention to preserve it is quite apparent. In every case where provision is made by the constitution itself for local officers, they are selected by local men. All counties, towns, and school districts are made to depend upon it. All elections are required to be in local divisions where electors reside. Cities are represented in the board of supervisors, and it is quite possible for their members to outnumber the rest. It certainly cannot be that the state can control those bodies by sending its own agents there, and it cannot be possible that it

was contemplated that any members of that board should be selected by a different mode of election or appointment from the rest. Cities may become counties, and surely there can be no county without popular institutions. Cities have been judicially declared to come within the denomination of 'townships,' so far as to be entitled to library money; and, unless they are made to include school districts, they need not be compelled to have free schools. No one would venture to assume that the constitution was designed to leave them in such a position. It is impossible to read that document without finding the plainest evidence that every part of the state is to be under some system of localized authority emanating from the people. This is no mere political theory, but appears in the constitution as the foundation of all our polity. There is no middle ground. A city has no constitutional safeguards for its people, or it has the right to have all its officers appointed at home. Unless this power is exclusive, the state may manage all city affairs by its own functionaries. The only reasonable meaning of the constitutional clause in question is that, when the legislature has designated the time and manner of appointment or election, the local authority shall fill the offices as so ordained." *Mr. Justice Cooley*, in the same case, says: "The question, broadly and nakedly stated, can be nothing short of this: Whether local self-government in this state is or is not a mere privilege conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure." He then says, "I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right." He then proceeds to the discussion of certain maxims of government relating to the creation and endowment of municipal bodies, their control, regulation, and abolishment, remarking, however, that: "Such maxims of government are very seldom true in anything more than a general sense. They never are, and never can be, literally accepted in practice. Our constitution assumes the existence of counties and townships, and evidently contemplates that the state shall continue to be subdivided as it has hitherto been. . . . It names certain officers which are to be chosen for these subdivisions, and confers upon the people the right to choose them. Then, after discussing the amplitude of legislative power in the absence of restrictions, he says: "The doctrine that, within any general grant of legislative power by the constitution, there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people. . . . The state may mold local institutions according to its views of policy or expediency, but local self-government is matter of absolute right, and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but, at discretion, sent in its own agents to administer it.

or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.

Nevertheless, when the state reaches out, and draws to itself and appropriates the powers which, from time immemorial, have been locally possessed and exercised, and introduces into its legislation the centralizing ideas of continental Europe, under which despotism, whether of monarch or commune, alone has flourished, we seem forced back upon, and compelled to take up and defend, the plainest and most primary axioms of free government, as if, even in Anglican liberty, which has been gained step by step through extorted charters and bills of rights, the punishment of kings and the overthrow of dynasties, nothing was settled, and nothing was established. But I think that, so far as is important to a decision of the case before us, there is an express recognition of the right of local authority by the constitution. That instrument provides that 'judicial officers of cities and villages shall be elected: that all other officers shall be elected or appointed at such time and in such manner as the legislature may direct.' It is conceded that all elections must, under this section, be by the electors of the municipality. But it is to be observed that there is no express declaration to that effect to be found in the constitution; and it may well be asked what there is to localize the elections any more than the appointments. The answer must be that in examining the whole instrument a general intent is found pervading it, which clearly indicates that these elections are to be by the local voters, and not by the legislature, or by the people of a larger territory than that immediately concerned. I think, also, that, when the constitution is examined in the light of previous and contemporaneous history, the like general intent requires, in language equally clear and imperative, that the choice of the other corporate officers shall be made in some form, either directly or indirectly, by the corporators themselves.

In *Allor v. Wayne County Auditors*, 48 Mich. 76, it was held that under our constitution there could not be any such thing as a municipal government which is not managed by popular representatives and agencies deriving their authority from the inhabitants; that there could be no complete city corporation without means of enforcing such regulations as are necessary for the peace and good order of the community; that constables are local peace officers; that no legislation would be valid which retained the names, but destroyed the powers, of such officers; that, while there is an undoubted power to vary the duties of such officers, their duties could not be so changed as to practically change the office; "that, when officers are named in the constitution, they are named as having a known legal character; that the Metropolitan police force of Detroit, so far as lawfully constituted, is merely an additional force of constables and watchmen appointed by the state for certain limited pur-

poses, and it cannot supersede the local peace officers for all common-law purposes.

In *Atty-Gen. v. Detroit*, 58 Mich. 220, 55 Am. Rep. 675, where the legislature undertook to create a board of commissioners of registration and election for the city of Detroit, it is said: "It is also well settled that our state polity recognizes and perpetuates local government through various classes of municipal bodies, whose essential character must be respected, as fixed by usage and recognition when the constitution was adopted; and any legislation for any purpose, which disregards any of the fundamental and essential requisites of such bodies, has always been regarded as invalid and unconstitutional.

In *Wilcox v. Paddock*, 65 Mich. 28, an act had been passed for the improvement of Maple river, in Clinton and Gratiot counties. It provided for an appointment by the probate court of Gratiot county of a commissioner, whose duty it was to examine the line of the proposed work, and if, in his opinion, it was necessary, and for the good of the public health, he should proceed with the work, and assess the cost thereof in excess of the appropriation upon the property benefited, and upon any township, city, or village, by reason of the benefit to the public health thereof. In that case it is said: "The whole theory of the constitution, and of our state polity, before and since its adoption, looks to the imposition of local taxes for local purposes by local officers. By this act they are to be levied and expended by a person not a resident of the township or the county of which the persons assessed are inhabitants, and in which the work is done from which the benefits authorizing the taxes are presumed to arise. The authority of the commissioner, who is made the taxing officer, is derived from a court whose jurisdiction is foreign to, and independent of, the county of Clinton; and the board of review which makes such assessment a finality is composed of four members out of five as completely beyond the reach of the people taxed as if they lived in another state. The people of Essex, in Clinton county, therefore, by this act, are taxed by officers in whose election they have no voice, and whom they have no power to replace by others of their own choosing. This cannot be done."

In *Detroit Board of Metropolitan Police v. Wayne County Auditors*, 68 Mich. 576, it was held that the attempted extension of the powers of the police board to police certain townships adjacent to the city of Detroit was illegal. Again it is said by the court that under our system we can have no governments, general or special, that do not immediately represent a popular constituency, and no properly called governmental power can be lodged anywhere else, and that the people could not be subjected to any delegated powers of government not exercised by their own representatives.

In referring to *People v. Mahaney*, the court says that the act under consideration in that case was held sufficient to replace a city marshal by the officers substituted. I am

aware that in the *Hurlbut Case*, and in some others, an attempt has been made to distinguish the *Mahaney Case*. The basis for the distinction is that the *Mahaney Case* related to a police force; that local municipalities have a twofold character, the one public, and the other private; and that in the matter of public order the state has a special interest, and the police force must be regarded as an agency of the state, rather than of the city. It does seem to me that in the discussion of the *Mahaney Case* there has been an unwarranted limitation as to the force and effect of the constitutional provisions relating to local self-government, and that the invocation of an implied power to sustain a legislative act which undertakes, in violation of constitutional guaranties, to thrust upon a local municipality officers in the selection of whom the inhabitants of that locality have no choice, and make such officers a part of the permanent system of local government, is indefensible. The question involved is not whether the state may not provide for a state militia. It is not whether or not the state does not possess certain police powers, or whether it may not exercise those powers. The power to appoint a state board of health, or an oil inspector, with his deputies, is not brought in question. Nor is it contended that the preservation of public order or of public health is not a matter of state concern. The board of health of the city of Detroit is a local board created primarily, at least, in the interest of the locality,—existing because of the existence of the local entity. The question is whether these local officers may be appointed by the state, simply because the board exercises a function in which the state is incidentally interested. It seems to me very clear that it is the exercise of governmental functions by officers selected by the inhabitants of the municipality that is guaranteed by the constitution to the local entity, and this without reference to whether the functions relate to matters purely local in character, or matters in which the public at large may have an incidental interest. Local ordinances are, as a rule, closely related to general laws. To attempt to confine the doctrine of the *Hurlbut Case* to such functionaries as are the mere caretakers of municipal property is a narrow view to take of the principle of local self-government. In that case, *Mr. Justice Cooley*, at page 106, says: "What is constitutional freedom? Has the administration of equal laws by magistrates freely chosen no necessary place in it? Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell, and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as respectful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where in the con-

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stitution the power to establish it was prohibited. It would be necessary, on the other hand, to point out to them where, and by what unguarded words, the power had been conferred. Some things are too plain to be written. If this charter of state government which we call a 'constitution' were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so,—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain. But the living spirit, that which gives it force and attraction, which makes it valuable, and draws to it the affections of the people; that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair, and to possess equal promise, with ours, and have only been wanting in the support and vitality which these alone can give,—the living and breathing spirit which supplies the interpretation of the words of the written charter would be utterly lost and gone." It may as well be asked, What is the theory of local self-government? Is it the mere privilege of providing water, light, and fire protection, and of paying for and owning the plant? Our constitution not only secures to townships and counties the right of selection of the officers of those municipalities, but also the right to insist that those functionaries shall not be shorn of their functions; and this notwithstanding the fact that the list includes officers who have been termed 'state officers,' and others whose functions embrace matters of general as well as of local concern. These officers include the circuit judges, probate judges, justices of the peace, prosecuting attorneys, sheriffs, school inspectors, highway commissioners, and constables, all charged with important functions, including the administration of law, the arrest and prosecution for crime, and the preservation of order. It is not so much the officer as the exercise of the function that is guaranteed to the locality. In *Robertson v. Baxter*, 57 Mich. 127, it was held that the essential qualities of townships are fixed by recognition in the constitution, and cannot be changed, and that public burdens cannot be laid, under the constitution, except by persons chosen by the community in which the work is to be done. In *People v. Springwells Twp. Board*, 25 Mich. 152, by Act No. 414 of 1871, the governor was empowered to appoint commissioners to improve the highway; but the court held that the powers of commissioners and overseers of highways were subject to legislative modification, but that no legislature could abolish the officers,

or take away all their functions. The difficulty that attended the determination of the *Allor Case*, *supra*, was not that officers known by another name had undertaken to discharge the functions, but that the attempt had been made by the police officers, who had not been chosen by the locality. There has not been for many years, in the city of Detroit, an officer known as a "supervisor," "commissioner of highways," or "overseer of highways;" but the functions of such officers have been discharged by other officers, and no one has ever questioned the right of substitution, or charged that the constitution has been violated. A health board is, under our statutes, an organic incident of every township, city, or village in the state. In the *Mahaney Case* it was held that the police officers were state officers, yet in the *Allor Case*, *supra*, it was held that they could not supplant the constabulary; and in *Detroit Board of Metropolitan Police v. Wayne County Auditors*, *supra*, it was held that these officers could not police territory adjacent to the city of Detroit, and that the people of such territory could not be subjected to any delegated governmental powers not exercised by their own representatives. Why not, if the people of the city of Detroit can be so subjected? Constables and sheriffs are charged with the preservation of order, yet, in respect of the mode of their selection, the constitution makes no distinction between these officers and township clerks or registers of deeds. The legislature is authorized to organize counties as well as cities and villages, and boards of supervisors are empowered to organize townships. When organized, each derives its powers, as to the selection of its officers, from the constitution, and not from the legislature, or the board of supervisors. Section 14, article 15, expressly provides that "judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed, at such time and in such manner as the legislature may direct." By this provision the constitutional guaranties accorded to townships and counties, respecting the matter of local self-government, are extended to cities and villages. It seems to me very clear that the theory of the constitution is to organize these local subdivisions as constituent governmental entities, to invest them with the largest measure of function and responsibility, to bring representatives and constituency into close relations, and thus secure to the officer the largest measure of moral support in the discharge of his duties, and to the locality, being the most directly interested, and having the best means of information, the right of selection and rejection. I am aware that officers may become derelict in the performance of their duties, but under the constitution the legislature may provide for the removal of any officer elected by a county, township, or school district; and there is no doubt of the power to provide for the removal by the governor of any officer of any municipality, in the discharge of whose functions the state has a special interest. The constitution itself points out the remedy in such case. But it may be said that a community may become incapable of self-government, and in

one of the cases this language is used: "The effect upon the whole state of abrogating local government in a single city or township, and leaving everything to the unrestrained passions of bad men, would inevitably be pernicious beyond estimate." *Youngblood v. Sexton*, 32 Mich. 417, 20 Am. Rep. 654. Happily, such a contingency is a very remote one. In *Atty-Gen. v. Detroit*, 58 Mich. 212-226, 55 Am. Rep. 675, Mr. Justice Morse says: "The nearer the officers are to the people over whom they have control, the more easily and readily are reached the evils that result from political corruption, and the more speedy and certain the cure. The form of our state government presupposes that the people of each locality, each municipal district, or political unit, are intelligent and virtuous enough to be fully capable of self-government." Conceding that there exists, by implication, the power to provide for such a contingency, it is but an emergency power, the exercise of which is sanctioned only by the emergency, and must then be provisional only. It certainly was not intended that such power could be invoked to supplant our local governmental system, or that, with the help of a mere fiction, there would be ingrafted upon that system, as a permanent structural part thereof, a feature so utterly repugnant to the whole theory of local self-government. I regard the doctrine of the *Mahaney Case* as utterly inconsistent with the principles underlying the subsequent decisions of this court, a few only of which have been referred to, and am of opinion that the case should not be regarded as authority upon the question raised here.

DETROIT, GRAND HAVEN & MILWAUKEE R. CO., *Appl.*,

v.

City of GRAND RAPIDS.

(.....Mich.....)

1. Railroad property cannot be sold for street assessments.
2. A railroad right of way cannot be benefited by the opening and paving of a street across it so as to subject it to an assessment for such improvement.

(Hooker, J., and McGrath, Ch. J., dissent.)

(July 2, 1895.)

APPEAL by complainant from a decree of the Superior Court of Grand Rapids refusing to enjoin the enforcement of an assessment for street improvements. *Reversed.*

The facts are stated in the opinion.

Mr. E. W. Meddaugh, with **Mr. L. C. Stanley**, for appellant:

The land, being necessary to the enjoyment of the franchise, is not subject to sale.

Lake Shore & M. S. R. Co. v. Grand Rapids 102 Mich. 374.

NOTE.—For note on the liability of railroads to assessments for public improvements, see *Chicago, M. & St. P. R. Co. v. Milwaukee (Wis.) ante*, 249.

By the charter of the city (title V. § 21), this property is not assessable for this improvement unless it, the property assessed, is deemed to be specially benefited (Charter Grand Rapids, title VI. §§ 4, 15). No benefit received by the owner in respect of some other parcel outside the assessment district would be sufficient. No general benefit to the railroad company or to its franchise would be proximate enough to warrant it if any such benefit existed.

Bridgeport v. New York & N. H. R. Co. 36 Conn. 355, 4 Am. Rep. 63.

The benefit must be of such kind as to benefit now the property for the uses in which it now serves the public.

New York & N. H. R. Co. v. New Haven, 42 Conn. 279, 19 Am. Rep. 534.

Special assessments are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds.

Cooley, Taxn. p. 606; *Macon v. Patty*, 57 Miss. 386, 34 Am. Rep. 451; *Hagar v. Reclamation Dist. No. 103*, 111 U. S. 705, 28 L. ed. 571.

The assessment of property for a local improvement without or beyond its enhancement is *pro tanto* the taking of private property for public use.

Tide Water Co. v. Coster, 18 N. J. Eq. 519, 90 Am. Dec. 634; *Williams v. Detroit*, 2 Mich. 560; *Thomas v. Gain*, 35 Mich. 181; *Grand Rapids School Furniture Co. v. Grand Rapids*, 92 Mich. 564; *Jones v. Detroit Water Comrs.* 34 Mich. 275; *Shaley v. Detroit*, 45 Mich. 435; *Hoyt v. East Saginaw*, 19 Mich. 43, 2 Am. Rep. 76; *Warren v. Grand Haven*, 30 Mich. 26.

Railroad property generally exempt from taxation is also exempt from special assessments except where specially benefited.

Cooley, Taxn. 650, 651; 2 *Rorer*, Railroads, p. 1492, notes 2, 3; *Dill*, Mun. Corp. 4th ed. § 752, note, p. 921.

Right of way not specially benefited is not assessable.

Philadelphia v. Philadelphia, W. & B. R. Co. 83 Pa. 41; *Junction R. Co. v. Philadelphia*, 88 Pa. 424; *Pittsburgh's Petition*, 138 Pa. 424; *State v. Elizabeth*, 37 N. J. L. 381; *New York & H. R. Co. v. Morrisania Trustees*, 7 Hun. 652; *Bloomington v. Chicago & A. R. Co.* 184 Ill. 451; *Farmers Loan & T. Co. v. Ansonia*, 61 Conn. 76; *Re Commissioners of Public Parks*, 47 Hun. 304.

Where the property is such as cannot be sold to pay special assessment, and no provision is made to collect the assessment, it is reasonable to suppose the legislature did not intend the property should be assessed.

Big Rapids v. Mecosta County Suprs. 99 Mich. 351; *Bloomington v. Chicago & A. R. Co. supra*; *Mount Pleasant v. Baltimore & O. R. Co.* 11 L. R. A. 520, 138 Pa. 365; *New York & H. R. Co. v. Morrisania Trustees, supra*; *Allegheny City v. Western Pennsylvania R. Co.* 138 Pa. 375; *Re Commissioners of Public Parks, supra*.

Although courts will not generally interfere, except in a case of plain abuse of sound

discretion, yet where property assessed is so situated that it cannot possibly receive any benefit, they would interfere to prevent the wrong.

Oregon & C. R. Co. v. Portland, 22 L. R. A. 713, 25 Or. 229; *Hanscom v. Omaha*, 11 Neb. 37; *Poulsen v. Portland*, 1 L. R. A. 673, 16 Or. 450; *State v. Brill* (Minn.) 59 N. W. Rep. 989; *Fifty-fourth Street*, 185 Pa. 8.

Mr. William Wisner Taylor for appellee.

Grant, J., delivered the opinion of the court:

The defendant city opened North Lafayette street across the complainant's right of way. The railroad bed, which is 100 feet wide, crosses the street at an angle of less than 45 degrees. An assessment district was established by the common council, on which was assessed the cost of the pavement, under a charter requiring assessments according to benefits received. The defendant included in this district the complainant's right of way to the distance of 100 feet on each side of the street. It divided this into three parcels, fixing the values at \$1,000, \$480, and \$600, respectively. More than one twentieth of the entire cost was assessed to complainant. The assessment on the \$1,000 piece was \$569; on the \$480 piece, \$373; and on the \$600 piece, \$63. It thus appears that on one piece nearly 80 per cent of its entire value was assessed as benefits, and on another piece more than 50 per cent.

1. The first question is settled by the case of *Lake Shore & M. S. R. Co. v. Grand Rapids*, 102 Mich. 374, which holds that railroad property cannot be sold for these assessments.

2. The right of way so assessed contains the main track and one side track. It has nothing else upon it, and is used for no other purpose. It has already been dedicated to a public use, and the question is presented whether a railroad right of way can be assessed by municipal corporations for public improvements. So far from being any benefit, it is established by the evidence that the opening and paving of the street were a damage to the complainant. A right of way cannot be benefited by the opening and paving of a street across it. None of the buildings of the complainant are within two blocks of this crossing. We can see no benefits, immediate or prospective, to the complainant. The division of the right of way into three parcels was arbitrary, as were also the valuations and supposed benefits. The point is so clearly and concisely stated by the court of Pennsylvania that we quote the opinion in *Philadelphia v. Philadelphia, W. & B. R. Co.*, 33 Pa. 43: "The municipal authorities paved the Gray's Ferry road for a considerable distance, at a place where it lies side by side with the defendants' railroad, and now seek to charge them with the half of the cost of it; but they cannot do it. Their claim has no foundation either in the letter of the law, or in its spirit, or in the form of the remedy. Not in the letter, because the defendants do not own the land sought to be charged, and have only their right of

way over it. Not in the spirit, because the paving laws are means of compulsory contribution among the common sharers in a common benefit, and as a railroad cannot, from its very nature, derive any benefit from the paving, while all the rest of the neighborhood may, we cannot presume that the compulsion was intended to be applied to them. Not in the form of the remedy, because the execution of this sort of claim is *levari facias*, a writ not commonly allowed against corporations, and which would hardly produce much when directed against a public right of way. It would be strange legislation that would authorize the soil of one public road to be taxed, in order to raise funds to make or improve a neighboring one." The same doctrine is held in *Junction R. Co. v. Philadelphia*, 88 Pa. 424; *State v. Elizabeth*, 87 N. J. L. 331; *New York & H. R. Co. v. Morrisania Trustees*, 7 Hun, 652; *Bloomington v. Chicago & A. R. Co.* 184 Ill. 451; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63; *South Park Comrs. v. Chicago, B. & Q. R. Co.* 107 Ill. 105; *New York & N. H. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534.

Decree is reversed, and decree entered in this court for complainant in accordance with the prayer, with the costs of both courts.

Long and Montgomery, JJ., concurred.

Hooker, J., dissenting:

The city of Grand Rapids caused an assessment for paving a street to be made upon two pieces of land forming a portion of the complainant's roadbed, and the bill in this cause was filed to restrain a sale of the parcels for such assessment. The complainant's right of way crosses the street, and 100 feet in length of said right of way on each side of the street was included in the assessment district. The bill was dismissed, and the complainant has appealed.

The decision in the recent case of *Lake Shore & M. S. R. Co. v. Grand Rapids*, 102 Mich. 874, is conclusive of this case to the extent that the premises assessed cannot be sold upon proceedings to collect the amount of said assessment.

It is insisted that the complainant's land is not subject to assessment for the improvement, and that for that reason also the complainant is entitled to the relief asked. The case of *Lake Shore & M. S. R. Co. v. Grand Rapids* holds that the premises involved in that case were subject to assessment for street improvement. The difference between that case and this is that in that the lands adjoining the street improved were used for depot purposes, while in this they were used for no other purpose but the roadbed, consisting of the main track and one siding, and while the benefits to the former are apparent, it is

said to be equally apparent that there are none in the latter. The charter of the city of Grand Rapids provides for local assessment of the cost of street improvements. The council determines the amount to be assessed, and the assessment district, and the board of review act as commissioners to make the assessment. Charter 1891, title 6, §§ 4-6. Notice of the assessment by publication is provided for, and the council hears appeals. Id. §§ 8-10. Apparently all proceedings in this case were regular, and complainant's right to relief depends upon the jurisdiction of the board of review and council to act in the premises upon its land. It is said that there is no jurisdiction in cases where the land is occupied for railway purposes and is used only for tracks. In other words, where the premises will not be benefited the proceedings are said to be void for want of jurisdiction. If we could say, as a legal proposition, that all railroad lands are exempt from assessments, or that all such lands except depot grounds are exempt, then we might say that this land should have been excluded from the assessment district by the council as not subject to assessment. But we have held that railroad lands are subject to local burdens where benefited, and whether benefited or not, and how much, are questions of fact. The owner has the right to a hearing upon appeal when he feels aggrieved at the assessment, but, unless we are to say that all persons who think that their property is not benefited may ask the court of chancery to review the decision of the commissioners and council upon the facts, the determination of the council must be considered final upon the subject. To hold that there is no jurisdiction where there are no benefits would make the jurisdiction of the board depend upon whether a court of chancery could be induced, under different proofs, to differ from the board in its opinion as to benefits. This land was determined to be a part of the assessment district by the council. It was their province to determine that question. The board determined that it would be benefited. This was within their prescribed duties, and was subject to an appeal, which complainant did not avail itself of. If it was a fact that the premises were benefited, complainant's land should be assessed; if not, it should not have been. The decision of this question by the tribunal to which it was confided should be final. *South Park Comrs. v. Chicago, B. & Q. R. Co. supra*; *Brown v. Grand Rapids*, 83 Mich. 107.

The decree of the superior court should be reversed, and a decree entered here perpetually restraining the sale of the premises named in the bill of complaint.

McGrath, Ch. J., concurred with **Hooker, J.**

TENNESSEE SUPREME COURT.

Sallie T. DUGGER *et al.*, for Use of SE-
COND NATIONAL BANK OF JACK-
SON,

v.

MECHANICS' & TRADERS' INS. CO.
OF NEW ORLEANS, *Appl.*

(.....Tenn.....)

1. The court will not construe as retro-spective Acts 1893, chap. 107, § 1, making void stipulations limiting liability on insurance policies to less than the full amount of loss if that does not exceed the amount of insurance.
2. The equal protection of the laws is not denied by Acts 1893, chap. 107, § 1, making void all stipulations in insurance policies limiting liability to less than the full amount of loss if this does not exceed the amount of insurance.
3. Disseizin of privileges or deprivation of property otherwise than by the law of the land or due process of law contrary to Const., art. 1, § 8, or U. S. Const., 14th Amend., § 1, is not made by Acts 1893, chap. 107, § 1, making void all stipulations in insurance policies which limit liability to less than the full amount of loss if this does not exceed the amount of insurance.
4. Excepting insurance upon cotton in bales from the provision in Acts 1893, chap. 107, § 1, making void all stipulations limiting liability to less than the full amount of loss if this does not exceed the amount of insurance, does not make an arbitrary, unreasonable, and unnatural classification in violation of Const., art. 1, § 8.
5. An insured does not waive the benefit of Acts 1893, chap. 107, § 1, providing that stipulations in insurance policies limiting liability to less than the full amount of loss, where such amount does not exceed the amount of insurance, shall be void by accepting a policy containing such a stipulation.

(June 22, 1896.)

APPEAL by defendant from a decree of the Chancery Court for Madison County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. Thomas Steele, for appellant:

The exception in favor of those who insure cotton in bales is a partial and discriminating provision in favor of persons who do that class of insurance, and it cannot be separated from the body of the act without very materially changing its scope; and, therefore, this provision taints the whole, and makes the entire statute void.

Stratton v. Morris, 12 L. R. A. 70, 89 Tenn. 497.

The classification is equally as arbitrary as that condemned by the supreme court in—

Morgan v. Reed, 2 Head, 276; *Memphis v.*

NOTE.—As to prospective operation of statute, see authorities collected in note to *Stewart v. Vandervort* (W. Va.) 12 L. R. A. 50.

For a construction of statutes making insurance policies valued, see note to *Havens v. Germania F. Ins. Co.* (Mo.) 26 L. R. A. 107.

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Fisher, 9 Baxt. 239; *Brown v. Haywood*, 4 Helsk. 360; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Budd v. State*, 3 Humph. 492, 89 Am. Dec. 189; *McKinney v. Memphis Overton Hotel Co.* 12 Helsk. 104; *Daly v. State*, 13 Lea, 232; *Woodward v. Brien*, 14 Lea, 522; *Green v. State*, 15 Lea, 708; *Burkholtz v. State*, 16 Lea, 72; *Neely v. State*, 4 Lea, 316; *Ragie v. State*, 86 Tenn. 272.

For a full and able discussion of this subject, we also refer the court to the case of *Low v. Rees Printing Co.*, decided by the supreme court of Nebraska, June 6, 1894, and reported in 24 L. R. A. 702, 41 Neb. 127.

Chapter 107 of the Acts of 1893 is violative of the constitution in that it deprives, or undertakes to deprive, insurance companies and persons who effect insurance on their property of their liberty of making contracts, and in this way is a deprivation of a right of property without due process of law.

Stratton v. Morris, *supra*; *Braceville Coal Co. v. People*, 23 L. R. A. 340, 147 Ill. 68. Also *Low v. Rees Printing Co.* *supra*; *Fraser v. People*, 16 L. R. A. 492, 141 Ill. 171; *Re Jacobs*, 98 N. Y. 98, 60 Am. Rep. 640.

Messrs. Stokes & Stokes and Sam Holding also for appellant.

Messrs. Haynes & Hays, for appellees:

Where a statute is founded on public policy, a party cannot waive its provisions even by express contract.

Reilly v. Franklin Ins. Co. of St. Louis, 48 Wis. 449, 28 Am. Rep. 552; *Queen Ins. Co. v. Leslie*, 9 L. R. A. 49, 47 Ohio St. 409.

Where a statute prohibits the making of contracts in any but a prescribed manner, they are, of course, void if made in any other.

Endlich, Interpretation of Statutes, § 455, p. 648.

A contract is illegal when it is opposed to public policy, or violates provisions of a public statute.

Stevenson v. Ewing, 87 Tenn. 47; *Ohio Life Ins. & T. Co. v. Merchants Ins. & T. Co.* 11 Humph. 1, 58 Am. Dec. 742; *City Bank of New Haven v. Perkins*, 29 N. Y. 554, 86 Am. Dec. 332; *Schmidt v. Barker*, 17 La. Ann. 261, 87 Am. Dec. 527; *Bowman v. Gonegal*, 19 La. Ann. 328, 92 Am. Dec. 537; *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717.

A contract prohibited by law is void.

Persons v. Jones, 12 Ga. 371, 58 Am. Dec. 476; *Rice v. Maxwell*, 18 Smedes & M. 289, 53 Am. Dec. 85; *Milton v. Haden*, 33 Ala. 30, 70 Am. Dec. 523; *Hervey v. Moseley*, 7 Gray, 479, 66 Am. Dec. 515.

Courts indulge every reasonable intendment favorable to the constitutionality of a public statute.

Cole Mfg. Co. v. Falls, 90 Tenn. 466.

States may prescribe conditions upon which foreign corporations may do business within their limits.

Gibbs v. Consolidated Gas Co. 180 U. S. 396, 32 L. ed. 979; *Ehrman v. Teutonia Ins. Co.* 1 Fed. Rep. 475; *Home Ins. Co. of New York v. Morse*, 87 U. S. 20 Wall. 456, 23 L. ed. 370; *Doyle v. Continental Ins. Co. of New York*, 94 U. S. 539, 24 L. ed. 151.

Mr. E. H. Hatcher, also for appellees:

A foreign corporation is not an individual or a citizen, within the meaning of any constitutional provision, except where there is a question of jurisdiction involved.

Hope Ins. Co. of Providence v. Boardman, 9 U. S. 5 Cranch, 57, 3 L. ed. 86; *Paul v. Virginia*, 75 U. S. 8 Wall. 177, 19 L. ed. 359; *Germania F. Ins. Co. v. Francis*, 78 U. S. 11 Wall. 215, 20 L. ed. 78; *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342; *State v. Brown & S. Mfg. Co.* 17 L. R. A. 856, 18 R. I.—; *Union Cent. L. Ins. Co. v. Chowning*, 24 L. R. A. 504, 86 Tex. 654; *Leep v. St. Louis, I. M. & S. R. Co.* 23 L. R. A. 264, 58 Ark. 407; *Com. v. Wilson*, 56 Am. & Eng. R. R. Cas. 230.

The act in question is not class legislation, aside from the fact that it applies to corporations, or rather, in this case, to a foreign corporation.

Fire Asso. of Philadelphia v. New York, State v. Brown & S. Mfg. Co., Union Cent. L. Ins. Co. v. Chowning, and *Leep v. St. Louis, I. M. & S. R. Co. supra*; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 129; *Truss v. State*, 13 Lea, 311; *State v. Schlemmer*, 10 L. R. A. 135, 42 La. Ann. 1166; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145; *Summerville v. Pressley*, 8 L. R. A. 854, 33 S. C. 56; *People v. Wright*, 70 Ill. 383; *Louisville, N. A. & C. R. Co. v. Wallace*, 11 L. R. A. 789, 136 Ill. 87; *Hancock v. Yaden*, 6 L. R. A. 576, 121 Ind. 366; *Churchman v. Martin*, 54 Ind. 380; *Peel Splint Coal Co. v. State*, 17 L. R. A. 385, 36 W. Va. 802; *Gulf, O. & S. F. R. Co. v. Ellis* (Tex.) 17 L. R. A. 286; *McCandless v. Richmond & D. R. Co.* 18 L. R. A. 440, 33 S. C. 103.

In *Parks v. Parks*, 12 Heisk. 633, an act was held valid giving to cotton brokers a special lien upon cotton sold by them.

In *Davis v. State*, 3 Lea, 376, a statute was held valid which prohibited persons from contracting for or speculating in witness fees, or buying them at less than their face value; but such fees as were traded for merchandise or hotel bills were excluded from the operation of the act.

See also *Cole Mfg. Co. v. Falls*, 9 Tenn. 460; *Cook v. State*, 13 L. R. A. 188, 90 Tenn. 407; *Illinois Cent. R. Co. v. Crider*, 91 Tenn. 494; *State v. Rauscher*, 1 Lea, 97.

The legislative competency to regulate the power of contracting was vigorously upheld in—

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Cooley*, Const. Lim. 6th ed. pp. 480, 481.

Fourteen states have passed laws making all insurance policies what are known as "valued policies," by which it is enacted that when a policy is issued on real property, and there is a total loss without the fault of the assured, the amount of the loss is conclusively established by the amount of the policy itself.

Richards, Ins. pp. 572, 573.

These various statutes have invariably been upheld whenever brought before the courts.

German Ins. Co. of Freeport, Ill. v. Eddy, 19 L. R. A. 707, 36 Neb. 461; 1 May, Ins. 3d ed. § 31 a, p. 51; *Hatens v. Germania F. Ins. Co.* 26 L. R. A. 107, 128 Mo. 403.

Even if this exemption of cotton in bales were invalid, it would not affect the validity of the other portion of the act.

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Cooley, Const. Lim. 6th ed. pp. 209-214; *Tillman v. Cocke*, 9 Baxt. 429; *Leep v. St. Louis, I. M. & S. R. Co.* 23 L. R. A. 264, 58 Ark. 407; *Illinois Cent. R. Co. v. Crider*, 91 Tenn. 506; *Miller v. American Mut. Acc. Ins. Co.* 20 L. R. A. 756, 92 Tenn. 172.

Where the language of an act might be construed to operate in *presenti*, in which case it would be unconstitutional, or in future, in which case it would be constitutional, the latter is imperative upon the courts.

Endlich, Interpretation of Statutes, §§ 82, 178, 181; Broom, Legal Maxims, 8th ed. *36; *Cooley*, Const. Lim. p. 77; *Descart v. Purdy*, 29 Pa. 113; *Fry v. State*, 68 Ind. 552, 30 Am. Rep. 244.

Messrs. Lynn & Lynn also for appellees.

Beard, J., delivered the opinion of the court:

The defendant is a foreign insurance company which, having complied with the requirements of chapter 122 of the Acts of the Legislature of 1891, and doing business in this state, delivered in 1894 to the complainant in Tennessee the fire insurance policy in controversy. The property covered by this policy was burned while it was in operation, and the insurer declining to pay the full amount of the loss, as claimed, the assured filed the bill in this cause. The defendant company admitted its liability for three fourths of this loss, and with its answer tendered and paid into the lower court the amount conceded to be due; but it insisted that it was under no other or further obligation, on account of a clause in the policy which is as follows: "It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that in the event of loss this company shall not be liable for an amount greater than three fourths of the actual cash value of the property covered by this policy at the time of such loss; and in case of other insurance, whether policies are concurrent or not, then for its *pro rata* proportion of such three-fourths value." On the other hand, the complainant contended that this stipulation was inoperative and void, by reason of section 1, chapter 107, of the Acts of the General Assembly of Tennessee passed at the session of 1893, and which is in words and figures as follows: "Be it enacted by the general assembly of the state of Tennessee, that insurance companies shall pay their policy holders the full amount of loss sustained upon property insured by them; provided, said amount of loss does not exceed the amount of insurance expressed in the policy; and all stipulations in such policies to the contrary are, and shall be, null and void; provided however, that insurance policies upon cotton in bales shall not be subject to the provisions of this act." This act was assailed by the defendant company in the court below as unconstitutional. The chancellor, however, held that the act was constitutionally passed, and that its legal effect was to make null and void the clause in the policy set out above. He therefore gave complainant a decree for the full amount of the loss, less the sum admitted and paid into the registry of the court below. The case

has been brought to this court by appeal, and two questions have been presented for our determination, as follows: First. Is the act in question constitutional? Second. Conceding it to be constitutional, has not the complainant waived the benefit of it, by accepting the policy with this stipulation embodied in it? We will consider these in the order in which they have been stated.

It is contended by the defendant's counsel that it is a retrospective act in its terms, impairing the obligation of contracts, and therefore void. The rule is so well settled it is hardly worth while at this late day to cite authorities in support of it, that in construing an act of the legislature, the courts will always give it prospective and not retrospective force, unless the purpose that it should have the latter effect is expressed by clear and positive command, or it is to be inferred by necessary or unequivocal and unavoidable implication. *Potter's Dwar. Stat. note 9, p. 163; Endlich, Interpretation of Statutes, § 271; Dash v. Van Kleeck, 7 Johns. 478, 5 Am. Dec. 291; 3 King, Dig. 4801.* The contention of defendant that this statute is retrospective rests alone upon the use of the verb "are" in the clause, "all stipulations in such policies to the contrary are and shall be null and void." We think, to adopt the view of defendant the court would depart from the well-established rule of construction above stated, and would impose upon the act as a whole a strained and unnatural meaning. In addition, we would have to overlook another rule, equally well settled, that when an act or any other instrument of writing is susceptible of two constructions, one of which will maintain and the other destroy it, the courts will always adopt the former. Without further citation of authorities to illustrate our view, or an analysis of the statute, we have no hesitancy in holding at least that it is not obnoxious to this objection.

Again, it is said to be violative of the last clause of section 1 of the 14th Amendment to the Constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." It may be conceded the Supreme Court of the United States has settled beyond controversy that a corporation is a "person" within this amendment. *Missouri Pac. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107; Santa Clara County v. Southern Pac. R. Co. 118 U. S. 394, 30 L. ed. 118.* Yet it is equally true there is nothing in the Federal Constitution which prevents this state from prescribing the terms on which foreign corporations shall come within its borders and carry on business with its citizens, or from excluding them altogether. *Paul v. Virginia, 75 U. S. 8 Wall. 168, 19 L. ed. 357; Fire Assn. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342; Doyle v. Continental Ins. Co. of New York, 94 U. S. 535, 24 L. ed. 148; State v. Phoenix Ins. Co. of Brooklyn, 92 Tenn. 420.* And, at most, in passing the act in question the legislature, so far as its general words embrace foreign corporations, has only supplemented the Act of 1891, by imposing an additional term or condition upon them, on compliance with which they are authorized to enter into in-

surance contracts with citizens of the state. Nor can we see in what respect it infringes this clause of the Fourteenth Amendment requiring "equal protection of the laws," when it operates alike on all companies issuing policies of insurance on property, whether they be foreign or domestic. "Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed." *Missouri Pac. R. Co. v. Mackey, supra.*

But, again, it is urged that this act violates so much of section 8 of article 1 of the Constitution of this state as provides "that no man shall be disseised of his . . . privileges . . . or deprived of his life, liberty, or property but by the judgment of his peers or the law of the land," as well as that part of section 1 of the Fourteenth Amendment to the Federal Constitution which is as follows: "Nor shall any state deprive any person of . . . property without due process of law." This objection rests on the theory that the legislature, in thus interfering with the right of insurance companies, and of the citizens of the state to make agreements for indemnity against loss by fire, such as are mutually satisfactory, is guilty of impertinent intermeddling with private contracts, with which the public has no concern, and over which it has no control, and in so doing it has disseised or deprived the parties in interest of a valuable property right, within the terms of these constitutional provisions. "The right to acquire and possess property necessarily includes the right to contract." *Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L. R. A. 264.* This right of contract inheres in property, and, in connection with its possession and use, forms its chief element of value. It is only by contract that its ownership can be acquired or transferred. And it is certainly true that if the legislature should undertake to provide that a man or any class of men, however general, should neither alienate property already acquired nor make contracts looking to the acquisition of more or other kinds of property, or that the citizens of the state, in whole or in part, should not have the capacity to enter into any agreements with regard to their own services or employment, such an act would "transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict." *Cooley, Const. Lim. (6th ed.) 484.* While this is unquestionably true, yet it is also certain that this right is not unlimited. The right of contracting with regard to one's own is subject to legislative control and conditions. The Reports of our own state, as well as of our sister states and of the Supreme Court of the United States, furnish cases in abundance illustrative of this last proposition. Without stopping to point out statutes like these forbidding the owner to sell his "unwholesome fish or flesh," or "bread made from unwholesome flour," or "adulterated spirituous liquors," or from delivering to a purchaser a poisonous drug without first la-

being it as "poison" (Mill. & V. Code, § 5632), all of which are maintained upon the ground of being within the limit of the police powers of the state, we call attention to the clear recognition by this court of the right to place limitations in personal contracts, as found, among others, in the cases of *Merchants' Dispatch Transp. Co. v. Block Bros.*, 86 Tenn. 892, and *Marr v. Western U. Teleg. Co.*, 85 Tenn. 529, where it was held that these corporations could not contract for exemption from liability for the negligence of their employes. It is true these decisions rested upon the theory that upon the railroad and telegraph a public use is imposed, which of itself sanctions legislative interference. But we are by no means restricted to cases of this class. In 1849-50 the legislature passed an act, among other things, providing that the husband shall not "sell his wife's real estate during her life without her joining in the conveyance," and again, in 1879, enacted that he should not "contract" away the rents or profits of his wife's lands, "except by her consent obtained in writing," Mill. & V. Code, §§ 3338, 3343; and though these acts of restriction were in the face of the husband's right at common law to unlimitedly dispose of both, yet their wisdom and constitutionality have been maintained by this court. *Coleman v. Satterfield*, 2 Head, 264; *Taylor v. Taylor*, 12 Lea, 490. In *Truss v. State*, 13 Lea, 811, notwithstanding an owner's common-law right to sell and deliver his property at any hour, whether of the night or day, he may choose, yet this court held an act to be constitutional which made it unlawful to sell or to buy loose cotton between sunset or sunrise; and at the present term of the court, upon the ground of public policy, we have held void a stipulation in a promissory note by which the maker obligated himself to waive the benefit of the exemption laws in the event a judgment was taken in it, and an execution was issued on this judgment. Upon the same ground, the court declines to enforce contracts with married women and minors where minority or coverture is relied on as a defense; and the right of the state to pass general statutes regulating contracts, such as the statute of frauds, has never been called in question. Illustrations of this principle might be indefinitely multiplied by going to the Reports outside of the state. We will content ourselves with referring to a few cases involving statutes like the one in question, and in which there seems not to have arisen a suspicion in the minds of counsel or of the courts that these statutes infringed on either the United States or the state constitution: Ohio has a statute which provides that, in the absence of any change increasing the risk, without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of a total loss the whole amount mentioned in the policy or renewal upon which the insurer received a premium should be paid to the insured. In *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L. R. A. 45, in regard to a policy which contained stipulations very like the one in the policy here involved, the court says that:

"The statute was founded upon considerations of public policy, its purpose being to exact care and diligence upon the part of insurance companies to avoid improper risks and overinsurance by requiring their agents to make personal examinations of the property and to fix its insurable value, as well as to protect the insured against unreasonable forfeiture and defenses,"—and held that the statute prevailed as against the *contra* stipulations. In *German Ins. Co. of Freeport, Ill. v. Eddy*, 36 Neb. 461, 19 L. R. A. 707, a question arose with regard to the effect of a similar statute upon a policy containing a stipulation for arbitration to ascertain the value of the property when a loss occurred. The court says: "The provisions of the statute override any stipulations in the policy to that effect, as an insurance company can only do business in the state on the conditions provided by law." The effect of state statutes upon policies of insurance with stipulations in violation of the terms of the statutes, has been considered in the following additional cases, which we will simply cite: *Reilly v. Franklin Ins. Co. of St. Louis*, 43 Wis. 449, 28 Am. Rep. 552; *Bammessel v. Brewers F. Ins. Co.* 43 Wis. 468; *Oshkosh Gas Light Co. v. Germania F. Ins. Co.* 71 Wis. 454; *Thompson v. Missouri Citizens Ins. Co.* 45 Wis. 888; *Emery v. Piscataqua Fire & Marine Ins. Co.* 52 Me. 322; *White v. Connecticut Mut. L. Ins. Co.* 4 Dill. 177, Fed. Cas. No. 17,545; *Fletcher v. New York L. Ins. Co.* 18 Fed. Rep. 526; *Wall v. Equitable L. Assur. Soc.* 82 Fed. Rep. 278. In all these cases the courts are agreed the statutes in question were demanded by an enlightened public policy, that they override such stipulations in a policy as are at variance with them, and in no one of them is a doubt suggested as to the constitutional power of the legislature to so mould these contracts as to secure to the assured the full benefit of the premium he has paid. Further, in the exercise of this right to control, in the matter of insurance against fire, the legislature of Pennsylvania passed an act confining the issuance of policies exclusively to corporations, and the supreme court of that state, by a majority opinion, held it to be constitutional, upon the ground, among others, that "the business of insurance against loss by fire is, by reason of its magnitude, its importance to property owners, and the nature of the business, a proper subject for the exercise of the police power of the state." *Com. v. Vrooman*, 164 Pa. 806, 25 L. R. A. 250. Without meaning to approve or dissent from the conclusion reached in that case, we refer to it to show how far the state's power to interfere in insurance contracts has been pressed by a court of the highest respectability. Without further elaboration on this point, we are content to add that the Act of 1893 does not violate either of the constitutional provisions quoted above.

Again, it is insisted this act violates section 8 of article 11 of our State Constitution, and is therefore void. This contention assumes that the act is partial in its character, and the criticism upon it by the counsel for defendant company is that in its classifica-

tion it is "arbitrary, unreasonable, and unnatural." At any rate, it is not partial so far as insurance companies are concerned. All these are put in the same category, and all alike are required to pay "the full amount of the loss sustained" in the contingency contemplated by the statute. *Cole Mfg. Co. v. Falls*, 90 Tenn. 468; *Stratton v. Morris*, 89 Tenn. 498, 12 L. R. A. 70. But it is said that the discrimination is between "those who insure cotton in bales, and those insuring all other kinds of property," or, to put it differently, in that the act, "for purposes of insurance, divides all property into two classes: First, cotton bales; second, everything that is not cotton bales,"—and it is this classification which it is urged is "arbitrary, unreasonable, and unnatural." It is true that "distinctions in these respects must rest upon some reason upon which they can be defended" (Cooley, Const. Lim. p. 390), and that statutory classifications, to be maintained, must be "natural and not arbitrary." *Demoville v. Davidson County*, 87 Tenn. 218. The question in each case, therefore, is, Is the classification natural or the reverse? And, in this particular case, is there any sound or legal reason why cotton in bales, with regard to insurance, should have been put into a class by itself, and thus have been exempted from the operation of this (otherwise general) statute? We think there is. It is a matter of common knowledge that cotton, from the time it is gathered from the stalk, through all of its stages, until it reaches and forms a part of manufactured goods, is very inflammable. It is prepared for transit by being placed in bales, and is transported in this form to the warehouses of the merchant, where it is held for a longer or shorter time, as the necessities of commerce may require. In these warehouses it is stored in large quantities, which represent frequently vast sums of money, and during these periods it is at all times more or less exposed to the peril of fire. A spark touching the lint which gathers outside of and clings to these cotton bales will kindle a fire that will rapidly spread until it becomes a great conflagration,—a conflagration which it is most difficult to control and extinguish until it has consumed the mass within its reach. In inflammability and liability to complete combustion it differs from all other of the agricultural products of this state. The larger and perilous risks that are taken by insurance companies on "cotton in bales," and the apprehension lest the general rule, if extended to it, might altogether or to a large extent prevent one citizen from getting proper insurance, no doubt induced the legislature to cover it by a proviso of exemption. We think this statement is sufficient to show that this exception is not "arbitrary, unreasonable, and unnatural." If it were necessary, the authorities in this state which sustain this conclusion might be quoted from at length. We are satisfied to refer to *Parks v. Parks*, 12 Heisk. 634. *Davis v. State*, 8 Lea, 380; *Demoville v. Davidson County*, *supra*, and the cases of *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 840; *Low v. Rees Printing Co.* 41 Neb. 127, 28 L. R. A.

24 L. R. A. 702; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, and others of the same class relied upon by the defendant company are easily distinguished from the case at bar. To illustrate this, we will take as types the two cases of *Low v. Rees Printing Co.* and *State v. Loomis*, *supra*. The first of these involved the constitutionality of an act of the legislature of Nebraska which provided that eight hours shall constitute a legal day's work for all classes of mechanics, servants, and laborers, except those engaged in farm and domestic service, and the court very promptly held that there was no reason for this discrimination between the laborers of the state, and that the act was partial and void. In the second of these cases was involved an act making "it unlawful for any corporation, person or firm engaged in manufacturing or mining, to issue for the payment of wages of labor any orders," etc., "payable otherwise than in lawful money;" and the court says the legislature here singles "out those persons who are engaged in carrying on pursuits of mining and manufacturing" and their employees, distinguishing them from all other employers and employees in limiting their right to contract, and thus making a "classification which is purely arbitrary." This act was held unconstitutional, and properly so. In none of these cases of which these two are examples were the courts able to find a reason for the statutory discrimination. Even, however, if the contention of the defendant company were correct,—that this proviso exempting "cotton in bales" from the operation of the statute was arbitrary and unreasonable,—yet, as it was not an inducement to the passage of the act proper, and is easily separable from it, upon well-settled principles of statutory construction the proviso would be eliminated, and the balance of the statute would be permitted to stand. *Neely v. State*, 4 Baxt. 174; *Burkholtz v. State*, 16 Lea, 71; *Tillman v. Cooke*, 9 Baxt. 429.

Lastly, it is insisted that the acceptance of the policy by the assured with this stipulation was a waiver of the benefit of this statute, which at most conferred only a personal privilege. This is erroneous. In the first place, the statute in express terms makes the stipulation in question "null and void." This statutory provision annuls this obnoxious agreement, and in legal effect it is as much a part of the policy as if written into its face. *Emery v. Picataqua Fire & Marine Ins. Co.* *supra*. In the second place, as was said in *Queen Ins. Co. v. Leslie*, *supra*: "The statute cannot be regarded as conferring on the assured a mere personal privilege, which may be waived by agreement. It moulds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurers' liability." The opinion of Judge Brewer, in *Wall v. Equitable L. Assur. Soc.*, *supra*, and that of Judge Dillon, in *White v. Connecticut Mut. L. Ins. Co.*, will be found in harmony with the above.

The result is, we affirm the chancellor is maintaining the constitutionality of this act.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Ex parte Samuel H. HART.

(63 Fed. Rep. 249.)

1. An information cannot be regarded as a substitute for an indictment within the meaning of U. S. Rev. Stat., § 5278, providing for the surrender of a fugitive from justice from another state.
2. The verification of an information will not be regarded as such an affidavit as is required by U. S. Rev. Stat., § 5278, for the surrender of a fugitive, when it is verified by a prosecuting attorney who swears that he believed the contents thereof to be true, but not that they are true.
3. Affidavits filed with the governor of a state and sent by him with a demand for the surrender of a fugitive to the governor of another state cannot be considered, if they are not certified to be authentic and are not recited in or used to obtain the warrants for extradition.
4. The act of a governor in issuing a warrant of removal on requisition for a fugitive is not conclusive on the courts of the fact that he had the necessary papers duly authenticated before him.

(October 2, 1894.)

APPEAL by petitioner from a judgment of the Circuit Court of the United States for the District of Maryland refusing to discharge petitioner from custody to which he had been committed awaiting extradition. *Reversed.*

The facts are stated in the opinion. Before Goff and Simonton, *Circuit Judges*, and Hughes, *District Judge*.

Mr. William Pinkney Whyte, for appellant:

Interstate extradition is based entirely on the provisions of the Constitution of the United States and the acts of congress passed in relation to it.

2 Moore, Extradition, 847.

Section 5278 of the Revised Statutes of the United States provides that fugitives from justice of another state shall be delivered up by the executive of the state to which he has fled whenever the executive of the state in which the fugitive has committed the crime demands his return, and produces "a copy of an indictment found or affidavit made before a magistrate of any state or territory charging the person demanded with having committed treason, felony, or other crime."

The law must be strictly complied with.

Ex parte Morgan, 20 Fed. Rep. 298.

An indictment is "a written accusation against one or more persons of a crime or misdemeanor preferred and prosecuted upon oath or affirmation by a grand jury legally convoked."

4 Bl. Com. 299; *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849.

Presentment or information is not synonymous with indictment.

Paschal's Anno. Const. p. 258, note 253.

The first "information," even if it could be

NOTE—What papers necessary to obtain surrender of fugitive from another state.

The act of congress upon the subject of interstate rendition of fugitives provides in effect as follows:

Whenever an executive shall demand any person as a fugitive from justice and shall produce the copy of an indictment found or an affidavit made before a magistrate of any state or territory charging the person so demanded with having committed a crime, certified as authentic by the governor of the state from whence the person so charged fled, it shall be the duty of the executive of the state to which he fled to cause him to be arrested and delivered up. U. S. Stat. February 12, 1793, 1 Stat. at L. 302, Rev. Stat. § 5278.

The Supreme Court of the United States has held that the legislation of congress if constitutional must supersede all state legislation upon the subject and by necessary implication prohibit it. The legislation of congress in what it does prescribe manifestly indicates that it does not intend that there shall be any further legislation upon the subject. *Prigg v. Pennsylv. ania*, 41 N. S. 16 Pet. 612, 10 L. ed. 1068.

So that the papers required would seem to be (1) a requisition or demand for the fugitive; (2) a copy of an indictment or affidavit charging the crime; and (3) some kind of authentication of the papers.

The tendency of the courts has been to regard the requirement for an indictment or affidavit as calling for evidence of a judicial proceeding begun against the alleged fugitive.

So the papers must make a strong case against the alleged fugitive, but nothing beyond the papers can be required.

If a case intended to be within the United States statute is presented in regular form no question of

formal defects in the indictment or of the guilt or innocence of the accused can be made, but if no crime is charged, or the papers are insufficient, or the accused has never been within the demanding state, the requisition should not be complied with. *Work v. Corrington*, 84 Ohio St. 64, 32 Am. Rep. 345.

The arrest of a person as a fugitive from justice cannot be made upon less evidence of the person's guilt than would authorize an arrest in an ordinary case. And this is nothing less than information on oath which gives probable cause to believe that the person demanded has committed a particular crime against the law of the state making the demand. *Re Doo Woon*, 13 Fed. Rep. 898.

Under the act of congress no other evidence is sufficient or can be received by the governor on whom the demand is made as sufficient in proof of the fact that the indictment or affidavit exists as a basis of the charge of crime than the copy certified by the governor of the demanding state. No other authentication is necessary. The copy of the indictment need not be certified by the clerk of the court nor accompanied by a certificate of the judge in order that the requisition may be acted upon. *Re Leary*, 10 Ben. 197; *Leary's Case*, 6 Abb. N. C. 43; *White v. Valley*, 14 U. S. App. 84, 55 Fed. Rep. 54.

It is immaterial whether the document presented is the original affidavit or a copy if it is certified as authentic by the governor. *Kurtz v. State*, 22 Fla. 38.

There is no authority to make the demand for the surrender of a fugitive from justice unless the person is charged with crime in the regular course of judicial proceedings. The judicial acts which are necessary to authorize the demand are plainly specified in the act of congress, and the certificate of the executive authority is

taken as an "affidavit," is not made before a "magistrate."

It is sworn to before a "notary public," who is not a magistrate.

3 Crim. L. Mag. 789.

The affidavit is not made on the knowledge of the affiant, but on his belief, as the prosecuting attorney of that county. This is insufficient.

Ex parte Smith, 8 McLean, 121.

Such an affidavit, if the information can be treated as an affidavit, is not made in accordance with the law.

Re Keller, 86 Fed. Rep. 681.

A court in extradition cases has power on habeas corpus, where the papers on which the governor's warrant issued are before it, to decide upon their sufficiency.

Ex parte Smith, 8 McLean, 127.

Mr. John P. Poe for appellee.

Goff, Circuit Judge, delivered the opinion of the court:

On the 8th day of January, 1894, Samuel H. Hart filed his petition in the circuit court of the United States for the district of Maryland, alleging that he was unjustly deprived of his liberty, and illegally confined in the Baltimore city jail, charged with the crime of embezzlement, and praying that the writ of habeas corpus issue. On the same day the court directed that the writ issue, which was done, and duly served. It appears from the return thereto that the petitioner was held in custody under a warrant issued by the governor of the state of Maryland, directed to Alexander G. Matthews,

agent of the state of Washington, by virtue of a requisition from the governor of the latter named state, demanding the extradition of the petitioner as a fugitive from justice. With the return are filed copies of the requisition papers, and of the governor's warrant of removal. It appears that the governor of Washington, on the 23d day of December, 1893, caused to be issued the following:

"The State of Washington. Executive Department.

"The Governor of the State of Washington, to His Excellency, the Governor of the State of Maryland: Whereas, it appears by a copy of information, which is hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the laws of this state, that Samuel H. Hart stands charged with the crime of larceny by embezzlement, which I certify to be a crime under the laws of this state, committed in the county of Pierce, in this state, and it having been represented to me that he has fled from the justice of this state, and is now to be found in the state of Maryland: Now, therefore, pursuant to the provisions of the Constitution and the laws of the United States in such case made and provided, I do hereby require that the said Samuel H. Hart be apprehended and delivered to A. G. Matthews, who is authorized to receive and convey him to the state of Washington, there to be dealt with according to law.

"In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of the state of Washington, at Olympia, this 23d

made conclusive as to their verity when presented to the executive of the state where the fugitive is found. He has no right to look beyond them, or to question them, or to look into the character of the crime specified in those judicial proceedings. *Kentucky v. Dennison*, 65 U. S. 24 How. 66, 16 L. ed. 717; *Botts v. Williams*, 17 B. Mon. 687.

The accusation on which the proceedings are founded must be a judicial one. *Forbes v. Hicks*, 27 Neb. 111.

It must appear that the tribunals of the demanding state have jurisdiction to try the person accused, for there can be no legal charge of crime except in the regular course of judicial proceedings. *Ex parte Morgan*, 20 Fed. Rep. 298.

Requirements of state statutes.

Some of the states have enacted statutes intended to regulate the subject some of which require more evidence of guilt to be produced than is required by the act of congress. In some cases these statutes have been given effect without any consideration of the question of their validity but the courts which have considered the question have held that legislation by a state impairing the full operation of the act of congress will be nugatory. *Kurtz v. State*, 22 Fla. 38.

The state laws cannot make any further requirements than those made by the act of congress. *Re Briscoe*, 51 How. Pr. 422.

And in *Degant v. Michael*, 2 Ind. 390, it is intimated that special legislation of a state in aid of the act of congress is unconstitutional.

But elsewhere it has been stated that the laws of the state may require the governor to surrender the fugitive upon terms less exacting than those imposed by the act of congress. *Knowlton's Case* (Colo.) 5 Crim. L. Mag. 250.

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And it has been held that the states may provide for cases not provided for by the United States. *Re Romaine*, 28 Cal. 586.

An Iowa statute requires that the requisition shall be accompanied by sworn evidence that the person charged is a fugitive from justice. And the court in construing it says that the mere statement in the affidavit that the accused is a fugitive from justice is not sufficient, but that the facts must be stated from which the governor can determine whether or not he is a fugitive. *Jones v. Leonard*, 50 Iowa, 106, 22 Am. Rep. 116.

So in California it is said that judicial proceedings must have been commenced against the fugitive in the state from which he fled before he can be surrendered. *Ex parte White*, 49 Cal. 433. In that case the proceedings were held to be controlled by the provisions of the California statute, and the court said that by that statute "it was not intended that a person might be arrested here upon an affidavit or information charging him with the commission of a crime in another state, where no prosecution has been commenced there and may never be."

In *Ex parte Cubreth*, 49 Cal. 430, it was held that the provision of the California statute providing for the arrest and detention of a criminal demanded by the governor was constitutional but the question as to the validity of the provisions requiring the commencement of proceedings in the foreign state before a demand can be complied with is not considered.

So the states may also provide for the arrest and detention of a person awaiting the requisition papers.

Statutes providing for the arrest of one accused of being a fugitive from justice before the requisition arrives for his rendition may impose any condition which the legislature may think necessary.

day of December, in the year of our Lord one thousand eight hundred and ninety-three.

"[Seal.] J. H. McGraw.

"By the Governor: J. H. Price, Secretary of State."

"The copies referred to are as follows, viz.:

"To the Governor of the State of Washington: You are respectfully requested to issue a requisition upon the governor of Maryland for the apprehension and rendition of Samuel H. Hart, who stands charged by information pending in the superior court of the state of Washington in and for the county of Pierce with the crime of larceny by embezzlement, committed in Pierce county, state of Washington, but who has, since the commission of said offense, and before an arrest could be made upon process issued by said court, fled from the justice of the state of Washington, and into the state of Maryland, where I believe he may now be found. The time and circumstances of his flight, and the reasons for my belief as to where he may be found, are as follows: The said Samuel H. Hart and Frank A. Dinsmore were, on or about the 18th day of November, 1893, at the town of Buckley, county of Pierce, and state of Washington, conducting a certain banking business, the said Hart styling himself as president and the said Dinsmore styling himself as cashier, under the assumed name of the Buckley State Bank; but said banking institution was unincorporated, and the said Hart and the said Dinsmore were doing business only on their own account. That Alexander McNicol deposited with said

Samuel H. Hart and the said Frank A. Dinsmore, and left with them for safe-keeping, to be returned to him upon demand and his check therefor, the sum of \$502.75. That on or about the said 18th day of November, 1893, the said Samuel H. Hart and Frank A. Dinsmore left said town of Buckley for parts unknown, taking with them the money belonging to said Alexander McNicol, and the money of a large number of other depositors, to wit, about the sum of \$6,000. That after diligent search, and through the aid of the detective agency, the said Samuel H. Hart has been found and arrested in the city of Baltimore, in the state of Maryland, where he is now held, as affiant is informed, awaiting an order from the governor of this state for his return upon extradition to answer for the crime committed as aforesaid. In my opinion, the ends of justice require that he be brought back to this state for trial; that the facts stated in the information are true, and that the prosecution of said Samuel H. Hart would in all probability result in his conviction of the crime charged. I herewith present a duly certified copy of the original information now on file in the office of the clerk of the superior court of said Pierce county. The requisition asked for said fugitive is not sought for the purpose of collecting a debt or enforcing a civil remedy, or to answer any other private end whatever, nor shall the criminal proceedings, when such offender is arrested, be used for any of said purposes.

"Dated at Tacoma, Washington, December 23d, 1893.

"Alexander McNicol."

State v. Swope, 72 Mo. 399; *Ex parte* Lorraine, 16 Nev. 63.

If a statute is enacted for the purpose of having the person arrested and held to await the action of the governor of the other state, it may require that before the arrest shall be made proceedings must have been taken in the other state. *State v. Hufford*, 28 Iowa, 301.

Under Nebraska act providing for the arrest and detention of a person "charged" with the commission of a crime in another state, the charge must be a prosecution lawfully instituted and then pending in such other state. *Smith v. State*, 21 Neb. 552. See also *note to Simmons v. Van Dyke* (Ind.) 26 L. R. A. 33.

The requisition.

The mere recitals contained in the requisition of the governor for an alleged fugitive from justice are not sufficient of themselves to authorize the arrest and surrender of the fugitive. *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217.

Statements of the governor in his requisition cannot aid a defective affidavit. *Ex parte Smith*, 3 McLean, 121.

A requisition is not of itself sufficient authority for arrest and imprisonment. Nor is the affidavit of an attorney communicating information received by telegraph that the accused is charged in the other state with the commission of an offense against its laws sufficient. *Re Rutter*, 7 Abb. Pr. N. S. 67.

The fact that the requisition does not state that the complaint was made before a magistrate or that there was a criminal proceeding pending in a proper court, will not vitiate the proceedings if it refers to annexed papers which are certified to be authentic and which show that the proceedings were actually begun in a proper court. *Re White*, 45 Fed. Rep. 237.

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The indictment.

The sufficiency of the indictment will not be considered. *Ex parte Voorhees*, 32 N. J. L. 141; *Ex parte Pearce*, 32 Tex. Crim. Rep. 301.

The validity of the indictment cannot be inquired into. *State v. Busine*, 4 Harr. (Del.) 572.

Formal defects in the indictment will not be considered by the state upon which the demand is made. *Davis's Case*, 123 Mass. 334.

Technical defects in the indictment will not be considered. *State v. O'Connor*, 33 Minn. 243; *Re Greenough*, 31 Vt. 379.

The executive upon whom the demand is made has no right to inspect the technical requisites of the indictment or to inquire into matters of defense under it. He must act when he ascertains that a crime is substantially charged. *Re Perry* (D. C.) 2 Crim. L. Mag. 84.

The fact that the indictment fails to mention the full Christian names of the person demanded will not justify the governor in refusing to deliver him up. *People v. Byrnes*, 33 Hun, 98.

The absence of the seal of the clerk of court in which the indictment purports to have been found and of a file mark on the indictment is immaterial. *Hibler v. State*, 43 Tex. 197.

The fugitive must be delivered when the demand is accompanied by a copy of an indictment or affidavit made before a magistrate charging the accused with having committed a crime within the state and certified as authentic by her governor, and there can be no refusal to act because of a defect in the indictment, if it is not contrary to the provisions of the Constitution of the United States, which involve the protection of life, liberty, and property. *Ex parte Reggel*, 114 U. S. 642, 20 L. ed. 250.

The affidavit.

The affidavit must be so explicit and certain that

"State of Washington, County of Pierce—*vs.*: I, Alexander McNicol, being first duly sworn, say that the facts set out in the foregoing application are true, as I verily believe.

"Alexander McNicol.

"Subscribed and sworn to before me this 23d day of December, 1898.

"[Seal.] W. A. Ryan,
"Clerk of Superior Court of Pierce County,
Washington."

"To the Governor: Having carefully examined the foregoing application and accompanying papers, I hereby approve the same, and in my opinion it would be proper for you to issue the requisition asked for. I nominate Alexander G. Matthews, sheriff of Pierce, Washington, as a proper person to be appointed and commissioned by you as the agent of the state of Washington to receive the said fugitive when he shall be apprehended, and bring him to this state, and deliver him into the custody of the sheriff of said county.

"W. H. Snell, Prosecuting Attorney."

"Copy of Act.

"Larceny by Embezzlement. If any agent, clerk, officer, servant, or person to whom any money or other property shall be intrusted,

with or without hire, shall fraudulently convert to his own use, or shall fail to account to the person so intrusting it to him, he shall be deemed guilty of larceny, and on conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year, or be imprisoned in the county jail for any length of time not exceeding one year."

"In the Superior Court of the State of Washington, in and for the County of Pierce.

"The State of Washington *vs.* Samuel H. Hart, Frank A. Dinsmore.

"Information.

"Samuel H. Hart and Frank A. Dinsmore are accused by the prosecuting attorney of the county of Pierce, state of Washington, by this information, of the crime of larceny by embezzlement, committed as follows: The said Samuel H. Hart and Frank A. Dinsmore, on or about the eighteenth day of November, eighteen hundred and ninety three, at the county of Pierce, and state of Washington, and within one year prior to the filing of this information, then and there being persons to whom was intrusted by one Alexander McNicol, in said county of Pierce, and state of Washington, with certain lawful money of the United States, to wit, the sum of five hundred and two dol-

lar and belief. *Ex parte Morgan*, 20 Fed. Rep. 298.

But if the commission of the crime is charged directly and positively, the affidavit is not vitiated by the fact that it concludes with the words "as said deponent verily believes." *Re Keller*, 26 Fed. Rep. 681.

Sufficiency of a complaint or information.
A complaint is not sufficient upon which to found extradition proceedings, unless it is shown to have all the requisites of an affidavit. *State v. Richardson*, 34 Minn. 115.

Where an information has been substituted for an indictment it constitutes a criminal pleading of as high a grade and is entitled to as much credence as an indictment. *Re Van Seiver*, 42 Neb. 772.

Charging the commission of the offense by an information is sufficient, and an indictment or affidavit proper is not required. *Re Hooper*, 52 Wis. 699.

The authentication.
The papers are not sufficient unless certified by the governor to be authentic. *Ex parte Hampton*, 1 Ohio N. P. 181.

The papers are insufficient if the copy of the indictment is not authenticated. *Ex parte Knowlton's Case* (Colo.) 5 Crim. L. Mag. 250.

The certificate of authentication is not required to be in any particular form. *Ex parte Sheldon*, 34 Ohio St. 519.

The governor is not bound to certify that the papers are genuine. It is sufficient that he certify that they are duly authenticated. *Hackney v. Welsh*, 107 Ind. 253, 57 Am. Rep. 101.

The governor's certificate that a copy of a complaint made on oath to a person styled a trial justice is authentic sufficiently authenticates the capacity of the person as a magistrate authorized to receive the complaint. *Kingsbury's Case*, 103 Mass. 223.

An authentication of the affidavit by the secretary of state is not sufficient. *Solomon's Case*, 1 Abb. Pr. N. S. 347.

Necessity of warrant.
It is not necessary that a warrant shall have been issued against the fugitive in the state in which he committed the crime. *Tullis v. Fleming*, 39 Ind. 15.

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jars, of the value of five hundred and two dollars, and the said Samuel H. Hart and Frank A. Dinsmore then and there having possession of said money, the property of said Alexander McNicol, by reason of said money being so intrusted to them by the said Alexander McNicol, did unlawfully, wrongfully, and feloniously and fraudulently convert the said money, to wit, the said sum of five hundred and two dollars, to their own use, and did unlawfully, fraudulently, and feloniously fail to account to the said Alexander McNicol therefor, with the intent then and there to defraud, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington.

"W. H. Snell, Prosecuting Attorney."

"State of Washington, County of Pierce—ss.: W. H. Snell, prosecuting attorney, being duly sworn, upon oath says that he has read the foregoing information, knows the contents thereof, and believes the same to be true.

"W. H. Snell.

"Subscribed and sworn before me, the 22d day of December, A. D. 1893.

"[Seal.] Chas. Bedford, Notary Public.

"Residence: Tacoma, Washington."

"Indorsed. No. 7,858.

"In the Superior Court of the State of Washington, in and for Pierce County."

"The State of Washington vs. Samuel H. Hart and Frank A. Dinsmore.

"Information. Crime Charged: Larceny by Embezzlement.

"Names of witnesses examined and known at the time of filing the foregoing information: Alexander McNicol, James McNeeley, Forest France, James Gallagher, Wm. Fetting, W. D. Jones, John McKinnell, Thomas McNeeley, Wm. Campinakey.

"Filed Dec. 28, 1893.

"W. A. Ryan, Clerk,

"By H. Johnston, Deputy."

"State of Washington, Plaintiff, vs. Samuel H. Hart and Frank A. Dinsmore, Defendants. Certificate

"State of Washington, County of Pierce—ss.: I, W. A. Ryan, county clerk, and clerk of the superior court of the state of Washington, for the county of Pierce, holding terms at Tacoma, in said county, do hereby certify that the annexed is a full, true, and correct copy of the information in the above-entitled action, now on file in this office.

"Witness my hand and the seal of the said superior court this 28d day of December, 1893.

"[Seal.] W. A. Ryan, County Clerk.

"In the Superior Court, State of Washington, in and for the County of Pierce.

"State of Washington vs. Samuel H. Hart and Frank A. Dinsmore. Order.

The criminal charge.

It is sufficient if the crime is substantially charged. *Re Keller*, 36 Fed. Rep. 681.

The papers must make it appear that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit certified by the governor as authentic. *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544.

Proof of flight.

There is some uncertainty in the decisions as to the necessity and sufficiency of proof of flight.

It has been stated that the governor must be satisfied that the accused person fled from justice. 6 Am. Jur. 226.

And that in addition to proof that a person is charged with crime, it is necessary to show that he has fled from justice, and this must be done by sworn evidence such as will authorize a warrant of arrest in any other case. *Re Jackson*, 2 Flipp. 183.

But it has been decided that the affidavit need not charge that the accused is a fugitive from justice. It is sufficient if it is stated that he committed a crime and then secretly fled. *Re Manchester*, 5 Cal. 287.

So it seems that the allegation of the flight of the accused is required to be made only in the affidavit of the power demanding the arrest and nowhere else. *Ex parte Romanes*, 1 Utah, 26.

The absence of an affidavit charging the person to be a fugitive from justice is not fatal to the requisition. If the fact that a person is a fugitive from justice must be proven it must be by some evidence other than that which would be furnished by an affidavit authenticated by the governor of the demanding state. The copy of the affidavit accompanying the requisition shows that the accused committed an offense in the demanding state, and the fact that he is afterwards found in the state in which the demand is made, is sufficient to show that he is a fugitive from justice in the sense in which those terms are used in the constitution. *Ex parte Swearingen*, 18 S. C. 74.

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Right to look behind papers or to make other requirements.

The question of the sufficiency of the indictment and the guilt of the accused must be left to be determined by the courts of the state where the trial is to be had. *Re Roberts*, 24 Fed. Rep. 132.

There is no authority to consider the question whether or not a crime has in fact been committed in the demanding state. Nor can the question of the good faith of the prosecution be inquired into. *People v. Shea*, 37 Chicago Legal News, 214.

The surrender cannot be refused because the statute creating the offense for which the surrender is demanded is alleged to be unconstitutional. *Pearce v. Texas*, 155 U. S. 811, 39 L. ed. 164.

The governor must be guided by the record produced. He has no authority to make any addition to it or to look behind the affidavit or indictment and inquire whether by the laws of the other state the facts charged therein would constitute a criminal offense. *Johnson v. Riley*, 13 Ga. 97.

The question of the probable guilt of the accused will not be inquired into. *Re Clark*, 9 Wend. 212.

In a state where printed copies in volumes of statutes of another state are required by statute to be admitted as presumptive evidence of such laws, if the crime charged is not alleged to be an offense against the laws of the demanding state, such printed volumes of laws may be examined to ascertain whether it is or is not an offense. *Ex parte Sheldon*, 84 Ohio St. 319.

In *Ex parte Hampton*, 1 Ohio, N. P. 181, the court intimates that it would require an assurance from the demanding state that the prisoner would be protected from mob violence before he would be delivered into the hands of their agent.

Effect of governor's representations.

The representations of the governor of the demanding state are of no effect unless supported by a duly authenticated copy of an indictment found or an affidavit made. *Ex parte Morgan*, 20 Fed. Rep. 298; *Ex parte Thornton*, 9 Tex. 685. H. P. F.

"Now, on this 23d day of December, 1893, it appearing to the court that William H. Snell, Esq., prosecuting attorney in and for said county of Pierce, has filed an information in said court, charging the said Samuel H. Hart and Frank A. Dinsmore with the crime of larceny by embezzlement: It is hereby ordered that a warrant issue by the clerk of this court for the arrest of the said Samuel H. Hart and Frank A. Dinsmore.

"Emmett N. Parker, Judge.

"W. A. Ryan, Clerk."

"Filed Dec. 23, 1893."

"State of Washington vs. Samuel H. Hart and Frank A. Dinsmore. Certificate.

"State of Washington, County of Pierce—ss.: I, W. A. Ryan, county clerk, and clerk of the superior court of the state of Washington for the county of Pierce, holding terms at Tacoma, in said county, do hereby certify that the annexed is a full, true, and correct copy of the original order for a warrant to issue for the arrest of the above-named defendants in the above-entitled action now on record in this office.

"Witness my hand and the seal of the said superior court this 23d day of December, 1893.

"[Seal.] W. A. Ryan, County Clerk."

"No. 7,858.

"In the Superior Court of the State of Washington, for the County of Pierce. Holding Terms at Tacoma.

"State of Washington, County of Pierce—ss.

"The State of Washington vs. Samuel H. Hart and Frank A. Dinsmore. Warrant.

"The State of Washington, to the Sheriff of Pierce County, State of Washington, Greeting: Whereas Samuel H. Hart and Frank A. Dinsmore, having been duly informed against by W. H. Snell, prosecuting attorney of Pierce county, Washington, in the superior court of the state of Washington for the county of Pierce, holding terms at Tacoma, charging the said Samuel H. Hart and Frank A. Dinsmore with the crime of larceny by embezzlement, all of which appears to us of record: Now, this is to command you, the said sheriff, to take the said Samuel H. Hart and Frank A. Dinsmore, and them, the said Samuel H. Hart and Frank A. Dinsmore, safely keep and have him forthwith in this court, there to answer the said charge, and abide such further order as the court may make in the premises. Herein fail not.

"Witness the Honorable Emmett N. Parker, judge of the said superior court, and the seal of said court, this 23d day of December, A. D. 1893.

"[Official Seal.] W. A. Ryan,

"County Clerk and Clerk of the Superior Court."

"State of Washington, County of Pierce—ss.: I, Alexander Matthews, do hereby return this warrant not served, for the reason that the within-named Samuel H. Hart and Frank A. Dinsmore are not found within the state of Washington.

"Witness my hand this 23d day of December, 1893.

"A. G. Matthews, Sheriff Pierce County, State of Washington."

"No. 7,858.

"State of Washington, Plaintiff, vs. Samuel H. Hart and Frank A. Dinsmore, Defendants. Certificate.

"State of Washington, County of Pierce—ss.: I, W. A. Ryan, county clerk, and clerk of the superior court of the state of Washington for the county of Pierce, holding terms at Tacoma, in said county, do hereby certify that the annexed is a full, true, and correct copy of the warrant for the arrest of above-named defendants and return of sheriff thereon in the above-entitled action, now on file in this office.

"Witness my hand and the seal of the said superior court this 23d day of December, 1893.

"[Seal.] W. A. Ryan, County Clerk."

It also appears that the governor of the state of Washington, on the 27th day of December, 1893, issued his second requisition, as follows, viz.:

"The State of Washington. Executive Department.

"The Governor of the State of Washington to His Excellency the Governor of the State of Maryland: Whereas, it appears by a copy of indictment which is hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the laws of this state, that Samuel H. Hart stands charged with the crime of larceny by embezzlement, which I certify to be a crime under the laws of this state, committed in the county of Pierce, in this state, and it having been represented to me that he has fled from the justice of this state, and is now to be found in the state of Maryland: Now, therefore, pursuant to the provisions of the Constitution and the laws of the United States in such case made and provided, I do hereby require that the said Samuel H. Hart be apprehended and delivered to Alexander G. Matthews, who is authorized to receive and convey him to the state of Washington, there to be dealt with according to law.

"In testimony whereof I have hereunto set my hand and caused to be affixed the seal of the state of Washington, at Olympia, this 27 day of December, in the year of our Lord one thousand eight hundred and ninety-three.

"[Seal.] J. H. McGraw.

"By the Governor: J. H. Price, Secretary of State."

This requisition was founded on the following papers, copies of which accompanied it, as follows:

"To the Governor of the State of Washington: You are respectfully requested to issue a requisition upon the Governor of Maryland for the apprehension and rendition of Samuel H. Hart, who stands charged by information pending in the superior court of the state of Washington in and for the county of Pierce with the crime of larceny by embezzlement, committed in Pierce county, state of Washington, but who, since the commission of said offense, and before an arrest could be made upon process issued by the court, fled from the justice of the state of Washington, and into the state of Maryland, where I believe he may now be found. The time and circumstances

of his flight, and the reasons for my belief as to where he may be found, are as follows: That the said Samuel H. Hart and one Frank A. Dinsmore were, on or about the 31st day of October, 1893, at the town of Buckley, county of Pierce, and state of Washington, conducting a certain banking business, the said Hart styling himself as president and the said Dinsmore styling himself as cashier under the assumed name of the Buckley State Bank, but said banking institution was unincorporated, and the said Hart and the said Dinsmore were doing business only on their own account. That Reese, Crandall & Redman, a corporation duly organized and doing business under and by virtue of the laws of the state of Washington, deposited with the said Samuel H. Hart and Frank A. Dinsmore, and left with them for collection, a one-day sight draft upon W. L. Barker & Company, a copartnership doing business in said town of Buckley, for the sum of eighty-nine dollars and twenty-eight cents (\$89.28). That the said draft was collected by the said Samuel H. Hart on or about the 31st day of October, 1893, but was never accounted for by said Hart to said Reese, Crandall & Redman. That on or about the 18th day of November, 1893, the said Samuel H. Hart left said town of Buckley for parts unknown, taking with him the money belonging to said Reese, Crandall & Redman, collected by him as above set forth, and taking with him also the money of a large number of others who had intrusted him with funds, to wit, the sum in excess of six thousand dollars. That after diligent search, and through the aid of a detective agency, the said Samuel H. Hart has been found and arrested in the city of Baltimore, in the state of Maryland, where he is now held, as affiant is informed, awaiting an order from the governor of this state for his return upon extradition to answer for the crime committed as aforesaid. In my opinion, the ends of justice require that he be brought back to this state for trial; that the facts stated in the information are true; and that the prosecution of said Samuel H. Hart would in all probability result in his conviction of the crime charged. I herewith present a duly certified copy of the original information now on file in the office of the clerk of the superior court of said Pierce county. The requisition asked for said fugitive is not sought for the purpose of collecting a debt, or enforcing a civil remedy, or to answer any other private end whatever, nor shall the criminal proceedings, when such offender is arrested, be used for any of said purposes.

"Dated at Tacoma, Washington, December 27th, 1893.

"Clem T. Reese."

"State of Washington, County of Pierce—ss: I, Clem T. Reese, being first duly sworn, say that the facts set out in the foregoing application are true, as I verily believe.

"Clem T. Reese.

"Subscribed and sworn to before me this 27th day of December, 1893.

"W. A. Ryan,

"Clerk of Superior Court of
"Pierce County, Washington."

28 L. R. A.

"To the Governor: Having carefully examined the foregoing application and accompanying papers, I hereby approve the same, and in my opinion it would be proper for you to issue the requisition asked for. I nominate Alexander G. Matthews, sheriff of Pierce county, Washington, as a proper person to be appointed and commissioned by you as the agent of state of Washington to receive the said fugitive when he shall be apprehended, and bring him to this state, and deliver him into the custody of the sheriff of said county.

"W. H. Snell,

"Prosecuting Attorney."

"Copy of Act.

"If any agent, clerk, officer, servant or person to whom any money or other property shall be entrusted, with or without hire, shall fraudulently convert to his own use or shall take and secrete the same with intent fraudulently to convert the same to his own use, or shall fail to account to the person so entrusting it to him, he shall be deemed guilty of larceny, and on conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year, or be imprisoned in the county jail for any length of time not exceeding one year."

"In the Superior Court of the State of Washington, in and for the County of Pierce.

"The State of Washington vs. Samuel H. Hart.
"Information.

"Samuel H. Hart is accused by the prosecuting attorney of the county of Pierce, state of Washington, by this information, of the crime of larceny by embezzlement, committed as follows: The said Samuel H. Hart, on or about the eighteenth day of November, eighteen hundred and ninety-three, at the county of Pierce, and state of Washington, and within one year prior to the filing of this information, being then and there the agent and servant for hire of Reese, Crandall & Redman, a corporation organized and doing business under and by virtue of the laws of the state of Washington, and as such agent and servant was then and there intrusted by the said Reese, Crandall & Redman with the care and safe-keeping of certain moneys and funds of the said Reese, Crandall & Redman, to wit, the sum of eighty-nine dollars and twenty-eight cents, lawful money of the United States, of the value of eighty-nine dollars and twenty-eight cents, and did then and there unlawfully, wrongfully, fraudulently, and feloniously abstract, misapply, and convert the said money to his own use, and did fail to account to the said Reese, Crandall & Redman therefor, with intent to defraud, which said money was then and there in the possession of the said Samuel H. Hart, and had been received by the said Samuel H. Hart by virtue of his said relations as agent and servant for hire of the said Reese, Crandall & Redman, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington.

W. H. Snell,

"Prosecuting Attorney."

"State of Washington, County of Pierce—ss: W. H. Snell, prosecuting attorney, being duly

sworn, upon oath says that he has read the foregoing information, knows the contents thereof, and believes the same to be true.

"W. H. Snell.

"Subscribed and sworn before me,
this 27th day of December, A. D. 1898. }

"[Official Seal.] W. A. Ryan,

"County Clerk and Clerk of the Superior Court for Pierce County, State of Washington.

"Filed Dec. 28, 1898. Clerk."

"State of Washington vs. Samuel H. Hart.

"Certificate.

"State of Washington, County of Pierce—ss: I, W. A. Ryan, county clerk and clerk of the superior court of the state of Washington for the county of Pierce, holding terms at Tacoma, in said county, do hereby certify that the annexed is a full, true, and correct copy of the information in the above-entitled action, now on file and record in this office.

"Witness my hand and the seal of the said superior court this 27th day of December, 1898.

"[Seal.] W. A. Ryan,

"County Clerk and Clerk of the Superior Court for Pierce County, State of Washington."

"In the Superior Court of Pierce County, State of Washington.

"State of Washington vs. Samuel H. Hart, Defendant. Order.

"Now, on this 27th day of December, 1898, information having been filed in said court charging said Samuel H. Hart, defendant herein, with the crime of larceny by embezzlement, it is hereby ordered that warrant issue for the arrest of said Samuel H. Hart, that he may be brought into court to answer said charge.

"John C. Stallcup, Judge."

"State of Washington vs. Samuel H. Hart.

"Certificate.

"State of Washington, County of Pierce—ss: I, W. A. Ryan, county clerk and clerk of the superior court of the state of Washington for the county of Pierce, holding terms at Tacoma, in said county, do hereby certify that the annexed is a full, true, and correct copy of the order to issue warrant in the above entitled action, now on record in this office.

"Witness my hand and the seal of the said superior court, this 27th day of December, 1898.

"[Seal.] W. A. Ryan,

"County Clerk and Clerk of the Superior Court for Pierce County, State of Washington."

"No. 7,859.

"In the Superior Court of the State of Washington, for the County of Pierce.

"Holding Terms at Tacoma.

"State of Washington, County of Pierce—ss.

"The State of Washington vs. Samuel H. Hart. Warrant.

"The State of Washington to the Sheriff of Pierce County, State of Washington, Greeting: Whereas Samuel H. Hart, having been duly informed against by Wm. H. Snell, prosecuting attorney of Pierce county, Washington, in the superior court of the state of Washington for the county of Pierce, holding terms at Tacoma, charging the said Samuel H. Hart with the crime of larceny by embezzlement, all of which appears to us of record: Now

this is to command you, the said sheriff, to take the said Samuel H. Hart, and him, the said Samuel H. Hart, safely keep, and have him forthwith in this court, there to answer the said charge, and abide such further order as the court may make in the premises. Herein fail not.

"Witness the Honorable John C. Stallcup, judge of the said superior court, and the seal of said superior court, and the seal of said court, this 27th day of December, A. D. 1898.

"[Seal.] W. A. Ryan,

"County Clerk and Clerk of the Superior Court."

"Indorsed: No. 7,859.

"In the Superior Court of the State of Washington for Pierce County.

"State of Washington vs. Samuel H. Hart. Warrant.

"State of Washington, County of Pierce—ss: I, A. G. Matthews, sheriff of Pierce county, state of Washington, do hereby certify that the within warrant came into my hands on the 27th day of December, 1898, and after due and diligent search I have been unable to find the said Samuel H. Hart in Pierce county, state of Washington, and I am informed he has fled to the state of Maryland.

"A. G. Matthews, sheriff.

"By A. P. Patterson, Deputy.

"Dated at Tacoma this 27th day of December, 1898."

The governor of the state of Maryland, after due consideration of said papers, issued the warrant of removal, of which the following is a copy, viz:

"State of Maryland. Executive Department.

"To Alexander G. Matthews, Agent of the State of Washington: Whereas, Demand has been made upon the governor of the state of Maryland by his excellency, John H. McGraw, governor of the state of Washington, for the apprehension and delivery of Samuel H. Hart, now alleged to be within the jurisdiction of this state as a fugitive from the justice of the said state of Washington, as defined by the constitution and laws of the United States; and whereas, such demand is accompanied by a copy of information and affidavits, charging such alleged fugitive with larceny by embezzlement, a crime under the laws of the said state of Washington, and the accompanying papers being certified as authentic by the governor of the said state: Now, therefore, I, Frank Brown, governor of the state of Maryland, do, by this, my warrant, authorize and empower you, if such fugitive be not held in custody of or under bail to answer any offense against the laws of the United States or of this state, forthwith to take and transport the said Samuel H. Hart to the line of this state, at your own expense. And I do hereby require all peace officers to whom this warrant may be shown to afford you all needful assistance in the execution hereof at your own cost and charge.

"Given under my hand and the great seal of the state of Maryland. Done at the city of Annapolis, on this the eighth day of Jan-

nary, in the year of our Lord one thousand eight hundred and ninety-four

"[Great Seal.] Frank Brown.

"By the Governor: Wm. T. Brantly, Secretary of State."

The circuit court of the United States for the district of Maryland, having considered petitioner's application for discharge under the writ of habeas corpus, entered the following order, viz.:

"The court having heard Hon. Wm. Pinkney Whyte, counsel for the petitioner, and Hon. John P. Poe, attorney-general of the state of Maryland, against the discharge of the petitioner, it is ordered this 15th day of January, 1894, that the petitioner be remanded to the custody of the warden of the Baltimore city jail, to be delivered by him to A. G. Matthews, the agent of the state of Washington, in pursuance of the warrant of the governor of the state of Maryland; and, the petitioner having given notice of an appeal from the foregoing order of court, it is now further ordered that the warden of the Baltimore city jail hold the petitioner in custody until the further order of this court."

On the 16th day of January, 1894, said Hart filed his petition for appeal, with assignment of errors, when the following order was entered, viz.:

"The judge of the circuit court of the United States for the district aforesaid having rendered a final decision in said case dismissing said writ and remanding said petitioner, and said petitioner having prayed that an appeal be taken in his behalf to the next United States circuit court of appeals for the fourth circuit, in which said cause may be heard in accordance with the statute in that behalf enacted, after argument had, it is considered and ordered that an appeal be, and the same is hereby, allowed upon the following terms, and under the following regulations: That the said Samuel H. Hart be taken into the custody of the United States marshal for the district of Maryland, to be by him safely kept, and that the said Samuel H. Hart do execute and deliver a good and sufficient bond in the sum of five thousand dollars, with security to be approved by the judge of the circuit court aforesaid, which said bond, when approved, shall be filed with the clerk of the said circuit court, and shall be conditioned as follows: That the said Samuel H. Hart do deliver himself up to the said marshal, and do appear before the said United States circuit court of appeals, whenever and wherever ordered by this court or by the said United States circuit court of appeals, and do then and there abide by and perform the judgment of the United States circuit court of appeals, in the premises; and that the said Samuel H. Hart do cause to be sent to the said appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and all other proceedings and documents and affidavits in said cause immediately; and that upon the execution and approval of said bond, as aforesaid, and the tender of the same, the said Samuel H. Hart be discharged from the custody of the marshal aforesaid, and allowed to go

free, subject to the terms of this order or the final decision of the said appellate court."

The amount of the bond was afterwards, on motion of petitioner, reduced by this court to \$3,000. The bond, with approved security, was then given, and the petitioner discharged from arrest, subject to the terms of said order. The governor of the state of Washington, in making the demands upon the governor of the state of Maryland, before mentioned and described, acted under the authority of sections 5278 and 5279 of the Revised Statutes of the United States, which provide:

"Sec. 5278. Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting of such fugitive to the state or territory making such demand shall be paid by such state or territory."

"Sec. 5279. Any agent, so appointed, who receives the fugitive into his custody, shall be empowered to transport him to the state or territory from which he has fled, and every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year."

By virtue of this legislation it was the duty of the governor of the state of Maryland to cause the arrest of Hart, and his delivery to the agent designated to receive him, provided it appeared by the papers transmitted by the governor of the state of Washington that the demand made for the surrender of the fugitive was accompanied by a copy of an indictment found, or affidavit made before a magistrate, charging him with having committed treason, felony, or other crime within said state of Washington; the same being certified as authentic, and it also being shown that the party so charged was a fugitive from justice, and within the jurisdiction of the state of Maryland. Were these essential provisions of the law complied with? The removal of a citizen from one state to another as a fugitive from justice is a matter of great importance, and worthy of serious consideration, yet always to be ordered, when a proper case is made. Such action is based upon article 4, section 2, of the Constitution of the United States,

and the laws enacted to enable the same to be executed. The provision referred to will be strictly construed, and all the requirements of the statute must be respected. In this case, does it appear that the papers transmitted and certified to by the governor of the state of Washington were of the character required for the purpose of securing the warrant of arrest and extradition? The first requisition, dated December 28, 1893, recites that it appears by a copy of an "information," which is annexed, and certified to be authentic, that the petitioner stands charged with the crime of larceny by embezzlement. We do not consider this a compliance with the act of congress, which we think requires the copy of an indictment found by a grand jury, and not the copy of an information filed by the attorney for the state. An information cannot be regarded as a substitute for an indictment where the latter is required in the legislation now under consideration. While it is in the power of the states to provide for the prosecution and punishment of all manner of crime by information, and without indictment by a grand jury (as was held by the Supreme Court of the United States in *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232); still, if they wish to rely upon the provisions of the Constitution and laws of the United States relating to fugitives from justice, they must strictly observe and respect the conditions of the same. The indictment had in mind by those who framed the constitution and enacted the statute referred to was "a written accusation of one or more persons of a crime or misdemeanor preferred to and presented upon oath by a grand jury." 4 Bl. Com. 299-302. The Supreme Court of the United States has recently described an indictment, as that word is used in the Constitution, as "the presentation to the proper court, under oath, by a grand jury, duly impaneled, of a charge describing an offense against the law for which the party charged may be punished." *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849. In this first requisition the copy of the information is all that is certified to be authentic. Holding, as we do, that the information cannot be considered as the equivalent of an indictment, we will now examine the argument of counsel for the state of Washington that the verification of the information will be regarded as such an affidavit as is required by the law. The information is verified by the prosecuting attorney, who swears that he believes the contents thereof to be true, not that they are true. This is not such charging of the commission of a crime before a magistrate of the state as is contemplated by the statute. For the purposes of an affidavit to be used for the arrest and removal of a fugitive from justice, this is not sufficient. The affidavit required in such cases should set forth the facts and circumstances relied on to prove the crime, under the oath or affirmation of some person familiar with them, whose knowledge relative thereto justifies the testimony as to their truthfulness, and should not be the mere verification of a court paper by a public official, who makes no claim to personal information as to the subject-matter of the same. *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; *Re Doo Woon*, 18 Fed. Rep. 898; *Ex parte Morgan*, 20 Fed. Rep. 298. 28 L. R. A.

By requiring such an affidavit, the liberty of the citizen is, to a great extent, protected, and the executive upon whom the demand is made is thereby enabled to determine if there is cause to believe that a crime has been committed. To authorize the removal of a citizen of Maryland to the state of Washington for trial on a charge of crime something more than the oath of a party unfamiliar with the fact that he believes the allegations of an information to be true should be required, and is demanded by the law. To hold otherwise would enable irresponsible and designing parties to make false charges with impunity against those who may be the subjects of their enmity, and permit them, after they have caused public officials to believe their representations, to secure the arrest, imprisonment, and removal of innocent persons on papers regular in character, but without merit and fraudulent in fact. It will be observed in this connection that the affidavits of Alexander McNicol, dated December 28, 1893, and of Clem T. Reese, dated December 27, 1893, filed with the governor of the state of Washington, and by him sent to the governor of the state of Maryland, are not considered, because, among other reasons, they are not recited in nor used to obtain the warrants for extradition, and are not certified to be authentic, in either of the warrants so issued. They cannot, therefore, be regarded as affidavits, under the section authorizing the warrant of removal; and, in the view that we take of this case, it will not be necessary for us to examine the questions whether an offense has in fact been committed, and, if the petitioner is a fugitive from justice, on which points it is insisted that said affidavits can be considered.

The governor of the state of Washington evidently reached the conclusion that the requisition made by him on the 28d of December, 1893, was defective, for we find that he caused another to be issued on the 27th day of December, 1893, in which it is recited that "it appears by a copy of indictment, which is herewith annexed, and which I certify to be authentic and duly authenticated in accordance with the laws of this state, that Samuel H. Hart stands charged with the crime of larceny by embezzlement," etc. On examination of the papers annexed, we find that no such copy of indictment is attached, but that the copy of an information filed by the prosecuting attorney on the 27th day of December, 1893, against said Hart, is filed with and made part of the papers with the requisition. The absence of the copy of the indictment is fatal to the validity of the warrant, which does not pretend to be founded on the copy of information nor of affidavit, but of the indictment alone. The copy of the information does not support the requisition, and, if it did, for the reasons heretofore given, would not be sufficient.

The claim that the act of the governor of a state in issuing his warrant of removal is conclusive, and that the presumption is he had the necessary papers, duly authenticated, before him, when he acted, cannot be assented to. The act of the governor can be reviewed, and, if he has not followed the directions and observed the conditions of the Constitution and

laws of the United States, pertinent to such matters, can be set aside as void. The highest as well as the most obscure official must respect the requirements of the Constitution and the laws made thereunder. The acts of the executive are subject to review by the courts by means of the writ of habeas corpus. It is not now necessary to cite authorities on this question, nor to recall incidents in English history, showing that this writ will issue, no matter how obscure the prisoner, nor how great the power of the official who detains him. We

find that the requisitions issued by the governor of the state of Washington did not comply with the law, and that the governor of the state of Maryland was not furnished with a copy of either an indictment or affidavit, made as required by section 5278 of the Revised Statutes of the United States, and consequently we hold that the warrant of removal is void.

The judgment of the Circuit Court will be reversed, and the petitioner will be discharged from arrest.

LOUISIANA SUPREME COURT.

Allen M. BRASHEAR

v.

HOUSTON CENTRAL, ARKANSAS & NORTHERN R. CO., *App't.*

(47 La. Ann. 735.)

- *1. This case is distinguished from those in which it is held that the passenger on a railroad, carried beyond his station cannot recover damages caused by jumping from a moving train.
2. A passenger on a railroad train, with a ticket for a station at which it is customary for the train not to stop, but to slow its movement, so as to allow passengers to alight, will be entitled to damages if, called to the platform by the announcement of the station, he is thrown from the steps of the car and injured; his fall being caused by the sudden increase of the speed of the train, when it should have been slowed or stopped. *Whart. Neg. § 371, 375, 377.*
3. Nor will it make any difference in the liability of the railroad company that the passenger is thus thrown from the car on the side opposite to his station; the train having passed the station without affording him an opportunity to alight, and he having crossed to the other side, under the reasonable expectation that the train would be slowed at his destination a few feet beyond the station.

(April 8, 1895.)

A PPEAL by defendant from a judgment of the District Court for the Parish of Grant in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Modifié.*

The facts are stated in the opinion.

Mr. Frederick G. Hudson for appellant.
Mr. H. H. White for appellee.

Miller, J., delivered the opinion of the court:

The plaintiff, a passenger on defendant's train alleges that he was thrown with violence to the ground by the movement of the cars

*Headnotes by *MILLER, J.*

NOTE.—For review of authorities respecting injuries to passenger in getting on or off railroad train, see note to *Carr v. Eel River & E. R. Co.* (Cal.) 21 L. R. A. 354, also *Woolsey v. Chicago, R. & Q. R. Co.* (Neb.) 25 L. R. A. 73; *Odum v. St. Louis S. W. R. Co.* (La.) 23 L. R. A. 152.

—2 L. R. A.

while he was endeavoring to alight at his place of destination. The defense is the general issue and contributory negligence. The judgment of the lower court, based on the verdict of a jury, was against the defendant for \$3,000, and defendant appeals. The plaintiff's ticket on the train was for a flag station, at which the trains made no stop unless flagged or to put out passengers, and the testimony is that for the last purpose it was customary to slow the train, instead of coming to a full stop. It is in proof that, as the train approached, the station was called by the train officials, and accordingly plaintiff went to the platform, to find that the train had passed his station. He supposed the purpose was to put him off at the mill where he was working, a short distance from the station and with that idea he stood on the steps of the car; but, instead of slowing, the train, as the petition alleges, "gave a sudden jerk," which threw him to the ground. If not this jerk, it is in proof the speed of the train was increased, so that there was no slowing either at the plaintiff's station, or after it was passed, to enable plaintiff to alight. The plaintiff's testimony is that he was thrown from the train; nor is there any testimony that he made the attempt to alight from the moving train. We note the reference in the brief of the defendant to the petition, and the inference from the petition, it is claimed, is, that plaintiff's fall was due to his stepping or jumping from the train. The allegations were: The custom of the trains to slow, and not to stop, at the station; that plaintiff was familiar with the custom, and had on several occasions got off while the train was in motion; that, as the station was neared, the usual stopping signals were given; that plaintiff went to the platform, and, when about to step off, there was the jerk and increased speed, throwing him to the ground. We do not think there is any sensible variance between the petition and the plaintiff's testimony that he was thrown from the train, and, as stated, he is not contradicted on that point.

In our appreciation of the testimony, the defense that the passenger, carried beyond his station, cannot recover for injuries ensuing from attempting to leave a train in motion, has no application. That defense is recognized in the text-books and adjudicated cases. 1 *Thomp. Neg.* p. 459; *Damont v. New Orleans & O. R. Co.* 9 La. Ann. 441, 61 Am. Dec. 214, citing the leading Pennsylvania decision of *Pennylt*

sania R. Co. v. Aspell, 23 Pa. 147, 62 Am. Dec. 323; *Walker v. Vicksburg, S. & P. R. Co.* 41 La. Ann. 796, 7 L. R. A. 111. If, indeed, under the impulse of the moment due to the signal of the train official, and the custom not to come to a stop, the plaintiff had jumped, his imprudence might, perhaps, be deemed attributable to the implied direction of the company. It has been held that, where the imprudence of the passenger under such circumstances is due to the error or fault of the train official, he will not be disentitled to recover for injuries. *Whart. Neg.* §§ 875, 877; 2 *Redf. Railways*, § 194; 3 *Thomp. Neg.* p. 1174; *Lehman v. Louisiana Western R. Co.* 37 La. Ann. 708; *Odum v. St. Louis S. W. R. Co.* 45 La. Ann. 1201, 23 L. R. A. 152.

The plaintiff was invited by the train signal to leave his seat and go to the platform. Under the natural expectation that the train would slow, if not stop, to enable him to alight, it cannot be deemed negligence that he stood on the steps of the car. It is urged on us that his station was passed, and he went from one, *i. e.* the station, side, to the other, and was standing on the steps on that side when the accident occurred. This was because he supposed, as he states, not putting him out at the station, it was intended to slow up at the mill, a few feet beyond. We cannot hold that this change in his position, induced by the natural expectation of a chance to alight that the company owes to its passengers, charges the plaintiff with negligence. Called to the platform and to the steps of the car,—for that is the significance of the whistle, and the announcement of the station by the train official,—the train is neither slowed nor stopped, passes the station and the mill with a speed accelerated, when it should have been diminished, and the result is that the plaintiff is thrown to the ground and injured. We think the record shows a case of responsibility of the defendant.

We have given very careful attention to the question of damages. The plaintiff describes himself as a hardy laboring man, had followed

blacksmithing, repairing machinery, and had followed farming. When working, he received \$2.50 per day, and, when the accident occurred, was engaged in making a "slab conveyor," for which he was to get \$50. The fall bruised him in his back, ribs, and shoulders. He testifies that his arm was disabled, his leg shortened, and other resulting injuries are stated by him. There is in the record the testimony of a number of physicians. Two called by plaintiff testify to the injuries, but the statement from one as to the result of the injuries is that his sufferings may be serious, accompanied with the qualification that he may recover. Another physician, who called on the plaintiff with his family physician, negatives any serious injuries to plaintiff. Two physicians, experts, appointed by the court to examine plaintiff, report no injuries to shoulders, hip, back, or legs, no difference in the length of the legs, and ascribe plaintiff's pains to some nervous trouble. We cannot find in the record any satisfactory basis for damages on the theory of permanent diminution of the plaintiff's working capacity. It weighs with us, too that the plaintiff, after the accident, worked at his job with no diminution of his physical ability apparent to his fellow workmen; but, of course, the effects of the fall might not then have been developed. Indeed, we think it proved the plaintiff was made sick later from the effects of the fall. The jury gave \$3,000. We cannot perceive the basis for this verdict. We think the damages should cover the expenses of his sickness and loss of time, and some allowance should be made for his suffering; but, from the examination of the record, we are brought to the conclusion that the judgment should be reduced.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed, and it is now ordered, adjudged, and decreed that the plaintiff recover from defendant \$500, with interest from date of judgment of the lower court, and the costs of the lower court; those of the appeal to be paid by him.

MARYLAND COURT OF APPEALS.

STATE of Maryland, *Appt.*,

v.

Charles L. APLEGARTH *et al.*

(.....Md.....)

1. A license tax on the business or occupation of those engaged in packing or canning oysters is not a tax on property within the constitutional provisions as to equality and uniformity, although regulated by the amount of business done, with a provision for the privilege of paying a maximum fixed amount instead.

2. A license tax on the business of an oyster packer may be properly included in

NOTE.—Compare with the above case the Virginia decision in *Com. v. Brown*, *ante*, 110, in which a tax on sales of a tongman was held to be not a license but a tax on property.

28 L. R. A.

the provisions of a statute on the general subject of the protection and preservation of oysters.

3. A license tax on all those engaged in packing or canning oysters for sale or transportation whose places of business are in the state is not an unconstitutional interference with interstate commerce as applied to those who may sell or transport their oysters beyond the state.

(May 16, 1895.)

APPPEAL by the State from a judgment of the Criminal Court of Baltimore City sustaining a demurrer to an indictment charging defendants with engaging in the business of packing and canning oysters without a license contrary to the provisions of the statute. *Reversed.*

The facts are stated in the opinion.

Messrs. John P. Poe, Atty-Gen., and Charles G. Kerr for appellant.

Meers, Gans & Haman, for appellees:

There is a great difference between a license required for purposes of regulation and a license which is used for the purpose of raising revenue.

The distinction between a demand of money under the police power and one made under the power to tax, is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue.

Cooley, Taxn. 586.

When the grant is not made for revenue, but for regulation, a fee for the license may be exacted, but it must be such a fee only as will legitimately assist in the regulation.

Cooley, Taxn. 598; *Vansant v. Harlem Stage Co. of Baltimore*, 59 Md. 335; *State v. Rowe*, 73 Md. 568; *Turner v. Maryland*, 107 U. S. 33, 27 L. ed. 370.

License fees are not taxes, but prices paid for the privilege of exercising a franchise. It is a tax only when revenue is the main purpose for which they are imposed.

Desty, Taxn. 805; Tiedeman, Pol. Powers, p. 279.

One class of men cannot be taxed in their property or occupation, exclusively, by a method different from that used as to every other tax, to support a general public burden.

The tax is really on the property and not on the occupation.

State v. Cumberland & P. R. Co. 40 Md. 22; *Welton v. Missouri*, 91 U. S. 278, 28 L. ed. 348; *Brown v. Maryland*, 25 U. S. 13 Wheat. 425, 6 L. ed. 680.

The nature of the taxing power requires uniformity.

State v. Philadelphia, W. & B. R. Co. 45 Md. 377, 24 Am. Rep. 511; *Wells v. Hyattsville*, 77 Md. 188; Cooley, Taxn. 141; *Dorgan v. Boston*, 12 Allen, 287; *Hammett v. Philadelphia*, 65 Pa. 151, 3 Am. Rep. 615; *Talbot County Comrs. v. Queen Anne County Comrs.* 50 Md. 245; Cooley, Taxn. 244; Desty, Taxn. 29.

If the license be regarded simply as a tax upon the business or occupation of the packer and canner, it would still be obnoxious to the constitutional rule.

All other license taxes which are really taxes on occupations, such as traders, have a definite rule of apportionment. The license is regulated by the amount of stock on hand, calculated by its value. In this case there is no calculation as to value.

Tiedeman, Pol. Powers, 477, 476; Cooley, Const. Lim. 619; *Knowlton v. Rock County Supra*, 9 Wis. 410.

If this license fee is to be regarded as a mere tax on the business of the packer, then this law embraces a subject distinct from its title and distinct from the body of the act.

The tax conflicts with the Constitution of the United States.

Leisy v. Hardin, 135 U. S. 151, 34 L. ed. 147; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 39 L. ed. 811; *Philadelphia & R. R. Co. v. Pennsylvania*, 82 U. S. 15 Wall. 282, 21 L. ed. 146; *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Crandall v. Nevada*, 73 U. S. 6 Wall. 35, 18 L. ed. 745; *Robbins v. 28 L. R. A.*

Shelby County Taxing Dist. 120 U. S. 489, 30 L. ed. 694; *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, 8 Inters. Com. Rep. 181.

Boyd, J., delivered the opinion of the court:

The appellees were indicted for engaging in the business of packing and canning, for sale and transportation, oysters taken in the waters of this state without obtaining from the state a license therefor. A demurrer to the indictment was interposed, which was sustained, *pro forma*, by the court below. The prosecution is based on sections 66, 67, article 72, Code Pub. Gen. Laws, as amended by chapter 380 of the Laws of 1894. It is contended on behalf of the appellees that these sections are (1) in conflict with the constitution of this state, because the license provided for is an arbitrary and unequal tax, contrary to the fifteenth article of the Bill of Rights, and not a lawful exercise of the police power of the state; and (2) that they are a regulation of interstate commerce, in violation of the Constitution of the United States. We will consider the case in that order.

There has been on our statute books for many years legislation having in view the protection and preservation of the oysters of this state. Since 1860 a separate article has been devoted to this subject in the several codes of public general laws of Maryland. For some years past the legislatures have generally been called upon to devote more or less time to this important subject, and, at the session of 1894, article 72, title *Oysters*, of the Code, was repealed, and re-enacted with amendments. Section 66 of that article, as thus amended, requires every person, firm, or corporation engaged in the business of packing and canning oysters for sale or transportation to take out, on or before the 1st day of September in each year, a license to engage in such business by application to the clerk of the circuit court of the county in which the place of business of such applicant is situated, or to the clerk of the court of common pleas, if in Baltimore city. The applicant is required to state the number of bushels of oysters which he proposes to pack during the succeeding eight months, and to pay at the time of issuing the license the sum of \$25 for such license, and in addition thereto the sum of \$1 per 1,000 for every 1,000 bushels over 10,000 so estimated in his application as the total number to be packed during the season. He is also required to make a return, under oath, within thirty days after the 25th day of April in each year (that being the end of the season in which oysters can be caught), to the clerk from whom he obtained the license, of the number of bushels packed or canned by him during the season, and to pay the clerk the further license money of \$1 per 1,000 for each 1,000 bushels packed or canned by him over and above the estimate in his application. This report must be forwarded to the comptroller of the state, who is authorized to return any overpayment, in case he is satisfied that the total number of bushels packed by said person was less than the number stated in his application. This section further provides that all moneys thus received from said licenses shall be paid over and accounted for by the clerks to the comptroller to be placed by him to the credit of the oyster fund, as provided by section

29 of said article. The latter section provides for the payment of moneys received from dredging licenses and other sources therein named into the treasury, to be "placed to the credit of a fund which shall be called 'The Oyster Fund,' and the same shall be kept separate and distinct from o'her funds in the treasury, and shall only be drawn upon for the purpose of maintaining sufficient and proper police regulations for the protection of fish and oysters in Maryland waters, and in the payment of the officers and men and keeping in repair and supplying the necessary means of sailing the boats and vessels of the state fishery force." Section 67 fixes penalties for the violation of section 66, and authorizes any person to pay the sum of \$300 per annum for a license, without being required to report the number of bushels handled by him, or otherwise disclose the operation of his business.

The above are the material parts of the sections of this law directly involved in this case. An examination of the other provisions of this article will show that the legislature has required those engaged in catching and taking oysters, for sale, out of the waters of Maryland, with rakes, tongs, scoops, dredges, and other instruments, to take out licenses, and also those engaged in selling oysters on commission. It will also be seen that great care has been taken to require persons connected with the oyster business to deal fairly with the state, and large outlays of money are provided for, to be paid out of the oyster fund, for the purpose of regulating, preserving, and protecting this important and valuable industry of our state. In considering this question, it is well to bear in mind that the oyster beds are the property of the state (*McCready v. Virginia*, 94 U. S. 891, 24 L. ed. 248; *Bradshaw v. Lankford*, 78 Md. 481, 11 L. R. A. 562), and that the legislature, representing the sovereign power of the state, can pass laws determining how oysters can be taken, can prohibit them from being taken at all, or make such other reasonable regulations concerning them as it may deem best and proper for the interests of the state at large. If the restrictions imposed upon those engaged in the business of taking oysters be withdrawn, the oyster beds might be destroyed, or at least seriously injured. It has therefore been deemed proper by the legislature to provide a "state fishery force," at large expense, to enforce the laws passed for their preservation and protection. If the income from licenses granted under laws existing prior to 1894 proved insufficient to meet the demands on the state, the legislature had the undoubted right to provide for the deficiency, provided, of course, it kept within constitutional bounds. If there be a class of persons engaged in business in this state who are largely dependent upon the oysters in the waters of this state for the conduct of their business, but who had heretofore not been required to have and pay for licenses for the privilege of engaging in such occupation, we can see no just or equitable ground to restrain the legislature from requiring them to do so, unless prohibited by the organic law of this state or of the United States. Such legislation on this particular subject might well be justified on the ground that the state, as owner of the oysters, is

entitled to a reasonable and fair compensation for them; and it may not be deemed just or wise to impose all the burden on those who oftentimes undergo great hardship and suffering in catching them, and therefore those engaged in packing and canning them are called upon to contribute their share of the compensation. If the state is not to profit by sales of its property, it should at least be protected from any loss in caring for it, and all those engaged in the oyster business might justly be required to contribute their portion of the cost and expense of preserving them. When we remember that oysters in the waters of the state belong to it, and see, from an examination of the article of the Code in which the sections now before us are embraced, the great expense incurred by the state in fostering and encouraging this industry, and preserving the oysters, and that all the revenue derived from the licenses objected to in this case are required to be placed in the separate fund applicable to those purposes, we might perhaps content ourselves by declaring this law to be valid, on the ground that these license fees are imposed for the regulation of the oyster business, with which oyster packers are connected. But we are now dealing with a statute passed by the legislature for the benefit of the state, and we are not called upon to draw nice distinctions between the power to license for regulation, and the power to license with a view to revenue as is sometimes required in construing charters of municipal corporations for the purpose of determining whether or not such corporation had the power to exact certain license fees. The cases of *Vansant v. Harlem Stage Co. of Baltimore*, 59 Md. 335, and *State v. Rowe*, 72 Md. 553, cited by the appellees, are of the latter kind.

The privilege of carrying on the business of packing and canning oysters is made, by this law, to depend upon the taking out of a license, and we do not think the provisions of the state constitution, looking to equality and uniformity in taxation, are thereby violated. It is said in *Tiedeman's Limitations of Police Powers* (page 282) that "the most common objection raised to the enforcement of a license tax is that it offends the constitutional provision which requires uniformity of taxation, since the determination of the sum that shall be required of each trade or occupation must necessarily, in some degree, be arbitrary, and the amount demanded more or less irregular. But the courts have generally held that the constitutional requirement as to uniformity of taxation had no reference to taxation of occupation." The right to require the payment of license fees for the privilege of carrying on business of different kinds has been recognized for many years in this state, and the license fees required to be paid have been fixed, in the discretion of the legislature, according to circumstances and the character of the business. Take, for example, the licenses to brokers. Exchange and insurance brokers are each required to pay \$100 per annum, stock and merchandise brokers \$75, and real estate and bill brokers \$50, per annum. Those engaged in the sale of ordinary goods, chattels, wares, or merchandise are required to pay according to the amount of stock at the principal season

of sale, thus varying from \$12 to \$150 per annum. Those selling spirituous or fermented liquors in quantities not less than a pint are required to pay from \$18 to \$150 per annum, while ordinary keepers pay from \$25 to \$450, according to the rental or annual value of the premises. Other instances might be cited, but these serve to illustrate what has been the practice in this state, and it would scarcely be contended that licenses cannot be required of persons engaging in such occupations as those above mentioned. Upon what principle, then, is the license fee required of oyster packers illegal? It is argued that the method adopted is novel. If that be admitted, it does not invalidate the law, but it does not materially differ from the traders' licenses, so far as the method of fixing the rate is concerned. In the latter the license fee is graduated according to the amount of stock on hand at the principal season of sale, while in this it is according to the number of oysters packed; the effort in each case being to require payment according to the amount of the business done in the occupation taxed.

We do not agree with the learned counsel for the appellees that this law imposes a tax on the property and not on the occupation. In the case of *State v. Cumberland & P. R. Co.*, 40 Md. 22, relied on by him, the act of assembly in question prohibited coal-mining companies from transporting any coal mined in this state until a state tax of two cents per ton on said coal was paid. It was intended to be in lieu of all other state taxes to be paid by those companies, and expressly provided that the comptroller should give the companies paying the taxes discharges from state taxes on their capital stock. It being manifestly and confessedly a direct tax on the property in the opinion of four out of seven judges who sat in the case, they held the law to be in violation of the fifteenth article of the Bill of Rights of this state. The other three judges dissented, on the ground that it was not unconstitutional, notwithstanding the language of the statute. This case differs widely from that, as this law simply provides for a license tax on the business or occupation of those engaged in packing or canning oysters, and not for a tax on property. In *State v. Philadelphia, W. & B. R. Co.*, 45 Md. 861, 24 Am. Rep. 511, this court held that a tax of one half of 1 per centum upon the gross receipts of railroad companies was not a direct tax upon the property of the companies, within the meaning of the fifteenth article of the Bill of Rights. It was such a tax as might be imposed or laid "with a particular view for the good government and benefit of the community," and not such as was prohibited under the prior clause of this article. Although that case differs from this, we refer to it as reflecting upon the character of tax the clause in the fifteenth article of the Bill of Rights relied on refers to, as construed by this court. See also *Rohr v. Gray*, decided at last October term, 80 Md. 274. It is true that the burden imposed on oyster packers as a class may differ from that on other occupations, but that is for the sound discretion of the legislature. An attorney at law may not pay taxes on one dollar's worth of property, and he is not now required to pay any license

tax to the state for the privilege of practicing his profession, while his neighbor, if a merchant, not only pays taxes on his stock of goods, but is required to pay a license tax before he can sell one dollar's worth of goods, yet it cannot be successfully contended that the law of this state requiring merchants to pay a license tax is unconstitutional. The courts must leave to the sound discretion of the legislature, which, of course, should be honestly exercised, the question as to what occupations shall be licensed, what rates shall be charged, etc., so long as the laws do not manifestly conflict with some provision of the Constitution of the United States or of the state. The method adopted in this case is probably as just as could be established. It is regulated by the amount of business done, and the privilege is given of paying the sum of \$800 as a fixed amount, instead of being governed by the number of bushels packed. If the legislature had arbitrarily fixed \$800 as the license tax to be paid by all oyster packers, the right to do so could not be questioned. Why, then, could it not adopt, as a minimum license fee \$25, and as a maximum \$800, with a sliding scale between those sums, according to the amount of business done? This is practically what was done.

Again, it was contended on the part of the appellees that if the license fee is to be regarded as a mere tax on the business of the packer, then this law embraces a subject distinct from its title and from the body of the Act. The Act of 1894, as has already been said, repealed and reenacted article 72 of the Code, and included all the public general laws on the subject of oysters, to the date of its passage. It adopted various regulations for the government of those connected with the oyster business, and in doing so provided for licenses to packers. It was therefore not only unobjectionable, but very appropriate, to include the provisions of sections 66 and 67 in this article. They are a part of the system adopted by the legislature to regulate, protect, and preserve the oysters of the state, and hence were embraced in this article. This is not without precedent in this state. In article 23, title *Corporations*, we find subdivisions of "Insurance Companies" and "Insurance Department," and under the latter provision is made for licensing agents of foreign insurance companies, who are required to pay \$200 per annum, and also a tax of 1½ per centum on the premiums collected, received, or secured in this state, or from residents thereof, in addition to some other fees named. The state has a large revenue from that source. Nor do we see any objection to the provision of the law requiring the license fees collected of the oyster packers to be paid into the oyster fund. Whether the money goes into the general treasury, and any deficiency in the oyster fund is made up by the state out of the general fund, or whether it be paid directly into the oyster fund, can make no possible difference to the packers. They are really benefited by the method adopted by this law, as the money paid by them is required to be used for purposes connected with the oyster business, in which they are directly interested. If the state has the right to impose a license tax, as we hold

it has, it can certainly determine what shall be done with the money as long as no unlawful use is made of it. Having considered the various objections urged by the learned counsel for the appellants to this law, we are of opinion that, treating it as a tax on the occupation of these persons, the law is not obnoxious to any of the provisions of our state constitution, and therefore must be sustained, unless it be in conflict with the Federal Constitution, which we will briefly refer to.

But little stress was laid on this ground of defense either in the oral argument or the brief filed by the appellants. We do not see how there can be any serious question about the validity of this law, so far as affected by the Constitution of the United States. The law does not in any way discriminate in favor of the citizens of this state against the citizens of other states. On the contrary, it only applies to those whose places of business are in this state. Nor do we think it can be said that it in any way regulates or undertakes to regulate interstate commerce. It was suggested in argument that, as the law applied to those engaged in packing or canning oysters for sale or transportation, the latter clause made the law objectionable. That term was evidently used to exempt those who packed or canned oysters for their own purposes, but not for sale or transportation. Of course, oyster packers in this state may sell or transport all their oysters within the state, or they may sell or transport some of them beyond the state. But

that does not prohibit the state from taxing them for the prosecution of their business within the state. It was said as early as the case of *Nathan v. Louisiana*, 49 U. S. 8 How. 80, 12 L. ed. 965, that "no one can claim an exemption from a general tax on his business within the state on the ground that the products sold may be used in commerce. No state can tax an export or an import as such, except under the limitations of the constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the state, it is a subject of taxation by the state. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation." Although it is sometimes difficult to draw the line between what is and what is not a regulation of commerce among the states, we have been referred to no case, and know of none, decided by the federal courts, that will bring this case within any of those classes that have been held to be in conflict with the Constitution of the United States. Being of the opinion, then, that there is no well founded constitutional objection to the law under consideration, viewing it from the standpoint of either the federal or state constitution, and recognizing the right of the legislature under those circumstances to pass it, we must reverse the judgment below, and award a new trial.

Judgment reversed, and new trial awarded.

NEW YORK COURT OF APPEALS.

Elizabeth S. EDGECOMB, *Appt.*,

v.

Sarah E. BUCKHOUT, *Admx.*, etc., of Eckford Webb, Deceased, *Resp't.*

(148 N. Y. 332.)

1. The mere fact of a contemplated marriage or marriage itself will not as matter of law justify the discharge of a woman who is engaged under a contract as housekeeper and to render services of a personal nature necessitating constant attendance upon her employer.
2. The term "housekeeper" as used in a complaint to recover for services is not so limited in meaning as to exclude evidence that the services include work as seamstress.
3. To prove the value of services as housekeeper in a stylish establishment, including personal attendance on the employer, where no situation exactly similar can be shown, the compensation of other housekeepers, who do not perform all the services that were performed in the case at bar, may be shown as the best evidence the nature of the case affords.
4. A decision of the general term reversing a judgment upon exceptions

NOTE.—No very similar case appears to have been decided on the question involved in the above case. See as to discharge of employé for refusing to work on Sunday, *Van Winkle v. Satterfield* (Ark.), 23 L. R. A. 853, and on the general subject of discharge, see note to *Keedy v. Long* (Md.) 5 L. R. A. 759.

23 L. R. A.

and at the same time affirming an order separately appealed which denied a motion for a new trial, can be reviewed by the New York court of appeals only upon questions of law arising upon the exceptions, and not in respect to sufficiency of evidence nor excess of damages.

(June 11, 1895.)

APPEAL by plaintiff from an order of the General Term of the Supreme Court, Second Department, reversing a judgment of the King's County Circuit in favor of plaintiff in an action brought to recover compensation for personal services rendered to defendant's intestate. *Reversed.*

The facts are stated in the opinion.

Mr. Daniel B. Thompson, for appellant:

There is no presumption of law that the marriage of a woman incapacitates her from performing a contract previously made, to act as housekeeper, and the question as to whether the plaintiff could perform her contract with *Mr. Webb*, notwithstanding her marriage, could only be determined as an inference from the surrounding facts and circumstances, and this question was within the exclusive province of the jury and it was properly submitted to the jury.

Justice v. Long, 53 N. Y. 323; *Stokes v. Johnson*, 57 N. Y. 678; *Hackford v. New York Cent. & H. R. R. Co.* 53 N. Y. 654; *Mead v. Parker*, 111 N. Y. 262.

Mr. Louis O. Van Doren, with Mr. Fred. J. Lancaster, for respondent:

If the master for good and sufficient cause discharge the servant before the expiration of the term of service; or if the servant without good cause quits service before the end of the term, he can recover nothing for the part of the term past, nor for the future.

Turner v. Kouwenhoven, 100 N. Y. 119.

The relation constituted is personal to both sides, and contemplates no substitution.

Lacy v. Getman, 6 L. R. A. 728, 119 N. Y. 109; *King v. St. John*, 9 Barn. & C. 896.

For any such conduct in fact as prevents a mutual agreement from being carried out to the reasonable satisfaction of the employer, the person employed may be dismissed.

1 Schouler, Dom. Rel. 4th ed. § 462; *Stoney v. Farmers Transp. Co.* 17 Hun, 579; *Huntingdon v. Claffin*, 88 N. Y. 182.

The courts of England and this state have always held that any willful disobedience of the master's orders is sufficient to warrant a dismissal of the servant; any conduct which renders services unpleasant or objectionable or unsatisfactory, within reason and good sense, is sufficient cause for dismissal.

Spain v. Arnott, 2 Stark. 256; *Bass Furnace Co. v. Glascock*, 83 Ala. 452, 60 Am. Rep. 748.

Peckham, J., delivered the opinion of the court:

The plaintiff brought this action to recover for services as housekeeper, which she alleged in her complaint herein she had performed for one Eckford Webb under an agreement that she should perform them up to the death of Mr. Webb, he agreeing with her that she should be compensated for such services by a provision in his will, by which she would have a life estate in the house No. 78 Rush street, in the city of Brooklyn, \$5,000 in cash, and \$3,000 in value of railroad bonds. The plaintiff alleged the performance of the contract on her part, the death of the other party to the agreement, Mr. Webb, and his failure to make any provision for her in his will. It was also alleged that the reasonable compensation for the services actually performed by the plaintiff would be the sum of \$18,000, no part of which had been paid to the plaintiff; and she demanded judgment therefor against his administratrix, with interest from October 1, 1893, the date of the death of Mr. Webb. The defendant put in an answer denying the agreement, alleging that the plaintiff had been fully paid for all services rendered by her to the deceased, and also alleging that the plaintiff, long prior to the death of Mr. Webb, had herself terminated, canceled, discharged, and abandoned the contract. Other defenses were set up in the answer, which are not necessary to state. It appeared upon the trial that the deceased, Mr. Webb, was a man about sixty years of age, very large in person, and somewhat helpless on that account. Some time in 1881, he engaged the plaintiff, who was then an unmarried woman of about forty years of age, to become his housekeeper, and to perform such other services as might be required of her from time to time. The agreement was that the plaintiff should perform such services for Mr. Webb

up to the time of his death, for which she was to be compensated as stated in the complaint. Pursuant to the agreement, the plaintiff then entered into the service of Mr. Webb, and remained in his service between eight and nine years. She proved the character of the services which she rendered, which were not alone those pertaining to an ordinary housekeeper, but included services of a personal nature, necessitating constant attendance upon Mr. Webb. They included also the purchase of supplies for the house and table, the hiring of servants, the superintendence of their work, paying the bills of the establishment, attending to the sewing and mending, and doing many other services which were stated in detail by the plaintiff and her witnesses. Some time in the spring or early summer of the year 1889, the plaintiff left the service of Mr. Webb, under circumstances which she stated in her testimony. They were in substance that upon informing Mr. Webb that she had received an offer of marriage from her present husband, Mr. Edgecomb, and asking his advice as to her acceptance of it, he stated that he had no advice to give, and became quite angry. The conversation was continued regarding the question of her ability to render to Mr. Webb the services which she had theretofore rendered if she married Mr. Edgecomb; and Mr. Webb said that she would not be able to render him such services, that her husband would not permit it, and that he would not have any married man around his house. The plaintiff replied that she had spoken with Mr. Edgecomb in regard to the matter, and that he was perfectly willing that she should continue to render the same services that she had before rendered; and that, unless he were willing that she should do so she would not marry him. In addition, she said she would, if Mr. Webb preferred it, take a house with her husband, and give to Mr. Webb the best rooms in it, and render to him the same services she had heretofore rendered him; or, if he chose, she would have Mr. Edgecomb come to the house, and she would continue to give the same services to Mr. Webb under those circumstances; or she would have Mr. Edgecomb remain where he was, and she would in that case continue to render the services until Mr. Webb died; and that, during the little space of a wedding tour which she would like to take, she would have her step-mother come and perform the same services for Mr. Webb that the plaintiff had been performing. The testimony shows that it was not an alternative demanded on the part of the plaintiff that the contract should be modified from that which was originally made. The evidence shows a statement on her part of her willingness to stand by the contract that she had made, and a statement that her proposed husband was entirely willing that she should do so; and then she offered at the option of the deceased other propositions in relation to taking a house, etc., which have just been stated. The result of it was that Mr. Webb discharged her, and gave her three weeks in which to leave his house. It is plain and the jury have found that the discharge was given by Mr. Webb solely for the reason that he refused to accept the services of plaintiff as a married woman, and his not-

fication to her that she might have three weeks in which to leave was based solely upon his determination to refuse at all events the services of the plaintiff as a married woman. He stated that he would not have a married woman, and that he wanted an unmarried woman to perform the services which he required. The plaintiff left the house pursuant to the notification of Mr. Webb, and soon thereafter was married to Mr. Edgecomb, and the two left for Europe. They were gone several years, and returned a short time prior to Mr. Webb's death, in October, 1893; and soon after that event the plaintiff brought this action to recover for the value of the services performed by her during the time that she was in his employ.

The learned judge, upon the trial, submitted to the jury the question as to what the terms of the agreement between Mr. Webb and the plaintiff were. If they found that the agreement was as testified to on the part of the plaintiff, the second question submitted to them was that relating to her performance of the agreement thus proved. He stated to the jury that the contention on the part of the plaintiff was that she had been ready, willing, and able at all times to continue to serve Mr. Webb, and that the relations between them were severed, not by any wrongful act on her part, but by some wrongful act on his part, and she claimed that his discharge of her was wrongful in the sense that her contemplated marriage did not constitute any just ground in and of itself for her discharge. The learned judge then said to the jury: "If the effect of the marriage of the plaintiff with Mr. Edgecomb was such as to render it practically impossible for her to continue thereafter to render the services as housekeeper which were contemplated by the agreement between her and Mr. Webb, this contract was ended by her act, and, as the contract is an entirety, she lost all right to recover in the action. . . . She testified that the husband was entirely willing to allow her to remain there just as she had remained before, to allow her to do just what she had done before, to perform all those various services which have been narrated with so much detail in your hearing during this trial, and you are asked to conclude, therefore, that there was no necessary obstacle to the continuance of that relation arising out of the new relation which she was about to form and did form with the gentleman who became her husband. In other words, you are told that this new relation was not incompatible with the continuation of the old one, and that the husband had no claims or rights as to his wife which rendered it improper, if not impracticable, for her to go on and do what she had been doing before. . . . I leave it to you as a question of fact to determine whether or not the effect of the marriage was to render it practically impossible for the plaintiff to continue to render the same services as she had rendered before. . . . If you shall find that the effect of the marriage she was about to contract took it out of her power to perform the contract, then she cannot recover at all. If such was not the effect of the marriage, and if you shall find that it was practicable for her to go on and do just what she did before,

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and that Mr. Edgecomb, her husband, was willing that she should go on and do just as she did before, then Mr. Webb was not in a position to break off the relations till something actually occurred which made it certain that she could not go on. Of course, he was under no obligations to make any change in his household to accommodate the husband. He was under no obligation to admit him there, either as the spouse of this lady or as a visitor for any purpose whatever, or to sacrifice one moment of the time which the plaintiff engaged should be devoted to him in order that she might devote it to her husband; but he was not justified in breaking off the relation if it were practicable that the relation should continue as it had continued, and as it was intended to continue by the contract, if she did everything to render such a result possible." Several written questions were submitted to the jury, which they answered. They found the agreement as testified to on the part of the plaintiff. They found that Mr. Webb dismissed plaintiff from his service because she became engaged to Mr. Edgecomb. They found that the marriage of the plaintiff to Mr. Edgecomb did not make it practically impossible for her to continue to perform such services as she had agreed to perform as housekeeper for Mr. Webb, and that the plaintiff did not voluntarily leave or abandon the service of Mr. Webb upon entering into her marriage engagement; also, that the plaintiff had not been paid for such services as she rendered to Mr. Webb. They also found that the fair and reasonable value of such services as the plaintiff rendered to Mr. Webb was \$85 per month, and they found a general verdict for the sum of \$8,330. The defendant appealed to the general term from the judgment entered upon the verdict; and that court held that the question respecting the right of the deceased to discharge the plaintiff should have been decided as a question of law by the trial court; and that, as matter of law, the marriage of the plaintiff wrought such a change in the plaintiff herself as to disqualify her from the performance of her contract with Mr. Webb; and that Mr. Webb was justified in construing her proposed marriage as a rescission of the contract on her part, and discharging her for that cause.

Treating the question as one of law simply, we are of opinion that the general term erred in its conclusion as above stated. We agree that the services contracted for in this case were those entirely of a personal nature, admitting of no substitution of any other individual, either as master or servant. The master selected the servant, and the servant chose the master. Submission to the master's will is the law of this contract, as it was of that in *Lacy v. Gelman*, 119 N. Y. 109-115, 6 L. R. A. 723. Of course, the master's will must be lawful and reasonable, and of such a nature must be his orders, and a breach of the agreement to render such services as were therein provided for and intended in this case would be ample justification to the master for the discharge of the servant, the plaintiff herein. But we are of the opinion that the mere fact of a contemplated marriage, or the marriage itself, would not, as matter of law, render the plaintiff in-

competent or necessarily disqualified to perform the services which had been contemplated in the agreement between the parties. The general term is in error when the learned judge, speaking for it, says that the evidence showed the deceased Mr. Webb had contracted for the services of an unmarried woman. He had contracted for the plaintiff's services, and at the time she happened to be unmarried. But there was nothing in the nature of those services which rendered it legally impossible for the plaintiff to perform them as a married woman, or which necessarily disqualified her from their performance upon her marriage. If her husband were entirely willing that she should perform them, and that she should remain in the house of Mr. Webb separated from her husband, he continuing to reside where he had resided up to that time, how can it be said as matter of law that this marriage necessarily rendered the plaintiff incompetent to perform her agreement? If, after the marriage had taken place, the deceased had found that the services of the plaintiff were not being rendered as they theretofore had been, on account of the fact that she had a husband who claimed any portion of her time and services, or who claimed or endeavored to exercise the right to be in the house of the deceased at any time, then there would have been justification for the discharge of the plaintiff by Mr. Webb. But, so long as the plaintiff continued in the faithful performance of the agreement which she had theretofore entered into with Mr. Webb, the fact that the plaintiff had a husband would, under the circumstances, be wholly immaterial, provided, of course, that the husband claimed no right to and did not in fact come to the house of the deceased, and made no claim for the presence or service of the plaintiff at his house or for her time. It is true that marriage is not only a contract, but an institution, as said by the learned court below, and that it not only creates rights and makes obligations, but that it confers a status. But so long as the husband claims no rights arising from the marriage contract, and is, on the contrary, entirely willing that the wife shall continue as theretofore in the full performance, separated and apart from her husband, of her obligations to another, it cannot be said that the wife necessarily and simply by virtue of the marriage disables or disqualifies herself from performing her earlier agreement, and that as long as she does perform it in every respect as fully and completely as she ever did, and the husband claims and exercises no rights whatever over her or in regard to her other obligations or duties, the party with whom such earlier contract has been made has no right to treat it as rescinded on the sole ground of the marriage. It was not error, therefore, of which the defendant can complain, that the trial judge left it to the jury to say whether the fact of the marriage of the plaintiff afforded ground for her discharge by the deceased, for it left the defendant, his administratrix, a chance for success which was not open to her if the question were to be decided as one of law. The single fact of the marriage, when considered with reference to the other facts, did not furnish such ground.

As the general term reversed the judgment,
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and granted a new trial, and the plaintiff has appealed from such order, and given the usual stipulation that, in case of its affirmance, judgment absolute shall go against her, the defendant urges that, even if the general term were in error on the ground above stated in granting the new trial, yet still the order can be maintained on the ground of the error of the trial judge in the admission of certain testimony which will now be considered. The defendant alleges that the trial court erred in allowing the witness Mrs. Mann to testify to the value of the services of a housekeeper. The witness testified she had been in the habit of hiring household servants for many years in the city of New York. She had been the proprietress of several boarding houses of the highest class, where very rich people, as she said, were accustomed to board, and where everything had been conducted, as she described it, "in first-class style." She had during that time hired many housekeepers, and paid them wages for their services, and she testified that their services were fairly worth the amounts she had paid to them. She also said that housekeepers in her employ never did any sewing, never did any purchasing, never did any paying of bills, never did any hiring or discharging of servants. It had been proved that such services had been performed by the plaintiff for Mr. Webb. The witness gave her opinion of the value of the plaintiff's sewing, not including her sewing as a seamstress; and she also testified that she had seen the plaintiff at various times doing sewing of all kinds, making sheets and pillow cases, mending clothing of the deceased, and doing other things of that nature; and she testified that such services, assuming they were in each month of about the same proportion as they had been when noticed by the witness, were worth \$20 per month. The defendant objected to all this evidence in due time, on the ground that it was incompetent and immaterial, and also on the ground that the witness was not shown to be an expert, and that the value of the services of the class of housekeepers engaged by the witness for work in such establishments as she conducted furnished no standard for measuring the value of the services of the plaintiff to the deceased Mr. Webb. It had appeared in evidence that Mr. Webb was a man of considerable means; that his establishment was conducted on quite a lavish scale of expenditures; that his table was of the best, furnished with wines, and the best and earliest that the market afforded in the way of game, vegetables, fruit, and other things; that he kept carriages and horses, and lived, in fine, as a man of quite large means. It was also objected that the services of the plaintiff as a seamstress were outside of and beyond that which was alleged in the complaint, which merely set forth the employment of the plaintiff as a housekeeper, and that that was exclusive of any services of the nature of those of a seamstress, and therefore evidence of the value of such services was incompetent. We are of opinion that these objections should not be sustained. The term "housekeeper" does not admit of any clear, accurate, and arbitrary limitation as to the character of the services which are embraced within the duties of such a person. Those duties are not very

strictly defined by such an expression. Generally speaking, we know that it has reference to services performed in the taking care of a house in connection with the inmates residing therein, but exactly what special and particular duties are to be regarded as embraced within the term must almost always be decided by the duties which are actually performed under the agreement as made. In this case the character of the duties was specifically detailed by the plaintiff and by various witnesses, all of whom went at quite great length into a description of the same; and it is seen that the term "housekeeper" in fact embraced duties not limited by the mere control and taking care of the house itself. Probably it would be impossible to show the value of such services by any individual who had herself performed precisely the same kind of services for another individual situated exactly as was the deceased, and in substantially the same neighborhood. Obviously, all that the plaintiff could do in order to show the value of her services was to call those people who had been engaged in the hiring of individuals to do the same class of services in some respects, although not to the same extent or precisely of the same character as those which were performed by the plaintiff. For this purpose she called Mrs. Mann, who had been in the habit of hiring housekeepers to do such work as she described when on the stand, and not one of them had been hired to do all the services which had been performed by the plaintiff. It was competent to show that the housekeepers thus employed were paid a certain sum per month, and that their services were fairly worth the amount which was paid to them. The same may be said with regard to the value of the plaintiff's services as seamstress. Mrs. Mann knew the value of the services of such an individual engaged in substantially the same neighborhood, and doing exclusively that kind of work; but, as the plaintiff did not confine herself exclusively to those duties, she did not earn as much in that capacity alone as did the hired seamstress, who devoted the whole of her time to that work. The witness assumed a certain proportionate time that the plaintiff gave to her work as a seamstress, and gave as her opinion an amount which, as she thought, would be the fair value of the services thus performed. In this we see no error. It was, as we have said, the best that the situation permitted plaintiff to do,—in other words, the best evidence that the nature of the case afforded; and therefore it was not incompetent, because it left the value of plaintiff's services as actually rendered somewhat indefinite and vague.

The defendant urges another ground for the affirmance of this order based upon the practice followed herein. It seems that the order as first made by the general term was one simply reversing the judgment and granting a new trial. The action had been tried before a jury, and, upon the coming in of the verdict, a motion had been made to set it aside, and for a new trial on the minutes of the judge. That motion was denied, and an appeal by defendant was taken from the order denying it, as well as from the judgment entered upon the verdict of the jury. Subsequent to the reversal of the judgment, and upon affidavits of

plaintiff's attorney, and upon an order to show cause, the order of the general term was, upon motion of the plaintiff, amended in such a way that the general term reversed the judgment upon the exceptions alone; and it also ordered that the order of the trial court denying defendant's motion for a new trial should be, and it thereby was, affirmed upon the facts. The defendant's counsel now contends, as we understand him, that the questions reviewed by the general term, and arising upon the appeal from the order denying defendant's motion for a new trial on the ground that the verdict was against the evidence and for excessive damages, should be regarded as before this court. We are not authorized to exercise such jurisdiction. If the order of the general term had stood as it was originally made, and an appeal had been taken to this court, we should have had to dismiss the appeal or affirm the order with costs, because it would not have appeared under such circumstances that the reversal of the judgment by the general term was founded on questions of law only. The general term knew what grounds it took in reversing the judgment and granting a new trial; and upon application to it by the plaintiff, after notice to the defendant, it deliberately amended its former order, and showed that it had passed upon the facts and affirmed the order denying the motion for a new trial, and that it reversed the judgment upon exceptions, or, in other words, upon questions of law only, the facts having been passed upon unfavorably to the defendant. In this case, as in others, we can only review the questions of law arising upon the exceptions. *Harris v. Burdett*, 73 N. Y. 136, 139; *Snebley v. Conner*, 78 N. Y. 218; *Kennicuff v. Parmelee*, 109 N. Y. 630; *Mickey v. Walter A. Wood, Mowing & Reaping Mach.* Co. 144 N. Y. 618.

We think the trial judge committed no error prejudicial to defendant, and that the order of the general term reversing the judgment and granting a new trial must be reversed, and the judgment upon the verdict affirmed, with costs.

All concur.

Re William H. SMITH *et al.*

(146 N. Y. 68.)

1. Authority to quarantine persons who refuse to be vaccinated but who are not infected with and are not shown to have been exposed to small-pox is not given by the Act of 1893, chap. 661, § 14, authorizing the isolation of all persons and things infected with or exposed to a contagious disease and to "provide thorough and safe vaccination for all persons in need of the same."

2. The mere fact that a person is carrying on a general express business in a district in which many cases of small-pox have existed does not show that he has been exposed to that disease so as to justify his detention in quarantine until he consents to be vaccinated.

NOTE.—For prior authorities on compulsory vaccination, see note to *Duffield v. Williamsport School Dist.* (Pa.) 25 L. R. A. 152.

For quarantine regulations by health authorities, see note to *Hurst v. Warner* (Mich.) 26 L. R. A. 484.

(May 3, 1895.)

A PPEAL by petitioners from an order of the General Term of the Supreme Court, Second Department, reversing an order of a Special Term for Kings County discharging petitioners from the custody of the health commissioner of the city of Brooklyn. *Reversed.*

Statement by Gray, J.:

The relators alleged in their petition that they were imprisoned, or restrained of their liberty, at their house in the city of Brooklyn, not by virtue of any judgment or process issuing from any court, but upon the order and direction of the respondent, the commissioner of health of the city of Brooklyn. They alleged as the cause for their imprisonment, which was effected by a detail of policemen to watch the premises, that they had refused to permit themselves to be vaccinated. They also alleged that they had been exposed to no contagion and were not afflicted with any disease, contagious or otherwise. In the return made by the commissioner of health to the writ of habeas corpus issuing upon the relators' petition, it is stated that the relators were placed under quarantine by his orders and by virtue of the authority vested by law in him to take such precautions as are necessary for the protection of the public health against small-pox; that the relators were retained in quarantine by reason of their refusal to permit themselves to be vaccinated; that for several months previously small-pox had been present to an alarming extent in the city of Brooklyn and had been epidemic in that city, and that the utmost precaution and most thorough preventive measures were necessary in order to prevent the spread of the disease beyond control. It is then alleged in the return as a well-established scientific fact, that vaccination is a preventive of that disease. The health commissioner then proceeds to state as follows: "That, as I was informed and believed, before ordering the quarantine to be placed upon the said premises and that said persons be detained therein, the said William H. Smith (one of the relators) is the proprietor of an express delivery business, and that the said Cummings (the other relator) is employed by him in said business, and that they are both actively engaged in the prosecution thereof in the cities of New York and Brooklyn and especially in Greenpoint and the eastern district of said city of Brooklyn, which latter has been one of the worst infected centers of said city. That said business is of a general nature, and may include the carrying of trunks, bedding, furniture, and numerous other articles which may come from infected centers and be infected with the germs of small-pox; and it became at once apparent to me that the said Smith and Cummings were unusually exposed to such contagion, and that they might be seized therewith and by communication with others spread the same; and that it was, therefore, of special importance that they should be vaccinated at once." The return then goes on to state that a quarantine was ordered to be placed upon the premises and the persons contained therein, until they consented to be vaccinated, and that such measures were taken in order to protect

the citizens of Brooklyn, in the belief that if the said Smith and Cummings were permitted to continue in their said business without being so vaccinated they might be the means of most serious fatal consequences to other citizens. The return alleges that there had been at least twenty-eight cases of small-pox in and about the 17th ward of the city and that a proclamation of great and imminent peril had been made by the mayor and the president of the medical society of the county of Kings. The proclamation, to which reference is made in the return, is annexed and refers to the measures and acts declared to be necessary by the commissioner of health and approves of them, and declares that the peril from an impending epidemic of small-pox shall be deemed to exist, etc. The acts and measures, which that declaration approves, are stated over the signature of the commissioner of health, who declares them necessary to be taken for the preservation of the public health from the impending pestilence of small-pox. They are stated to be, "First: Thorough and sufficient vaccination of every citizen, who has not been successfully vaccinated within such period of time as, in the judgment of the commissioner of health, renders such person immune, should be procured; Second: Wherever any person in said city shall refuse to be vaccinated, such person shall be immediately quarantined and detained in quarantine until he consents to such vaccination." The relators demurred to the return, and, after a hearing, were discharged from the commissioner's custody. They appealed to this court from an order of the general term, which reversed the order, etc., discharging them.

Mr. Charles J. Patterson, for appellants:

The constitutional right of the citizen is inviolable, except where it must give way to an overruling public necessity, and hence the power of the commissioner is not absolute. It depends upon the existence of the overpowering necessity and extends only to such action as is appropriate to meet the emergency.

And under the statutes applicable to this case the questions whether the overruling necessity exists, and whether the remedy is appropriate, are judicial ones to be passed upon by the courts whenever a citizen challenges the right of the commissioner to interfere with his person or property.

People v. Yonkers Board of Health, 140 N. Y. 1, 33 L. R. A. 481; *Young v. Flower*, 8 Misc. 84.

The commands of the health commission must be reasonable and cannot be above the constitution. Even the legislature from which he derives his power cannot go beyond that instrument.

People v. Gillson, 109 N. Y. 889; *People v. Marz*, 99 N. Y. 377, 52 Am. Rep. 84; *Re Jacobs*, 198 N. Y. 107, 50 Am. Rep. 686.

Before a man's liberty or property can be taken, he must have a right to be heard before some tribunal.

Stuart v. Palmer, 74 N. Y. 183, 80 Am. Rep. 289.

Mr. Alexander H. VanCott, for respondent:

The provisions of the charter of Brooklyn make the commissioner of health, the mayor, and the president of the medical society of Kings county the judges of the existence of great and imminent peril to the public health of the city by reason of impending pestilence.

When they, in good faith, exercised this judgment, and in form and manner as prescribed by the statute declared the existence of such peril, their determination was final and conclusive of the fact.

Laws 1888, chap. 583, title 12, § 5; *Harrison v. Baltimore*, 1 Gill, 264; *Brown v. Purdy*, 22 Jones & S. 109.

The law presumes public officials to have acted in good faith and according to law in the absence of proof to the contrary.

Wood v. Morehouse, 45 N. Y. 868; *People v. Yonkers Board of Health*, 28 L. R. A. 481, 140 N. Y. 1.

The legislature had the power to confer the authority and impose the duties conferred and imposed by these acts.

Kerrigan v. Force, 68 N. Y. 881; *Re New York Elec. R. Co.* 70 N. Y. 327; *Re Gilbert Elec. R. Co.'s Petition*, Id. 361; *People v. Dutton*, 7 L. R. A. 715, 119 N. Y. 569.

From the earliest organization of the government, the absolute control over persons and property, so far as the public health was concerned, was vested in boards and officers who exercised a summary jurisdiction over the subject, and who were not bound to wait the slow course of the law, and juries had never been used in this class of cases.

Metropolitan Board of Health v. Heister, 37 N. Y. 681; *Health Department of New York v. Knoll*, 70 N. Y. 530; *Hannibal & St. J. R. Co. v. Huesen*, 95 U. S. 465, 24 L. ed. 527; *Lawton v. Steele*, 7 L. R. A. 134, 119 N. Y. 226; *Morgan's L. & T. R. & S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237.

The power of the officers "intrusted with the execution of this important public function" is always held to be commensurate with the degree of the public danger.

2 Hamilton's Works, ed. 1851, § 454; *People v. Toynbee*, 2 Park. Crim. Rep. 490, 20 Barb. 168.

Infectious and contagious diseases have been from the earliest times most zealously guarded against.

The restraint of personal action is justified when it manifestly tends to the protection of the health and comfort of the community, and no constitutional guaranty is then violated.

People v. Warden of City Prison, 27 L. R. A. 718, 144 N. Y. 529; *People v. Ewer*, 25 L. R. A. 794, 141 N. Y. 129; *Minneapolis, St. P. & S. S. R. Co. v. Milner*, 57 Fed. Rep. 276.

The detention of persons who may have been subject to contagious diseases is a part of the quarantine system to the same extent as the isolation of those actually ill with such diseases.

Young v. Flower, 3 Misc. 84; *Seguine v. Schultz*, 81 How. Pr. 898.

There is a fundamental difference between judicial proceedings and non-judicial proceedings with reference to what constitutes "due process of law." As was said by Hunt, *Ch. J.*, in the *Heister Case*, 37 N. Y. 681, above quoted, health officers intrusted with the important

function of executing the laws enacted for the protection of the public health "were always empowered to act in a summary manner."

Bl. Com. bk. 4, chap. 13 (16th ed. 1825), p. 161, and notes by Coleridge; *Murray v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272, 15 L. ed. 372.

The statutes in question were within the power of the legislature to enact.

People v. Keeler, 69 N. Y. 463, 52 Am. Rep. 49; *Happy v. Mosher*, 48 N. Y. 318; *Henderson v. Wickham*, 92 U. S. 260, 23 L. ed. 543.

The commissioner offered relators vaccination by his duly appointed vaccinators, or the opportunity to be vaccinated by any physician in good standing. They declined to be vaccinated at all, and he isolated them. This was due process of law.

People v. Keeler, *supra*.

This was the only and therefore the reasonable course, and it follows that it was the lawful course.

Hiller v. Burlington & M. R. R. Co. in Nebraska, 70 N. Y. 223.

Gray, J., delivered the opinion of the court:

The question presented, like all those which involve the right to restrain the citizen in his personal liberty, or to interfere with his pursuit of a lawful avocation, demands a careful consideration of the provisions of law, under which the right is alleged to be conferred. Where such a right is claimed, it must appear very clearly and satisfactorily, not only that it has been conferred by the law, but, also, that in its exercise the facts were present which justified it. The validity of the law is not so much called in question, as the right to enforce its provisions is. For his authority, the respondent refers to certain provisions of the charter of the city of Brooklyn (chap. 583, title 12); where the health commissioner is empowered as follows: "Section 5. In the presence of great and imminent peril to public health of the city of Brooklyn, by reason of impending pestilence, it shall be the duty of said commissioner to take such measures . . . for the preservation of the public health from such impending pestilence as he may in good faith declare the public safety and health to demand, and the mayor of the said city and the president of the medical society of Kings county shall also in writing approve. And such peril shall not be deemed to exist, except when and for such period of time as the mayor, president of the medical society and the health commissioner shall by proclamation declare." The provisions of section 14 of chapter 661 of the Laws of 1898 (the "Public Health Law"), which relate to "contagious and infectious diseases," are, also, referred to. They are that, "every such local board of health shall guard against the introduction of contagious and infectious diseases by the exercise of proper and vigilant medical inspection and control of all persons and things arriving in the municipality from infected places, or which from any cause are liable to communicate contagion. It shall require the isolation of all persons and things infected with or exposed to such disease, and provide suitable places for the treatment and care of sick persons who cannot otherwise be provided for. . . . It shall provide as stated

intervals a suitable supply of vaccine virus, etc., . . . and at all times provide thorough and safe vaccination for all persons in need of the same." It would seem from a consideration of these provisions of law that, while responsibility and a wide authority have been conferred upon the respondent in the administration of his important office, nevertheless, the statute contemplates, when persons or property are to be affected by the isolation mentioned, that the fact must exist, either that they are infected with the contagious disease, or that they were exposed to it. But I find no warrant for the rather extraordinary declaration of the commissioner that "wherever any person shall refuse to be vaccinated, such person shall be immediately quarantined and continued in quarantine until he consents to such vaccination." Of course, if we could regard it as a mere expression of his opinion as to what measures would be necessary to prevent pestilence, this document would not demand our consideration; but, being issued officially and with the formal approval of the mayor and the president of the medical society of Kings county, as required by the city charter, it assumes the importance of a public and official paper, and the inquiry suggests itself as to the authority for its terms. That the powers conferred upon the health commissioner by the provisions of the city charter give to him the right to compel the vaccination of every citizen in the city of Brooklyn, if he would escape quarantine, seems an unnecessary and it is an unwarrantable inference from the language. It is difficult to suppose that the legislature would invest local officials with such arbitrary authority over their fellow citizens and the language of an act would have to be very plain before the court would be warranted in giving it such a construction. But the legislature has done nothing of the kind. In the presence of imminent peril to the public health of the city, by reason of an impending pestilence, he may take such measures as he declares the public safety demands and which are approved by the mayor and the president of the medical society. This language is sufficient to confer the needed authority to do all acts which in his judgment, as approved by his associates in the matter, are necessary to be done to improve the sanitary conditions of the city and to preserve the public health from being affected. That authority would, undoubtedly, be sufficient to deal summarily with cases where persons are stricken with a contagious or infectious disease, or have been actually exposed to it, and it is broad enough for every practical purpose in dealing with the facts of any case presented; but the authority is not given to direct, or to carry out, a quarantine of all persons, who refuse to permit themselves to be vaccinated and it cannot be implied. Certainly no power should be implied from an act, which is not necessary to its due execution; and where the liberty and the property of persons are sought to be brought within its operation, the case must be clearly seen to be within those intended to be reached.

Passing to the question of what power is vested in the commissioner by virtue of his office, under the public health law, it is very clear that an "isolation of all persons and things," is

only permitted when they are "infected with or exposed to" contagious and infectious diseases. That that language means, when speaking of persons and things "exposed" to disease, the actual fact and not a mere possibility, is plain from the language which precedes it in the section. The local board of health is to guard against the introduction of contagious and infectious diseases, by the exercise of medical inspection and control of persons and things either arriving from infected places, or from any cause liable to communicate contagion. Obviously, there must be an inspection of persons and things and the resulting discovery, if they are not actually "infected" with disease, that they have been "exposed" to it, and that the conditions actually exist for a communication of contagion, in order to bring into operation the power to isolate. The meaning of the particular language in the section is, and it should read, that the board of health shall "require the isolation of all persons and things infected with, or who have been exposed to such diseases." In the present case, the relators are not alleged to have been infected with any contagious or infectious disease, or to have been exposed to such. The allegations of the commissioner of health are based only upon information and belief and when referring to the necessity for the stringent measures adopted towards the relators, they simply assert the prosecution of a general express business, which is, in part, carried on through what "has been one of the worst infected centres of the city." It is not alleged that the business had included the carrying of infected articles, or articles from infected centres, or that the relators had been exposed to contagion; but possibilities, merely, are alleged. It is alleged that the business may include the carrying of articles which may come from infected centres and the relators might be seized with small-pox; and, if they were permitted to continue in their business without being vaccinated, they might be the means of serious consequences to other citizens with whom they came in contact. Such allegations fall far short of stating facts, upon which the commissioner of health would be authorized to take such drastic measures, as to effect the imprisonment of citizens by quarantining them in their houses. He had no jurisdiction to make the order here, unless there was, in fact, before him a case where the parties were either infected with, or had been actually exposed to the disease of small-pox. It was necessary to that jurisdiction that the danger should actually have existed, in the infection of the persons or things, or in their having been exposed to the disease. See *People v. Yonkers Board of Health*, 140 N. Y. 1, 23 L. R. A. 481. While he was vested with great and extensive powers, in order, in the presence of danger, to act summarily for the preservation of the public health, he was bound to show a state of facts which justified such an exercise of those powers.

I think no one will dispute the right of the legislature to enact such measures as will protect all persons from the impending calamity of a pestilence and to vest in local authorities such comprehensive powers as will enable them to act competently and effectively. That

those powers would be conferred without regulating or controlling their exercise, is not to be supposed and the legislature has not relieved officials from the responsibility of showing that the exercise of their powers was justified by the facts of the case. The question here is not whether the legislature had the power to enact the provisions of section 24 of the Health Law; but whether the respondent has shown that a state of facts existed, warranting the exercise of the extraordinary authority conferred upon him. Like all enactments which may affect the liberty of the person, this one must be construed strictly; with the saving consideration,

however, that, as the legislature contemplated an extraordinary and dangerous emergency for the exercise of the power conferred, some latitude of a reasonable discretion is to be allowed to the local authorities upon the facts of a case.

As the respondent has utterly failed to show any facts which warranted the isolation of the relators, they were properly discharged and the order of the General Term should be reversed and that of the Special Term affirmed.

All concur, except Haight, J., not voting.

NEBRASKA SUPREME COURT.

CHICAGO, BURLINGTON & QUINCY
R. CO., *Plff. in Err.*,

v.

Horace C. METCALF.

(.....Neb.)

***1. Section 104, chapter 16, Comp. Stat., requiring that a bell shall be rung or a steam whistle sounded by a locomotive at a distance of at least eighty rods from the place where a railroad shall cross any other road or street, etc., applies as well to roads in fact used by the public, though not dedicated as public highways, as to those so dedicated.**

2. The object of that statute is not merely to protect persons intending to cross the track from collisions, but also to protect all persons lawfully at or near the crossing from any danger naturally to be apprehended from the sudden approach, without warning, of a train at such a place.

3. Therefore, where a crossing had been provided at a railway station to afford access to the depot, one whose team had been driven to a car upon a side track near the depot, for the purpose of unloading the car, was within the protection of the statute.

4. In such case it was erroneous to instruct the jury that the railroad company was liable if it failed to give the signal required by statute provided the injury was caused in consequence of such omission. Union Pac. R. Co. v. Bassemussen, 25 Neb. 810, in so far as it states a contrary doctrine, overruled.

5. Where chattels are injured by the negligence of another, but not wholly destroyed, the measure of damages is the difference between the value of the chattels immediately before the injury and immediately thereafter.

6. One whose chattels are injured by the negligence of another cannot, by voluntarily abandoning what remains, charge that other with the total value of the chattels; and where there was evidence tending to show that the destruction was not total, and that the plaintiff had so voluntarily abandoned what remained, it was error to instruct the jury that the measure

of damages was the market value of the chattels before their injury.

(April 6, 1896.)

ERROR to the District Court for Hamilton County to review a judgment in favor of plaintiff in an action brought to recover the value of certain property alleged to have been destroyed by a collision with defendant's train through defendant's negligence. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. A. W. Agee, for plaintiff in error:

The signals required by statute to be given when a train is approaching a public street or highway are exclusively for the benefit of persons traveling along such street or highway, and about to cross the railroad at the highway crossing.

2 Rorer, Railroads, 1004, 1006, 1015; 1 Thomp. Neg. p. 452, note 3; *Clark v. Missouri Pac. R. Co.* 35 Kan. 850; *Illinois Cent. R. Co. v. Phelps*, 29 Ill. 447; *Bell v. Hannibal & St. J. R. Co.* 72 Mo. 50; *Hodges v. St. Louis, K. C. & N. R. Co.* 71 Mo. 50; *Holmes v. Central R. & Bkg. Co.* 87 Ga. 593; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003; *Rosenberg v. Grand Trunk R. Co.* 8 Ont. App. 482; *East Tennessee, V. & G. R. Co. v. Feathers*, 10 Lea, 108; *St. Louis & S. F. R. Co. v. Payne*, 29 Kan. 166; *Cordell v. New York Cent. & H. R. R. Co.* 64 N. Y. 585; *Byrne v. New York Cent. & H. R. R. Co.* 94 N. Y. 12; *Alabama G. S. R. Co. v. Hawk*, 73 Ala. 112, 47 Am. Rep. 408; *Harty v. Central R. Co. of New Jersey*, 42 N. Y. 471; *People v. New York Cent. R. Co.* 25 Barb. 199; *Elwood v. New York Cent. & H. R. R. Co.* 4 Hun, 809; *Philadelphia & R. R. Co. v. Spear*, 47 Pa. 300, 36 Am. Dec. 544; *O'Donnell v. Providence & W. R. Co.* 6 R. I. 211; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Missouri Pac. R. Co. v. Pierce*, 33 Kan. 61.

Unless at a place where by law the signals are required to be given, the unnecessary sounding of the whistle or ringing of the bell would probably render the railroad company liable for injuries caused by the frightening of teams thereby.

Georgia Railroad v. Carr, 73 Ga. 557; *St. Louis & S. F. R. Co. v. Payne*, 29 Kan. 166.

*Headnotes by IRVINE, C.

NOTE.—On the question for whose benefit signals by approaching trains are required by statute at public crossings, see *Lomergan v. Illinois Cent. R. Co.* (Iowa) 17 L. R. A. 254, and note. 28 L. R. A.

The duty of ringing a bell or sounding a whistle at places other than where the railroad crosses a public highway is not imposed by statute nor particularly defined by law.

Byrne v. New York Cent. & H. R. R. Co. 104 N. Y. 362, 68 Am. Rep. 512; *Harrison v. North Eastern R. Co.* 29 L. T. N. S. 844; *Sutton v. New York Cent. & H. R. R. Co.* 66 N. Y. 243; *Nicholson v. Erie R. Co.* 41 N. Y. 526; *Hodges v. St. Louis, K. O. & N. R. Co.* 71 Mo. 50; *Bauer v. Kansas Pac. R. Co.* 69 Mo. 219; *Wabash, St. L. & P. R. Co. v. Neikirk*, 15 Ill. App. 172; *Bennett v. Grand Trunk R. Co.* 8 Ont. App. 446; *Williams v. Chicago, M. & St. P. R. Co.* 64 Wis. 1; *Thomas v. Delaware, L. & W. R. Co.* 8 Fed. Rep. 729; *Hill v. Portland & R. R. Co.* 55 Me. 438; *Johnson v. Louisville & N. R. Co.* (Ky.) 13 Am. & Eng. R. R. Cas. 623; *Shearm. & Redf. Neg.* 476; 2 Rorer, Railroads, 1006.

Since such crossings are not within the purview of the statute the defendant was not required, even for the benefit of persons about to pass over it, to ring the bell or blow the whistle continuously for any distance.

2 Rorer, Railroads, 1013; *Cordell v. New York Cent. & H. R. R. Co.* 6 Hun, 461; *Paducah & M. R. Co. v. Hoehl*, 12 Bush, 41; *Bauer v. Kansas Pac. R. Co. supra*.

It was error for the court to refuse to submit to the jury the question of whether or not the servant of the plaintiff was negligent in not ascertaining whether or not the train by which the injury was done had passed the station before driving in between the tracks.

Carrey v. Chicago, M. & St. P. R. Co. 61 Wis. 71; *Courson v. Chicago, M. & St. P. R. Co.* 71 Iowa, 28; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Miner v. Connecticut River R. Co.* 153 Mass. 898; *Gonzales v. New York & H. R. Co.* 88 N. Y. 440, 98 Am. Dec. 58; *Shearm. & Redf. Neg.* 476, and citations.

It was incumbent on the plaintiff to show by the evidence, and for the jury to find, that the team was driven in between the tracks from reasonable necessity.

Hickey v. Boston & L. R. Co. 14 Allen, 482; *Smith v. Savannah, F. & W. R. Co.* 86 Ga. 196; *Ely v. Des Moines*, 17 L. R. A. 124, 86 Iowa, 55; *Hauseman v. Railroad Co.* 8 Lanc. L. Rev. 257; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 806, 49 Am. Rep. 580; *Erie v. Magill*, 101 Pa. 628; *Fleming v. Lock Haven*, 15 W. N. C. 216.

By driving in between the tracks and leaving his team unhitched, with the lines on the side of the wagon opposite from him, while he climbed up on the car of coal, and was engaged in shoveling coal into the wagon which would necessarily make considerable noise, at a time when a train was due and likely to pass at any moment, Dixon was guilty of gross negligence, which of itself must defeat a recovery in this case.

1 Rorer, Railroads, 704, 705; *Chicago & N. W. R. Co. v. Clark*, 2 Ill. App. 116; *Goldstein v. Chicago, M. & St. P. R. Co.* 46 Wis. 404; *Whitney v. Maine Cent. R. Co.* 69 Me. 208; *Dewille v. Southern Pac. R. Co.* 50 Cal. 888.

It is no excuse that the boy's attention was absorbed in his work.

Baltimore & O. R. Co. v. Whitacre, 35 Ohio 38 L. R. A.

St. 627; *Carroll v. Minnesota Valley R. Co.* 13 Minn. 80, 97 Am. Dec. 231; *Shearm. & Redf. Neg.* 281, and note 1; *Roth v. Milwaukee & St. P. R. Co.* 21 Wis. 256; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274.

Nor does the fact that the defendant had permitted persons to go in between the tracks furnish any excuse for Dixon driving in as he did.

Hickey v. Boston & L. R. Co. supra; *Moore v. Pennsylvania R. Co.* 99 Pa. 804, 44 Am. Rep. 106; *Fleming v. Lock Haven, supra*.

It was the duty of the plaintiff to take care of the property not destroyed, and the measure of his damages could not exceed the difference between its value before and after the accident, with interest. He could not abandon the property and recover its value.

Memphis & C. R. Co. v. Hembree, 84 Ala. 182; *Holmes v. Irwin*, 18 Neb. 313; *Long v. Clapp*, 15 Neb. 417.

Messrs. Whitmore & Carr and E. J. Halner for defendant in error.

Irvine, C., filed the following opinion:

Metcalf sued the railroad company to recover damages for injuries done to a team of mules, a wagon, and set of harness which had been struck by a train of the company near the station at Hampton. There was a verdict and judgment for the plaintiff for \$365.42, to reverse which the railroad company prosecutes error.

The evidence upon which the verdict is evidently based tends to show that at Hampton the plaintiff in error's railroad passes through the village in an easterly and westerly course, nearly all of the inhabited portion of the village lying north of the tracks. There is a side track, with switches at either end, lying north of the main line. The station is situated between the main line and the side track, at a point not far from the west switch. Two highways cross the tracks, one being Third street, or, as the witnesses designated it, Main street, about 275 feet east of the depot. The other, a section-line road at the east boundary line of the village, about 1,000 feet from the depot. In addition to these crossings, there are two others, one immediately east, and one immediately west, of the depot platforms. These crossings are not on public highways, but were placed by, or at least with the consent of, the railroad company, for the purpose of affording access to its depot and platform. The main line, the side track, and the depot platform outline a triangle west of the depot, and one of the crossings referred to affords an entrance to the space thus inclosed. The primary object of this crossing was to afford access for teams to the west platform. In unloading and loading cars standing on the side track to the west of the depot, it is practicable either to drive a wagon north of the side track, close to the cars, or south of the side track, by means of this crossing, into the triangular space referred to. Metcalf owned a mill situated some distance south of the tracks. His manager had been notified that a car load of coal consigned to him had arrived, and a servant named Dixon was instructed to take the mules and wagon and unload this coal. The car stood upon the siding, a short distance

west of the depot. Dixon drove over the Main street crossing to the north side of the car, and from that side took one wagon load of coal. Returning for the second load, he testifies that he found the Main street crossing blocked by cars, and therefore drove by the depot, and over what we have called the "West Crossing," into the triangular space, and approached the car from the south side. He applied the brake to the wagon, wrapped the lines around the brake handle, and, mounting the car, was engaged in shoveling coal into the wagon, when a freight train approached from the east, frightening the mules, which ran towards the crossing, and were there struck by the train. One mule was killed, and the other severely injured, and the harness and wagon were torn to pieces. The negligence alleged is that the train was behind its schedule time, that it was running at a dangerous rate of speed, and that no signals were given, by bell or whistle, of the approach of the train. Of the errors assigned, it will be necessary to consider only those relating to the instructions.

Complaint is made of the refusal of each of the instructions numbered 4, 5, 6, 7, 10, 11, asked by the defendant. Of these, the refusal of the tenth is the only assignment noticed in the briefs, and the others must therefore be deemed waived. The record does not contain any instruction numbered 10, so that we are unable to consider whether or not its refusal was erroneous. The seventh instruction given by the court is as follows: "(7) The jury are instructed that if the evidence shows that the crossings immediately east and west of the depot at Hampton were placed there by the railroad company for the use of persons having business at or about the depot, in either loading or unloading cars, and such crossings were in fact so used generally, then it was the duty of the person in charge of the engine in question to sound the signal provided by law, precisely the same as for any other crossings, and as elsewhere explained in these instructions." Section 104, chap. 16, Comp. Stat., is as follows: "Sec. 104. A bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one half thereof to go to the informer, and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect." It is argued that a proper construction of this section limits its application to public highways, and that the crossing where the accident occurred is not within the purview of the law, and that the instruction is therefore erroneous. We do not think the statute should be given so narrow an application. Some courts have held that such a statute is in derogation of the common law, and therefore the subject of strict construction; but we think, in most of the cases where such statutes have been confined in their application to public highways, the language of the statute was such as to evidently call for

such restriction. The object of the law was plainly to afford ample warning to persons near the railroad at points where they might lawfully cross, and probably where they were about to cross as trains approached. These crossings were expressly designed to afford access to the depot of the railroad company, and the exigency for warnings was probably as great there as at highway crossings on the prairie. Therefore, we think that when the court instructed the jury that the duty to sound signals applied to this crossing, provided the jury should find that the crossings were placed there by the railroad company for the use of persons having business about the depot, and that such crossings were in fact so used generally, the law was stated as favorably to the railroad company as could be required. The language of the statute is, "where the said railroad shall cross any other road or street;" and we hold that it applies as well to roads in fact used by the public, though not legally dedicated to public use, as to those so dedicated. The instruction was therefore correct.

The eighth instruction is as follows: "(8) The court instructs the jury that, by the laws of this state, every railroad company is required to have a bell of at least 80 pounds weight, and a steam whistle, placed and kept on each locomotive engine, which shall be rung or whistled at the distance of at least 80 rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have passed said road or street, and that the company shall be liable for all damages resulting by reason of a neglect to comply with such law. Now, if the jury believe from the evidence that the persons in charge of the engine in question omitted to sound a whistle or ring a bell continuously for the distance of 80 rods before reaching the crossing at which the team in question was struck, and you further believe from the evidence that the team was struck, as charged in the petition, in consequence of the omission to ring the bell or sound the whistle while the person in charge of the team was in the exercise of all reasonable care and caution in the matter, then the defendant railroad company is liable to the plaintiff for the loss and damage sustained by him by reason of such injury, if any such has been proven." It will be observed that this instruction charges the railroad company with the same duty towards the plaintiff as if the plaintiff's team, as the train approached, had been approaching the crossing with the intention of using the same, and the criticisms made upon the instruction raise the following questions: First, Does the statute impose any duty upon the railroad company, except in favor of those on the road and about to cross the tracks? Second, If any duty is imposed in favor of others, does a violation of the statute, as to such persons, merely afford evidence of negligence, or does it constitute negligence, as a matter of law, provided the injury be the proximate result of the violation of the statute?

On the first question suggested, the authorities may be grouped in three classes. It has been sometimes held that the object of such a statute is solely to warn persons on a highway, approaching and about to cross the tracks,

and that, therefore, where the injury was sustained by any other person, the failure to obey the statute was no evidence of negligence. Among the cases so holding are *St. Louis & S. F. R. Co. v. Payne*, 29 Kan. 166; *Missouri Pac. R. Co. v. Pierce*, 88 Kan. 61; *Neely v. Charlotte, C. & A. R. Co.* 33 S. C. 186; *O'Donnell v. Providence & W. R. Co.* 6 R. I. 211. The case of *St. Louis & S. F. R. Co. v. Payne*, *supra*, was one very similar to this in its facts. It may here be observed that, in many cases where the rule has been stated in language similar to the above, the injury was suffered by some one on the tracks at a place other than a lawful crossing, and the language was not used to distinguish between persons about to cross, and persons lawfully on the highway at or near the crossing, but not intending to cross. This distinction seems to have presented itself to Judge Brewer in *St. Louis & S. F. R. Co. v. Payne*, and he says that he concurred solely upon the ground that the plaintiff was not upon the highway. In another class of cases it is said that where the injury was suffered by some one crossing, or attempting to cross, the highway, the violation of the statute is negligence in law, but where the injury is to another person, claiming to be so situated that he had a right to rely on the giving of the signals, the failure to give them is evidence of negligence, to be submitted to the jury with the other facts in the case. Among such cases are *Maney v. Chicago, B. & Q. R. Co.* 49 Ill. App. 105; *Western & A. R. Co. v. Jones*, 65 Ga. 631. In the third class of cases it is held that the object of the statute is not solely to protect persons intending to cross the track from collisions, but that its object is to protect all persons lawfully at or near the crossing from any danger naturally to be apprehended from the sudden approach, without warning, of a train at such a place. *Harty v. Central R. Co. of New Jersey*, 42 N. Y. 468, is a case usually cited in support of the rule announced in the first group of cases above stated. But an inspection of the case convinces us that the case really belongs in the last class. In that case the injury was sustained by a person walking upon the track at some distance from the crossing, and it was held that the statute did not protect such a person; but the language of Allen, J., in *People v. New York Cent. R. Co.*, 25 Barb. 199, was quoted with approval, as follows: "The hazards to be provided against were two fold: First, the danger of actual collision at the crossing; and, second, that of damage by the frightening of teams traveling upon the public highway near the crossing. In *Ransom v. Chicago, St. P. M. & O. R. Co.* 62 Wis. 178, 61 Am. Rep. 718, it was held that the statute was intended to guard against the danger of injury to teams traveling upon the highway near the crossing, as well as the danger of actual collision at the crossing, and that a railroad company was therefore liable for injuries caused by a failure to obey the statute, to persons traveling on a highway parallel with the railroad, and not intending to cross the track." In *Loneragan v. Illinois Cent. R. Co.*, 87 Iowa, 755, 17 L. R. A. 254, the facts were similar to those in the case before us, and the court held that the plaintiff was within the protection of the statute. A rehearing was allowed, and 38 L. R. A.

the first decision adhered to. 87 Iowa, 759, 17 L. R. A. 257. In the opinion on rehearing, the court reviews the authorities at length, and, to our minds, conclusively demonstrates that the rule illustrated by the third class of cases is correct. The plaintiff was lawfully upon the company's land, having reached it by a means provided for the purpose. Whether or not he exercised due care in going where he did, in the care of his team, and in watching for trains, was submitted to the jury, and found in favor of the plaintiff. He claims that his driver had a right to rely on the giving of the statutory signals, and that, had the company given them, the driver would have been warned of the approach of the train in sufficient time to protect the mules from fright. Whether or not any signals were given is a question upon which the evidence was conflicting. We think that, so far as the first question is concerned, the instruction stated the law correctly, and was applicable to the evidence.

The second question presented by the instruction under consideration is also one upon which courts in different states have reached different conclusions. In some states it is held that the violation of a statute or ordinance is negligence in law, while in others it is held that it is merely evidence of negligence. We think a consideration of the decisions of this court compels a solution of the question here without regard to authorities elsewhere. In *Lincoln v. Gillilan*, 18 Neb. 114, it was held that even where the facts are undisputed, if, upon such facts, different minds may honestly draw different conclusions as to whether or not such facts establish negligence, or the absence thereof, the question as to the conclusion to be arrived at is for the jury, and not for the court. The rule there laid down, stated in those words, stated in equivalent language, or assumed without definite statement, has formed the basis of all decisions in negligence cases, at least since the decision cited. Among the more recent cases following this rule may be cited *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642, Id. 39 Neb. 808; *American Waterworks Co. v. Dougherty*, 37 Neb. 873; *Missouri Pac. R. Co. v. Baier*, Id. 235; *Omaha Street R. Co. v. Craig*, 39 Neb. 601; *Omaha & R. V. R. Co. v. Brady*, Id. 27; *Omaha & R. V. R. Co. v. Morgan*, 40 Neb. 604; *Chicago, B. & Q. R. Co. v. Wymore*, Id. 643; *Chicago, B. & Q. R. Co. v. Wilgus*, Id. 660; *Chicago, B. & Q. R. Co. v. Oleson*, Id. 889; *Union Pac. R. Co. v. Erickson*, 41 Neb. 1. In several cases it has been said that it was improper to state to the jury a circumstance or group of facts, and instruct that such fact or group of facts amounts to negligence *per se*. *Missouri Pac. R. Co. v. Baier* and *Omaha & R. V. R. Co. v. Morgan*, *supra*. This rule, so well settled and so generally adhered to, should not be departed from without sound and conclusive reasons for the exception. It is everywhere agreed that a jury may infer negligence from the single fact of the violation of a statute, providing the injury was the direct result of such violation. Therefore, where the violation of a statute is shown, and where, from that fact and from the other facts in evidence, there can be no ground for a reasonable difference of opinion as to the negligence of the defendant, it might be proper to give such an in-

struction as the one we are considering; but we do not know that the obligation of a statute is any greater than that of the unwritten law, and all negligence must consist in the disregard of one or the other. We cannot see that any distinction in kind arises between a case where the defendant has violated a statutory obligation, and one where he has violated the common law obligation to conduct himself, for the safety of others, in such a manner as one of ordinary prudence would conduct himself under similar circumstances. We see no reason for carving out an exception to the general rule of negligence in such a case as this, and the current of decisions of this court compels a result in accordance with that reached by adopting the general rule. In *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb. 475, the negligence alleged was, as here, the failure to give the statutory signal for a crossing while running at a high rate of speed, and behind schedule time. The rule was there stated, in the syllabus, to be that such facts were to be considered in deciding whether the company was guilty of negligence, and the opinion uses this language: "If it be true that the train was running at the rate of speed described by the witnesses, through the village, and that no signal of any kind was given, the train being one hour and a half later than its usual and regular time, these facts would be proper to be considered by the jury in ascertaining whether the employees of plaintiff in error were negligent or not, the law requiring the signals to be given." This would seem to be a clear expression that the violation of the ordinance while sufficient evidence of negligence, is not conclusive, and does not amount even to a presumption of law. An instruction to the same effect was quoted with approval in *Omaha Street R. Co. v. Loehneisen*, 40 Neb. 37, and in *Omaha Street R. Co. v. Duval*, Id. 29. In discussing an ordinance limiting the speed of street-cars, the court said: "If, therefore, the privilege granted is exercised in a manner forbidden by an ordinance enacted for the safety of the general public, and injuries result, these facts afford reasonable grounds for inferring negligence prejudicial to the rights of those in whose interest and for whose protection such municipal regulations were adopted. These principles were embodied in instruction No. 1 requested by plaintiff, and that instruction was therefore properly given." We are aware that in *Union Pac. R. Co. v. Rassmussen*, 25 Neb. 810, an instruction to the effect that, where a railroad company runs its trains through a city at a greater rate of speed than the ordinance permits, negligence will be presumed, was held correct. But in the opinion in that case it was said that, "if the train was greatly exceeding a fixed rate, this was competent for the jury to consider as tending to prove negligence;" and in the syllabus the doctrine of the case was stated to be that the ordinance of the city limited the speed of trains

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to six miles an hour within the corporate limits is proper evidence to go to the jury on the question of negligence, and that a failure to discharge the duty imposed by ordinance may be considered by the jury in determining whether the railroad company was guilty of negligence. In view of the general and well established rule, and in view of the other cases on the subject, and also in view of the fact that the opinion in *Omaha, N. & B. H. R. Co. v. O'Donnell*, *supra*, was written by the same judge who wrote the opinion in *Union Pac. R. Co. v. Rassmussen*, we must conclude that the last-cited case does not correctly state the law, in so far as it approves the instruction to the effect that a violation of the ordinance would raise a presumption of negligence. We conclude, therefore, that the district court erred in stating to the jury that the railroad company was liable, as a matter of law, if the injury resulted from a failure to sound the signals, and that the court should not have gone further than to have instructed the jury that they might infer negligence from that fact.

As to the measure of damages, the court instructed the jury that, if they found for the plaintiff, his damages should be assessed "in the reasonable market value of the property at the time either destroyed or injured, and afterwards taken into its possession by the defendant company," together with interest. This instruction assumed a state of facts not borne out by the evidence. The plaintiff's manager refused to take away the living mule and the remnants of the harness and wagon, whereupon the station agent caused the mule to be cared for, and the two collars, which seemed to have been the only portion of the harness left intact, to be stored at a livery stable. The plaintiff afterwards obtained these collars. The plain inference from the evidence is that the retention of the mule by the railroad company was due solely to the plaintiff's refusal to receive it into his possession. Had the proof shown that the property was entirely destroyed, or had it shown without contradiction that the railroad company converted what was not destroyed to its own use, the instruction would have been correct. But it has often been decided that one who has been injured by the negligence of another must exercise reasonable precautions to render the injury as light as possible, and that he cannot recover for increased damages due to his own negligence. The company cannot be charged, as for a total destruction of the property, merely because the plaintiff elected not to retain such portion as was not destroyed. The measure of damages, under the evidence in this case, was the difference between the value of the property immediately before its injury and its value thereafter.

Reversed and remanded.

Rehearing denied.

NEW HAMPSHIRE SUPREME COURT.

Isaac K. GAGE

v.

Asa M. GAGE.

(.....N. H.....)

1. A tenant in common may be compelled to account to his cotenant for the use of the lands held in common, although he has received the benefits thereof without any attempt to exclude the other, or any promise or mutual understanding to give any compensation for the profits taken by him.

2. An action of assumpsit against a cotenant may be allowed to be changed, if necessary, into a bill in equity, under the New Hampshire practice.

(July 25, 1890.)

CASE reserved by the Trial Term for Merri-mac County for the opinion of the full court of an action of assumpsit brought by one tenant in common of certain real estate against his cotenant to recover for the use and occupation by the latter of the land. *Case discharged.*

NOTE.—Liability of cotenants to account for use and occupation and rents and profits.

- I. The common-law doctrine.
- II. Reason of the common-law doctrine.
- III. States not adopting the English statute.
- IV. When held liable.
 - a. In case of ouster.
 - b. In cases where an agreement exists.
 - c. When occupied by one alone.
- V. The remedy as between cotenants.
 - a. Statutory action of account.
 - b. Proceedings in equity.
 - c. In action of assumpsit.
- VI. Liability to account for rents received.
- VII. Lien for rents received.
- VIII. The question, What is more than a just share?
- IX. Necessity of a demand.
- X. Necessary allegations in action of account.
- XI. In what character liable.
- XII. Position of cotenant holding over.
- XIII. Extent of liability.
- XIV. When liable to pay interest.
- XV. When held for the rental value.
- XVI. Position of purchaser of cotenant's share.
- XVII. As to encumbrances.
- XVIII. The question of deductions.
- XIX. Mere profits.
- XX. The application of the statute of limitations.
- XXI. Construction of the state statutes.

Upon the question of the liability of tenants in common to an action of trover, see *note* to *Waller v. Bowling* (1891) (N. C.) 12 L. R. A. 261.

The question as to the right of a cotenant to contribution for improvements made by him will form the subject of a separate *note* to *Ward v. Ward* (1895) (W. Va.) 29 L. R. A. —.

I. The common-law doctrine.

In *Coke upon Littleton*, §§ 199-206, the ancient rule of the common law is stated as being that one tenant in common cannot maintain an action against his cotenant for taking the whole profits of the common estate unless he has been appointed bailiff by his cotenant. *Hudson v. Coe* (1857) 7 Me. 83.

And the other accepted that appointment, in which case an action of account lay against the bailiff as in the case of an owner of an entirety of an estate. *Webster v. Calef* (1867) 47 N. H. 289.

So that independent of statute one tenant in common cannot maintain an action against his cotenant for taking the whole profits of the joint estate. *Cutler v. Currier* (1866) 54 Me. 81.

Even though the cotenant may have embezzled such profits or appropriated the whole to himself. *Shiels v. Stark* (1854) 14 Ga. 429; *Nelson v. Clay* (1833) 7 J. J. Marsh. 140, 22 Am. Dec. 397.

But if one tenant in common sell the entire property his cotenant may sue at law. *Cowles v. Garrett* (1857) 30 Ala. 341.

For nothing is better settled than the rule that the mere occupation of premises owned in common

by one tenant in common does not entitle his cotenant to call him to account or render him in any way liable to an action for the use and occupation of the estate. *Newbold v. Smart* (1880) 67 Ala. 826; *Fleider v. Childs* (1883) 73 Ala. 597; *West v. West* (1890) 90 Ala. 458; *Pico v. Columbet* (1859) 12 Cal. 414, 78 Am. Dec. 550; *Chapin v. Foss* (1874) 75 Ill. 230; *Humphries v. Davis* (1885) 100 Ind. 369; *Reynolds v. Wilmet* (1877) 45 Iowa, 698; *James v. Brown* (1878) 48 Iowa, 568; *Belknap v. Belknap* (1889) 77 Iowa, 71; *Gowen v. Shaw* (1855) 40 Me. 58; *Moses v. Ross* (1856) 41 Me. 360, 66 Am. Dec. 250; *Israel v. Israel* (1890) 30 Md. 120, 96 Am. Dec. 571; *McLaughlin v. McLaughlin* (1894) 80 Md. 115; *Sargent v. Parsons* (1815) 12 Mass. 149; *Peck v. Carpenter* (1856) 7 Gray, 263, 68 Am. Dec. 477; *Blood v. Blood* (1872) 110 Mass. 545; *Everts v. Beach* (1876) 81 Mich. 136, 18 Am. Rep. 169; *Hause v. Hause* (1882) 29 Minn. 252; *Kean v. Connelly* (1878) 25 Minn. 222, 33 Am. Rep. 458; *O'Connor v. Delaney* (1893) 38 Minn. 247; *Ragan v. McCoy* (1890) 29 Mo. 356, 397; *Buckelew v. Snedeker* (1876) 27 N. J. Eq. 62; *Izard v. Bodine* (1857) 11 N. J. Eq. 408, 69 Am. Dec. 595; *Edsall v. Merrill* (1883) 37 N. J. Eq. 114; *McMurray v. Rawson* (1842) 3 Hill, 59; *Green v. Putnam* (1847) 1 Barb. 500; *Woollever v. Knapp* (1854) 18 Barb. 295; *Scott v. Guernsey* (1866) 60 Barb. 163, affirmed (1871) 48 N. Y. 106; *Wilcox v. Wilcox* (1887) 48 Barb. 287; *Joslyn v. Joslyn* (1878) 9 Hun, 388; *McAlear v. Delaney* (1884) 19 N. Y. Week. Dig. 252; *Le Barren v. Babcock* (1887) 48 Hun, 598; *Zapp v. Miller* (1888) 109 N. Y. 51; *Valentine v. Healey* (1895) 96 Hun, 259; *Wagstaff v. Smith* (1845) 39 N. C. 1; *Northcott v. Casper* (1849) 41 N. C. 303; *Anderson v. Greble* (1881) 1 Ashm. 126; *Delaney's Estate* (1899) 2 Pa. Dist. Rep. 800; *Jones v. Weathersbee* (1849) 4 Strobb. L. 50, 51 Am. Dec. 653; *Jones v. Massey* (1890) 14 S. C. 202; *Tyner v. Fenner* (1890) 4 Lea, 469; *Schneider v. Taylor* (1886) 16 Lea, 304; *Osborn v. Osborn* (1884) 63 Tex. 495; *Anderson v. Clanch* (1837) (Tex.) 8 S. W. Rep. 760; *Teach v. Beattie* (1890) 33 Vt. 195; *Dodson v. Hays* (1887) 29 W. Va. 577; *Rice v. George* (1873) 20 Grant, Ch. (U. C.) 221.

Not even for an injury done to it by him short of destruction of it, or a conversion of the whole of it to his own use, or that which is equivalent. *Southworth v. Smith* (1858) 27 Conn. 355, 71 Am. Dec. 72.

And where it is not shown that the tenant in possession is liable to account, the mere occupation of the premises by him is no ground for the appointment of a receiver. *Varnum v. Leek* (1886) 65 Iowa, 751.

So a tenant in common cannot recover for use and occupation of the premises against the lessee of the interest of his cotenant in the absence of an attornment or refusal of occupancy. *Badger v. Holmes* (1856) 6 Gray, 118.

Even under the English Statute of Anne mere exclusive occupation is not sufficient to entitle one tenant in common to sue the other for use and occupation. *Brown v. Wellington* (1871) 106 Mass. 313, 8 Am. Rep. 380.

There being no adverse claim, there is no princ-

The facts found by the referee upon which the case was reserved are as follows:

The parties are brothers, and since the land became their property a part of it has been used by both in common as pasture and wood land, and a small lot has been exclusively occupied by plaintiff. With plaintiff's knowledge, and without objection, defendant has occupied the rest, and taken all the crops from it, except a small part taken by plaintiff. Plaintiff was never excluded from occupying, or from taking the products. He has received all he asked for, or attempted to take. If defendant is liable for rent (estimating the use and occupation at the rental value), there would be a balance of \$612.42

due from him to plaintiff. There has never been any mutual understanding, or any promise on defendant's part, that he would in any way make any compensation for his occupation of any part of the land or for his use of plaintiff's undivided share. Defendant did not agree to pay plaintiff for either past or future occupation.

Messrs. W. G. Buxton and Bingham & Mitchell for plaintiff.

Messrs. Daniel Barnard and Chase & Streeter, for defendant.

One tenant in common, in the absence of an express agreement, is not liable to his cotenant, who is not excluded from the common land, for

ple of law or equity that will charge one as the hirer of the other's interests, the use being reasonable, and an incident of the possession when not wrongful. *Akin v. Jefferson* (1885) 65 Tex. 137.

The English Statute of 4 and 5 Anne, chap. 16, only giving the action where the land held in common was let and one of the cotenants received more than his just share of the rents. *Ibid.*

As against a bailiff who refused an account, *Borrell v. Borrell* (1859) 33 Pa. 402; *Gloninger v. Hazard* (1862) 42 Pa. 400.

Although he had not been constituted bailiff, *Norris v. Gould* (1884) 15 W. N. C. 137.

So the action of account will not lie against a tenant in common who has obtained more than his share, unless the tenant sought to be charged has been constituted and received the products and profits as bailiff. *Leach v. Beattie* (1860) 33 Vt. 196.

The effect of the statute was to create an obligation to account as bailiff in the absence of an express agreement, from the mere relation of privity between the cotenants. *Northcott v. Casper* (1849) 41 N. C. 303.

Upon a bill merely seeking an account for rents of property alleged to have been received and appropriated to the defendant's use during certain years, but no recovery for the mere use and occupation, no recovery can be had on such use and occupation unless the cotenant complaining has been wholly evicted, forcibly kept out of possession, or there has been an agreement to pay rent. *Gayle v. Johnston* (1885) 80 Ala. 395.

There must be something more than a mere occupation of the estate by the one and a forbearance of such occupation by the other; the one merely occupying doing nothing more than what he has a right to do. *Newbold v. Smart* (1880) 67 Ala. 323.

A mere friendly occupation of the common estate by one tenant not rendering him liable to account for rents and profits. *Wilkinson v. Stuart* (1883) 74 Ala. 196.

Even though the occupancy is that of a firm of which he is a partner, *Scott v. Guernsey* (1866) 60 Barb. 163, affirmed (1871) 48 N. Y. 103.

Although he may have embezzled the profits or appropriated the whole. *Nelson v. Clay* (1833) 7 J. J. Marsh. 140, 23 Am. Dec. 387; *Shiels v. Stark* (1854) 14 Ga. 429.

So a tenant in common in possession under the mistaken idea that he is entitled to the whole interest is not liable to account for the use thereof, where there is no exclusion or claim made upon him to protect the other's rights. *Sailer v. Sailer* (1886) 41 N. J. Eq. 308.

Where one tenant in common of a parcel of land kept a ferry thereon under license thus enhancing the value of the property, the same right being open to the other whose enjoyment and rights were not obstructed, the right to keep the ferry was considered a personal privilege in the profits of which
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the other cotenant was not entitled to share. *Ragan v. McCoy* (1860) 29 Mo. 356, 367.

So where it was not charged that the defendant tenant in common with the heirs after the death of his wife, let the lands and received the rents, or that the heirs ever demanded or that he ever refused the right to occupy any portion of the land, or that he constituted himself their bailiff, there was no case upon which the heirs could compel such tenant in common in possession to pay them rents. *Akin v. Jefferson* (1885) 65 Tex. 137.

The Statute of 4 and 5 Anne altered the common law so far as to enable a tenant in common to maintain account-render against his companions as bailiff for receiving more than his just share and proportion; and in construing the meaning of the words "account-render" in this section, the court in *Norris v. Gould* (1884) 15 W. N. C. 137, adopted the reasoning of the court in the English case of *Henderson v. Eason* (1851) 17 Q. B. 701, 21 L. J. Q. B. 82, 9 Eng. L. & Eq. 337, 16 Jur. 518, holding that account-render would not lie by one tenant in common against the other for the mere use and occupation of the premises by such cotenant with the consent and approbation of his cotenant. To the same effect *Culter v. Currier* (1866) 54 Me. 81.

The Statute of 4 and 5 Anne, chap. 16, is not repealed by 3 and 4 Wm. IV., chap. 27. So held in *Henderson v. Eason* (1846) 15 L. J. Ch. 457, 10 Jur. 821, 15 Sim. 303, where the surviving cotenant in common claimed six years' rent, the deceased tenant having entered into possession with the consent and under an understanding that he should pay an occupation rent when called upon to do so, the court allowing the claim.

In *Fry v. Payne* (1887) 52 Va. 759, the defendant was in possession and used the land, and there was nothing inconsistent with the asserted rights of others, his possession being looked upon as the possession of all, there being no ouster.

II. Reason of the common-law doctrine.

At common law and independently of statute joint tenants and tenants in common are looked upon in the light of partners. *Hamilton v. Conline* (1868) 28 Md. 640, 32 Am. Dec. 724.

So tenants in common being jointly seized of the entire estate, each has an equal right of entry and possession, and the entry and possession of one will be presumed to be in accordance with his title, such presumption holding until some notorious and unequivocal act of exclusion occurs. *Israel v. Israel* (1869) 30 Md. 120, 96 Am. Dec. 571.

As such are entitled to occupy their portion of every part of the premises. *Crane v. Wagoner* (1866) 27 Ind. 52, 39 Am. Dec. 493.

Therefore one cannot make his own omission to occupy the joint estate a ground of action against his cotenant, the relation of landlord and tenant

taking and converting to his own use the products of such land.

Webster v. Culef, 47 N. H. 294; *Berry v. Whidden*, 62 N. H. 473; *Badger v. Holmes*, 6 Gray, 118; *Peck v. Carpenter*, 7 Gray, 283, 66 Am. Dec. 477; *Sargent v. Parsons*, 12 Mass. 149; *Kean v. Connelly*, 25 Minn. 222, 33 Am. Rep. 458, and cases cited.

Assumpsit for use and occupation cannot be maintained in the absence of a contract, express or implied, to pay for such occupation.

Durrell v. Emery, 64 N. H. 223.

The referee finds: (1) that there was no express contract; (2) that there was no tacit agreement or understanding from which a contract can be inferred; (3) that there was no

contract by estoppel arising from the acts or conduct of the parties.

See *Seena v. Trus*, 53 N. H. 630.

Bingham, J., delivered the opinion of the court:

"There is a large class of contracts, called 'implied contracts,' which rest merely on construction of law, and in which there is, properly speaking, no assent of the parties to the terms by which they are bound. What the law looks to in these cases is not agreement of the parties, but their circumstances or acts; and from their circumstances or acts the law raises the duty and implies the promise by which, in the individual case, the party will

not subsisting between them. *Badger v. Holmes* (1856) 6 Gray, 118.

If the rule were otherwise its effect would be that one tenant in common by keeping out of the actual possession of the premises might convert the other into his bailiff and prevent him from occupying except upon payment of rent. *Tyner v. Fenner* (1880) 4 Lea, 430. To the same effect, *Jones v. Massey* (1880) 14 S. C. 232; *Pico v. Columbet* (1859) 12 Cal. 414, 73 Am. Dec. 550.

The possession by one cotenant of the interest of the other is an incident to possession when not wrongful. *Akin v. Jefferson* (1885) 65 Tex. 137.

And is the exercise of a legal right. *Pico v. Columbet*, *supra*.

As owner of the estate *per my et per tout*. *Schneider v. Taylor* (1886) 16 Lea, 304.

Each having a right to occupy. *Gowen v. Shaw* (1855) 40 Me. 58; *Sargent v. Parsons* (1815) 12 Mass. 149; *Kline v. Jacobs* (1871) 68 Pa. 57; *Neil v. Shackelford* (1876) 45 Tex. 119; *Osborn v. Osborn* (1884) 62 Tex. 495.

By virtue of his own title. *Valentine v. Healey* (1895) 36 Hun, 259.

The following cases in order of states also maintain the above principles. *Newbold v. Smart* (1880) 67 Ala. 326; *Wilkinson v. Stuart* (1883) 74 Ala. 198; *Bird v. Bird* (1875) 15 Fla. 424, 21 Am. Rep. 296; *Crane v. Waggoner* (1868) 27 Ind. 52, 39 Am. Dec. 498; *Israel v. Israel* (1869) 30 Md. 120, 95 Am. Dec. 571; *Badger v. Holmes* (1856) 6 Gray, 118; *Campbell v. Campbell* (1870) 21 Mich. 438; *Everts v. Beach* (1875) 81 Mich. 126, 18 Am. Rep. 169; *Hutton v. Powers* (1868) 38 Mo. 353; *Ragan v. McCoy* (1860) 29 Mo. 356, 367; *Buckelew v. Snedeker* (1876) 27 N. J. Eq. 82; *Barrell v. Barrell* (1874) 25 N. J. Eq. 173; *Austin v. Ahearne* (1874) 61 N. Y. 6; *Volentine v. Johnson* (1883) 1 Ill. Eq. 49; *Graham v. Pierce* (1869) 19 Gratt. 28, 100 Am. Dec. 653; *Dodson v. Hays* (1887) 29 W. Va. 577.

And such occupancy alone does not render the tenant liable for rent. *Varnum v. Leek* (1885) 65 Iowa, 751.

The neglect of a cotenant to enter into equal enjoyment at any moment may be regarded as an assent to the sole occupation of the other. *Pico v. Columbet* (1859) 12 Cal. 414, 73 Am. Dec. 550.

The equal right to possession extending to every part and parcel of the subject-matter of the tenancy. *Sconce v. Sconce* (1884) 15 Ill. App. 169.

One cannot gain an exclusive right to any part. *Ragan v. McCoy* (1860) 29 Mo. 356, 367.

So the possession of one tenant in common is in contemplation of law the possession of the other. *Israel v. Israel* (1869) 30 Md. 120, 95 Am. Dec. 571; *Irvine v. Hanlin* (1823) 10 Serg. & R. 219; *Jones v. Massey* (1880) 14 S. C. 232.

And is treated as had with the consent and approbation of the other. *Newbold v. Smart* (1880) 67 Ala. 326.

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So that an actual ouster must be proved to rebut such presumption. *Israel v. Israel*, *supra*.

The land being free to all, there is no reason in compelling him who does enter to pay rent to him who neglects or distinctly refuses to do so. *Ragan v. McCoy*, *supra*.

Therefore one tenant in common occupying the whole estate without claim on the part of his cotenant is under no obligation to account. *Isard v. Bodine* (1857) 11 N. J. Eq. 403, 69 Am. Dec. 595.

Such occupancy of the entire property being warranted by his own interest and estate and in his own right. *Everts v. Beach* (1875) 81 Mich. 126, 18 Am. Rep. 169.

Whether the occupancy is united or single, if it follows the common right and is not affected by special arrangements it extends so far as the common interest extends. *Ibid*.

Neither tenant is excluded by the circumstance that the other does not occupy. *Ibid*.

If a cotenant does not see fit to come in and occupy, the sole occupation of one is not an exclusion of the other. *Newbold v. Smart*, *supra*.

The mere fact that for some reason one does not occupy, not obliging the other to stay out. *Everts v. Beach*, *supra*.

So the mere fact that a tenant in common is in possession will not of itself make him liable for an occupation rent. *Jones v. Massey* (1880) 14 S. C. 232.

For if the whole possession by one cotenant could render him liable to the other, it would be in the power of the other by voluntarily remaining out of possession to keep out his companion also. *Pico v. Columbet* (1859) 12 Cal. 414, 73 Am. Dec. 550.

It is a recognized limitation upon the doctrine of relation that it shall not be applied in such a way as to make that tortious which, when done, was lawful. *Davis v. Chapman* (1898) 36 Fed. Rep. 42.

The action for use and occupation being founded on privity of contract and not on privity of estate. *Barron v. Marsh* (1884) 63 N. H. 107.

So the non-liability of one cotenant to account for the rents, issues, and profits received by him in the absence of an express agreement, results from the nature of the tenure. *Roseboom v. Roseboom* (1873) 15 Hun, 309, affirmed (1880) 81 N. Y. 356.

But the right of a cotenant to retain, use, and appropriate the benefits of the land extends only to the products of its proper use and employment, and not to anything which is part of the land itself and not severable in the proper use of it. *Shepard v. Pettit* (1883) 30 Minn. 119.

The true distinction of liability is between the case where one of the cotenants occupies and uses the common estate, and the case where one cotenant collects rents from a third party for the use and occupancy of the common estate; in the former case he is not liable to account while in the latter he is. *Re Final Settlement of Tyler v. Cartwright* (1890) 40 Mo. App. 373.

be bound. In the case of an express contract, the law measures the extent of each party's duty by the terms to which he has expressly agreed; in the case of an implied contract, the terms are such as reason and justice dictate in the particular case, and which therefore the law presumes that every man undertakes to perform." 1 Chitty, Cont. 11th ed. 79. "If the forms of common-law actions were adapted to the truth of the case, a defendant could not be held liable in an action of contract except upon proof of an actual contract, either express or tacit. But, by a fiction adopted for the sake of the remedy, the law in some instances allows an action of contract to be maintained to enforce a legal

obligation or duty which the defendant has never in fact promised to perform. The law in such cases implies a promise, though such implication may be directly against the actual fact, and even against the party's strongest protestations." *Eastman v. Clark*, 58 N. H. 276, 280, 16 Am. Rep. 192. The idea of a contract implied by law is a legal fiction, invented and used for the sake of the remedy, to enforce the performance of a legal duty. *Seeva v. True*, Id. 627; *Kelley v. Davis*, 49 N. H. 187; *Re Rhodes*, L. R. 44 Ch. Div. 94. The invention of the fiction is an application of the general principle that requires such convenient procedure to be invented and used as is necessary to furnish complete remedies

III. States not adopting the English statute.

The English Statute 4 and 5 Anne has been construed so as to give a right of recovery for mere use and occupation by one part owner against another, and similar statutes have been enacted in some of the states of the Union with a like construction, but no such statute exists in Alabama; the Statute of Anne having been enacted after the settlement of the United States the common-law rule which denies such right prevailing in that state. *Gayle v. Johnston* (1885) 80 Ala. 395.

Therefore the mere occupation of premises by such a tenant does not render him liable. *Fielder v. Childs* (1883) 73 Ala. 567.

So section 4160 of Mansfield's Arkansas Digest, giving landlords the right to recover a reasonable compensation for the use and occupation of their premises, has no application to the occupancy of tenants in common, the relation of landlord and tenants not existing between them, in the absence of an agreement, each occupying in his own right. *Hamby v. Wall* (1897) 48 Ark. 135.

And the Statute 4 and 5 Anne, chap. 16, is not adopted in California, nor is any similar statute passed by the legislature. *Pico v. Columbet* (1899) 12 Cal. 414, 73 Am. Dec. 550.

Neither is it in force in North Carolina. *Chambers v. Chambers* (1824) 10 N. C. 232, 14 Am. Dec. 556. But see *Wagstaff v. Smith* (1845) 39 N. C. 1, *infra*, Head V., subd. a.

With reference to the meaning of the words "for receiving more than comes to his just share or proportion" the court, in *Early v. Friend* (1860) 16 Gratt. 21, 73 Am. Dec. 469, contended that the construction placed upon the words by the English case of *Henderson v. Eason* (1851) 17 Q. B. 701, 21 L. J. Q. B. 82, 16 Jur. 518, 9 Eng. L. & Eq. 337, to the effect that the act only intended to make a tenant in common accountable for receiving from a stranger on account of the rents and profits of the property more than his just share and proportion, was too technical and narrow, and that it should embrace not only such cases but those in which such rents and profits were produced by such tenants in occupation and enjoyment of the property, the court considering that the word "received" as used in the statute literally meant a receiving of profits as well as of use and occupation, and by renting out of the property.

In commenting upon the construction of such statute, as declared in the case of *Henderson v. Eason*, *supra*, the court stated that if that decision had been made before the English statute was adopted in Virginia, the construction which that decision settled in England would have been adopted by implication along with the statute, but that as at the time of the adoption of the statute there had been no English decision construing it, the court was left free to construe it according to its apparent meaning, and the probable intention of the legislature without being controlled by sub-

sequent decisions in England, or elsewhere, other than in its own state. *Early v. Friend*, *supra*.

The Virginia courts have expressly held that one tenant in common or joint tenant occupying the premises to the exclusion of his cotenants is accountable for receiving more than his just share whether paid by a stranger or derived from the use and occupation of the property, but the occupying tenant is liable only for the fair value of the property in the condition in which it was at the time it went into his possession, and the cotenants are not entitled to the benefit of the issues and profits made by the application of the skill and capital of the occupying tenants bestowed on the common property. *White v. Stuart* (1832) 75 Va. 546, 567.

In *White v. Stuart*, *supra*, the court considered the case required the modification of the rule owing to the change of circumstances existing therein.

IV. When held liable.

The rule, however, as above declared, has its exceptions, and such a cotenant will be held liable in cases where he has ousted and excluded his cotenant from possession and has refused to allow him to occupy; also in cases where he has acted as bailiff, receiving more than his just share of the rents and profits, and when the position of landlord and tenant has existed between them.

There must be something more than occupancy of the estate by one and a forbearance to occupy by the other. *Boley v. Barutis* (1897) 130 Ill. 192, affirming (1896) 24 Ill. App. 515; *Soonce v. Soonce* (1894) 15 Ill. App. 169.

Yet it has been held that occupancy by one cotenant of the common property by the consent of the other does not necessarily relieve him from the payment of the rent. *Shiels v. Stark* (1854) 14 Ga. 429.

a. In case of ouster.

Such tenants have been held liable in cases where they have ousted or prevented the possession by their cotenants. *Terrell v. Cunningham* (1881) 70 Ala. 100; *Newbold v. Smart* (1890) 67 Ala. 322; *Gayle v. Johnston* (1885) 80 Ala. 395; *West v. West* (1890) 90 Ala. 458; *Hamby v. Wall* (1897) 48 Ark. 135; *Pico v. Columbet* (1899) 12 Cal. 414, 73 Am. Dec. 550; *Southworth v. Smith* (1855) 27 Conn. 365, 71 Am. Dec. 72; *Bird v. Bird* (1875) 15 Fla. 424, 21 Am. Rep. 296; *Crane v. Waggoner* (1866) 27 Ind. 52, 39 Am. Dec. 442; *Humphries v. Davis* (1895) 100 Ind. 399; *Carver v. Coffman* (1897) 109 Ind. 547; *Carver v. Fennimore* (1888) 118 Ind. 236; *Davis v. Hutton* (1891) 127 Ind. 481, 485; *Varnum v. Leek* (1895) 65 Iowa, 751; *Belknap v. Belknap* (1899) 77 Iowa, 71; *Sears v. Sellew* (1870) 23 Iowa, 506; *Austin v. Barrett* (1878) 44 Iowa, 488; *Dodge v. Davis* (1892) (Iowa) 53 N. W. Rep. 2; *Balfour v. Balfour* (1881) 23 La. Ann. 297; *Richardson v. Richardson* (1881) 72 Me. 403; *Israel v. Israel* (1889) 30 Md. 120, 96 Am. Dec. 571; *McLaughlin v. McLaughlin* (1894) 80 Md. 115; *Badger v.*

for the infringement of legal rights. *Boody v. Watson*, 64 N. H. 162, 171, 178, 179, and authorities there cited; *Haverhill Iron Works v. Hale*, 64 N. H. 406. If there is a legal obligation, there is a remedy in some form of action. "It has been long settled that if there are cosureties, . . . and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this court, either upon a principle of equity or upon contract, to call upon his cosurety for contribution; and I think that right is properly enough stated as depending rather upon a principle of equity than upon contract, unless in this sense, that, the principle of equity being in its operation

established, a contract may be inferred upon the implied knowledge of that principle by all persons, and it must be upon such a ground, of implied assumpsit, that in modern times courts of law have assumed a jurisdiction upon this subject. *Craythorne v. Swinburns*, 14 Ves. Jr. 160, 164.

In *Dos v. Morrell*, Smith (N. H.) 255, a house had been built as a single tenement, with "two rooms on the floor, chimney in the middle, entry front side the chimney, outside door, stairs up to the chambers," and a part of it had been set off on execution, the sheriff and appraisers making partition "by an imaginary line, running through the middle front door, entry, through the stairs,

Holmes (1856) 6 Gray, 118; *Sargent v. Parsons* (1815) 12 Mass. 149; *Campbell v. Campbell* (1870) 21 Mich. 438; *Everts v. Beach* (1875) 31 Mich. 134, 18 Am. Rep. 169; *McClure v. Thorpe* (1888) 68 Mich. 33; *Hause v. Hause* (1892) 29 Minn. 252; *Kean v. Connelly* (1878) 25 Minn. 223, 33 Am. Rep. 458; *Hutton v. Powers* (1866) 38 Mo. 363; *Ragan v. McCoy* (1860) 29 Mo. 365, 367; *Barrell v. Barrell* (1874) 25 N. J. Eq. 173; *Saller v. Saller* (1896) 41 N. J. Eq. 308; *Isard v. Bodine* (1887) 11 N. J. Eq. 403, 69 Am. Dec. 595; *Edsall v. Merrill* (1883) 37 N. J. Eq. 114; *Taggart v. Hurlbut* (1873) 68 Barb. 563; *Austin v. Ahearne* (1874) 61 N. Y. 6; *Le Barren v. Babcock* (1887) 46 Hun, 508; *Valentine v. Healey* (1896) 86 Hun, 259; *Woolver v. Knapp* (1854) 18 Barb. 265; *Northcott v. Casper* (1843) 41 N. C. 303; *Norris v. Gould* (1884) 15 W. N. C. 137; *Jones v. Weatherbee* (1849) 4 Strobb. L. 50, 51 Am. Dec. 653; *Annelly v. De Saussure* (1837) 26 S. C. 437; *Lyles v. Lyles* (1833) 1 Hill, Eq. 70; *Jones v. Massey* (1880) 14 S. C. 202; *Akin v. Jefferson* (1885) 65 Tex. 137; *Anderson v. Clanch* (1887) (Tex.) 6 S. W. Rep. 760; *Osborn v. Osborn* (1884) 63 Tex. 495; *Graham v. Pierce* (1869) 19 Gratt. 23, 100 Am. Dec. 658; *Dodson v. Hays* (1887) 20 W. Va. 577; *Davis v. Chapman* (1888) 26 Fed. Rep. 42.

And that without regard to the fact that he realizes nothing while in possession of the land. *Sears v. Sellow* (1870) 28 Iowa, 501.

A cotenant having no right to the exclusive possession of any particular portion, and if he exercises such right and excludes his cotenant from a participation in the possession he must account to his cotenant for his interest in the part from which he has ousted him. *Isard v. Bodine* (1887) 11 N. J. Eq. 403, 69 Am. Dec. 595.

At common law one joint tenant, tenant in common, or coparcener using the common land exclusively but not ousting or excluding his co-owner is not chargeable for the use and occupation, but under section 14 of chapter 100 of the West Virginia Code this rule is changed as to joint tenants and tenants in common, but not as to coparceners. *Ward v. Ward* (1896) (W. Va.) 29 L. R. A.—.

Where there is an ouster no distinction exists between the case and one where a disseisor holds lands of another and no question as to tenancy in common arises. *Sears v. Sellow*, *supra*.

In such a case he will be liable as a trespasser for the rental value beyond his share. *Jones v. Massey* (1880) 14 S. C. 202.

If upon demand by the cotenant of his moiety, the other refuses to pay and denies his title, claiming the whole and continuing in possession such possession is adverse and an ouster. *Meredith v. Andree* (1846) 29 N. C. 5, 45 Am. Dec. 504.

But the refusal of a demand made of a tenant in common in possession by his cotenant, of the whole property will not amount to even evidence of an ouster of his cotenant. *Ibid*.

And still less is this so where the refusal is made

by one claiming under such cotenant, of whose title the tenant in possession has no notice. *Ibid*.

So the lessee holding under one tenant in common is not liable to another tenant in common where there is no attornment or objection to such cotenant occupying it. *Austin v. Ahearne* (1874) 61 N. Y. 6.

And the onus of proving the actual ouster is upon the party alleging it. *McLaughlin v. McLaughlin* (1894) 80 Md. 115.

So a mere allegation that the defendant has been in possession and receipt of the rents and profits, without alleging a denial of the plaintiff's joint occupancy of the premises, will not support a case for rents and profits. *Lilly v. Menke* (1894) (Mo.) 28 S. W. Rep. 643.

The ouster and possession by the tenant, and the value of the rents and profits, are the only facts necessary to be shown to enable a recovery. *Sears v. Sellow* (1870) 28 Iowa, 501.

He must show a refusal of occupancy. *Bennett v. Virginia Ranch, Land, & Cattle Co.* (1892) 1 Tex. Civ. App. 321; *Neil v. Shackelford* (1876) 45 Tex. 119; *Osborn v. Osborn* (1884) 63 Tex. 495; *Akin v. Jefferson* (1885) 65 Tex. 142.

Evidence which fully sustains a claim that the use of the property was exclusive and hostile continuing down to the very last pleadings filed in the case which denied the common ownership and asserted that the property was separate, is sufficient to render the defendant liable for the reasonable value of the use of the share of the common property which belongs to the other cotenants. *Osborn v. Osborn*, *supra*; *Yard v. Bodine* (1887) 11 N. J. Eq. 404, 69 Am. Dec. 595.

An exclusion may occur where there is no express refusal by the tenant in possession to allow the others to occupy, as where one of several tenants takes possession of premises which are not capable of joint occupancy. *Edsall v. Merrill* (1883) 37 N. J. Eq. 114; *Davidson v. Thompson* (1871) 22 N. J. Eq. 83.

If one does not receive the money as tenant in common but as his own money, claiming the whole profit and refusing all participation with him, such act amounts to an ouster, not being a silent possession which would not amount to an ouster, but an actual adverse possession, and upon the refusal to let the other tenant in, denying the right and exacting payment from him for the whole, claiming a right to the whole of the land from which the profits were taken, the defendant can be made responsible in an action of assumpsit. *Irvine v. Hanlin* (1823) 10 Serg. & R. 219. Whether the defendant could be made liable in an action of account-render, the court did not decide.

In *Davidson v. Thompson*, *supra*, the complainant asked for an account of the rents of the annual value from the defendant in exclusive possession, and it was held that a joint tenant in

chimney," etc. The plaintiff, deriving title from the levy, owned one part, and the defendant owned the other. The house was old, and the defendant's part became untenable, was not worth repairing, and was condemned as dangerous by the fire wards, who "ordered it to be repaired (or otherwise rendered not dangerous on account of fire)." The defendant "took down his part to the line, . . . carefully and prudently, doing as little damage to the plaintiff as he could. He . . . sawed through the plate, girt, stairs, boards, etc., but did not take down the chimney." The action was trespass, and the plaintiff recovered damages on the ground that, "from the nature of the

thing," the parties must be considered as interested in common in the entry, chimney, stairs, etc., and each "was under an obligation to the other to keep his part in repair, at least so far that the tenement of the other should suffer no injury from want of such repair." On each side of the boundary line there was a community of interest, created, not by contract, but by the common law. In respect to repairs, the community of interest included a mutual obligation and a correlative right; and for the enforcement of such an obligation and the maintenance of such a right the common law of this state furnishes an adequate mode of procedure. If the defendant, instead of demolishing his part of

possession was accountable to his cotenants for rent, but that the rule as to tenants in common was different, a tenant in common not being in general liable unless he has excluded his cotenant from the premises or unless he has taken and kept possession of the premises capable of a joint occupation to the exclusion of his cotenant.

A widow in possession as tenant in common with minor heirs is liable for their just proportion of the value of the use and occupation of so much of the common property not the homestead as she has held and enjoyed the exclusive use of, and the fact that the children are minors for a part of the time makes no difference to their rights. *Lynch v. Broad* (1888) 70 Tex. 32; *Osborn v. Osborn* (1884) 62 Tex. 498.

Where the plaintiff's title in the premises was established and it was also shown that the defendants refused him the use and enjoyment of his interest therein, or to let him into possession or pay him for the use and occupation, receiving the total value of the premises himself occupying the whole to the prejudice of the plaintiff, the court affirmed the judgment of the court below giving the plaintiff a third interest in the use and occupation. *Muldowney v. Morris & E. R. Co.* (1886) 42 Hun. 444.

In *Zapp v. Miller* (1888) 109 N. Y. 51, plaintiff and defendant were tenants in common of land devised to them subject to a precedent life estate. Plaintiff being defendant's ward, executed deeds to the latter soon after she came of age the action being brought to set aside the deed on the ground of fraud and undue influence. The court held that obtaining title to the whole property held in common by reason of fraud or undue influence practiced on a cotenant enabled him to bring ejectment, and would entitle him to recover rent from the date such deeds were delivered.

b. In cases where an agreement exists.

In order to sustain the action for use and occupation the relation of landlord and tenant must exist either by express or implied agreement. *Barron v. Marsh* (1884) 63 N. H. 107; *Hamby v. Wall* (1887) 48 Ark. 126.

An agreement to pay for the use and occupation may be implied as well where parties are tenants in common as in other cases, the only difference being that the relation of landlord and tenant will not be so readily inferred from occupation in the case of a cotenant as in the case of a stranger. *Boley v. Barutio* (1887) 120 Ill. 122, affirming 24 Ill. App. 515.

If the legal construction of a writing does not make it a contract on the subject of rent, parole evidence is admissible on the question whether there was a contract on that subject. *Savings Bank of Strafford County v. Gatchell* (1879) 59 N. H. 281.

An action for use and occupation can only be maintained, however, where the relation of land-

lord and tenant exists. *Hutton v. Powers* (1866) 38 Mo. 353.

The mere participation in the profits of land with a joint occupation, or an occupation which does not exclude the owner from possession, not amounting to a tenancy. *Newbold v. Smart* (1880) 67 Ala. 824.

A cotenant who leaves the state cannot, when it suits him, file a bill for partition, and require his cotenants who have occupied parcels of the land to pay him a ratable part of the same for which the parcels might have been rented, the portion occupied not being more than a ratable part of the whole tract; upon the ground that there is no express contract to that effect and nothing from which either in law or in equity such a contract can be implied. *Roberts v. Roberts* (1855) 55 N. C. 123.

The evidence must show a contract express or implied, or that the relation of landlord and tenant existed between them. *Durrell v. Emery* (1866) 64 N. H. 223.

Where one tenant in common occupies the premises under an agreement with his cotenant that he will be responsible for the value of the premises, he can be compelled to account. *Abbey v. Wheeler* (1864) 10 Misc. 61.

There must be an agreement between the cotenants to pay rent. *Newbold v. Smart* (1880) 67 Ala. 824; *Terrill v. Cunningham* (1881) 70 Ala. 100; *Gayle v. Johnston* (1885) 80 Ala. 395; *West v. West* (1890) 90 Ala. 458; *Pico v. Columbet* (1859) 12 Cal. 414, 73 Am. Dec. 550; *Reynolds v. Wilmeth* (1877) 45 Iowa, 632; *James v. Brown* (1878) 48 Iowa, 568; *Belknap v. Belknap* (1889) 77 Iowa, 71; *Badger v. Holmes* (1856) 6 Gray, 118; *Keen v. Connelly* (1878) 25 Minn. 222, 33 Am. Rep. 458; *Hause v. Hause* (1882) 29 Minn. 252; *O'Connor v. Delaney* (1893) 53 Minn. 247; *Hutton v. Powers* (1866) 38 Mo. 353; *Durrell v. Emery*, *supra*; *Woolever v. Knapp* (1864) 18 Barb. 265; *Scott v. Guernsey* (1866) 60 Barb. 163, affirmed (1871) 48 N. Y. 106; *Joelyn v. Joelyn* (1876) 9 Hun. 388; *Wilcox v. Wilcox* (1867) 48 Barb. 327; *Kline v. Jacobs* (1871) 68 Pa. 57; *Norris v. Gould* (1884) 15 W. N. C. 137; *Langley's Estate* (1893) 2 Pa. Dist. Rep. 800; *Anderson v. Clanch* (1887) (Tex.) 6 S. W. Rep. 760; *Dodson v. Hays* (1837) 29 W. Va. 577.

Yet a cotenant may be liable for rent without an express agreement by the one to pay rent to the other. *Boley v. Barutio* (1887) 120 Ill. 122, affirming 24 Ill. App. 515.

In such a case he is liable in an action for use and occupation for whatever the occupation of the other's share is reasonably worth, although such oral agreement does not in all respects constitute the ordinary relations of landlord and tenant. *Kites v. Church* (1886) 142 Mass. 566.

If the conduct of the cotenants toward each other in relation to the occupancy of the premises is such that an agreement to use each a particular part of the premises can be reasonably implied,

the building, had merely refused to repair it, the plaintiff would have had a remedy in equity, if not at law. *Roberts v. Peavey*, 27 N. H. 477, 503. Where several own a mill, milldam, or flume, in common or in severalty, when the privilege of the water is owned in common, there is an implied contract between them, running with the land, that each shall bear his portion of the expense of repairs. On this implied contract is founded the statute relating to the repairs of such property. *Runnels v. Bullen*, 2 N. H. 532, 538; Gen. Laws, chap. 141; *Fowler v. Fowler*, 50 Conn. 256, 257.

In *Campbell v. Mesier*, 4 Johns. Ch. 334, 1 L. ed. 868, 8 Am. Dec. 570, there was a de-

cree in favor of an owner of a city lot against the owner of an adjoining lot, compelling contribution to defray part of the cost of a party wall built by the plaintiff in place of an old and ruinous one which he had pulled down. It was alleged in the bill that he had been nonsuited in an action at law brought for the same purpose on the ground that he had no remedy at law. In the opinion *Chancellor Kent* says: "This case falls within the reason and equity of the doctrine of contribution which exists in the common law, and is bottomed and fixed on general principles of justice. . . . The doctrine rests on the principle that, where the parties stand in *equali jure*, the law requires equality,

then either, on being disturbed in his occupation by the other, is entitled to the remedies as though no relation of cotenancy existed. *Boley v. Barutio*, *supra*.

But an express promise must be shown. *Gowan v. Shaw* (1855) 40 Me. 53; *Sargent v. Parsons* (1816) 12 Mass. 149; *Wilbur v. Wilbur* (1847) 13 Met. 404; *Joselyn v. Joslyn* (1876) 9 Hun. 388.

A tenant in common occupying the premises is not in the absence of an express agreement liable for rent when the premises are destroyed. *White v. Stuart* (1882) 78 Va. 546, 567.

Otherwise the relation of landlord and tenant does not exist between them, and section 4169 *Mansfield's Arkansas Digest*, giving landlords power to recover a reasonable compensation for the use and occupation of their premises, has no application to tenants in common. *Hamby v. Wall*, (1887) 48 Ark. 135.

The statutory remedy for use and occupation applying only when the relation of landlord and tenant actually exists. *Ibid.*; *Mason v. Delancy* (1884) 44 Ark. 444.

So a cotenant in possession cultivating one half of the land is not liable for the rent in the absence of a lease or agreement to pay the same to his cotenant. *Beckel v. Beckel* (1871) 23 La. Ann. 150.

The above case of *Beckel v. Beckel*, was approved and affirmed by the court in *Balfour v. Balfour* (1881) 83 La. Ann. 297, there being nothing to show any dispossession, or any intention to interfere with the enjoyment of the other cotenant, or a cultivation more than equal to the party's share in proportion of the premises nor any impairment of the rights of the coproprietor.

And possession under an adverse claim of title negatives the idea of a promise to pay rent. *Richardson v. Richardson* (1881) 72 Me. 403.

But an agreement between cotenants to pay rent for the use and occupation of the premises will only inure for the benefit of the tenant with whom it is made. *Scott v. Guernsey* (1866) 60 Barb. 163, affirmed (1871) 48 N. Y. 106.

In such a case a court of law has ample jurisdiction to award damages for a breach of the contract inasmuch as the agreement amounts to a temporary severance of their tenancy in common and the party who disposes of his interest in the term to his cotenant is as much entitled to his action to recover the price as he would have been had he sold the entire interest to him. *Lookard v. Lookard* (1848) 16 Ala. 423.

The question being one of fact for the jury. *Chapin v. Foss* (1874) 75 Ill. 280.

Before one tenant can compel the other to pay him for the mere occupation of the premises, he must show either an express agreement to account or to pay something so that neither trespass for mesne profits, assumpsit, nor account-render will lie. *Norris v. Gould* (1884) 15 W. N. C. 187.

If there is not any actual ouster or eviction of

one tenant in common by the other, neither is liable to the other for mere use and occupation, unless there is a contract or agreement to pay rent, or unless upon letting of the premises one tenant in common actually realized in rents collected an undue proportion of the use and occupation and rents of the premises. *Terrell v. Cunningham* (1881) 70 Ala. 100; *Newbold v. Smart* (1880) 67 Ala. 326.

As by agreement one joint tenant or tenant in common may become the bailiff of the other, and as such chargeable in an action of account. *Murray v. Rawson* (1842) 3 Hill, 59.

So it has been held that one tenant in common may distrain upon another. *Snelgar v. Henston* (1821) Cro. Jac. 611.

For one cotenant can let his part to the other with the ordinary incidents of distress. *Cowper v. Fletcher* (1865) 6 Best & S. 464, 84 L. J. Q. B. 187, 12 L. T. N. S. 420, 13 Week. Rep. 730.

And in *Luther v. Arnold* (1884) 8 Rich. L. 24, 63 Am. Dec. 422, a tenant in common was allowed to distrain for rent due from his cotenant under a lease of the premises.

In *Davies v. Skinner* (1883) 53 Wm. 633, 46 Am. Rep. 665, the plaintiff, tenant in common, sued for and recovered rent under an express agreement whereby the defendant was to have the sole use upon paying a specified rate.

The rule that a tenant in common in exclusive possession of common property is not liable to account to the other tenants in common, either for rent or for a share of profits in the absence of an express agreement to do so, has been applied to the case of a husband occupying in right of his wife who holds as tenant in common with another. *Wilcox v. Wilcox* (1860) 48 Barb. 327.

In *Chapin v. Foss* (1874) 75 Ill. 280, the plaintiff, a widow of a deceased partner of the defendants, sued for use and occupation of premises used by the firm, an undivided half, the deceased's share, being devised to her by the will, making her tenant in common with the defendant. The court held that if the plaintiff was such co-owner with the defendant she could not recover for the use and occupation, unless the evidence showed that, as to the undivided half of the premises so owned by her, the defendants were her companions holding and occupying such undivided half under her as tenants after the decease of her husband.

In *Wilbur v. Wilbur* (1847) 13 Met. 404, assumpsit was brought for the use and occupation of land owned in common by defendant and plaintiff, and alleged to have been hired of the plaintiff by defendant; to prove such hiring plaintiff produced evidence of an agreement made with the wife of the defendant; upon an objection to the evidence, the court held that no implied authority could be shown from the relation of husband and wife; it not being shown that the husband knew of the agreement, he continuing to occupy solely without notice

which is equity, and one of them shall not be obliged to bear the burthen in case of the rest. It is stated in 2 Fitzherbert Nat. Brev. 163 b, that the writ of contribution lies where there are tenants in common, or who jointly hold a mill, *pro indiviso*, and take the profits equally, and the mill falls into decay, and one of them will not repair the mill. The form of a writ is given to compel the others to be contributory to the reparations. . . . The doctrine of contribution is founded, not on contract, but on the principle that equality of burden, as to a common right, is equity. . . . In the case before me, the parties had equality of right and interest in the party wall, and it became absolutely

necessary to have it rebuilt. . . . Contribution depends rather upon a principle of equity than upon contract. The obligation arises, not from agreement, but from the nature of the relation, or *quasi ex contractu*; and as far as courts of law have, in modern times, assumed jurisdiction upon this subject, it is, as Lord Eldon said (*Craythorne v. Swinburne*, 14 Ves. Jr. 164), upon the ground of an implied assumpsit. The decision at law, stated in the pleadings, may therefore have arisen from the difficulty of deducing a valid contract from the case. That difficulty does not exist in this court, because we do not look to a contract, but to the equity of the case. . . . The houses on each side . . .

or objection, thereby ratifying her action, plaintiff could not recover.

So the defendant's written acknowledgment that he held the land as tenant of the plaintiff without prejudice to the defendant's right to bring suit in equity was held not conclusive evidence of a promise to pay rent and he was not to be estopped by his tenancy to assert his own rights whatever they were in such suit, the acknowledgment containing no allusion to rent. *Savings Bank of Strafford County v. Getchell* (1879) 58 N. H. 281.

In *Kites v. Church* (1886) 142 Mass. 586, in answer to the defendant's contention that plaintiff could not recover because it was an action on an account annexed to recover rent by a tenant in common against a cotenant, the court held that by statute as well as by usage in Massachusetts the word "rent" included the compensation to be paid for the occupation of land by a tenant, whether holding under a written lease, or at will or at sufferance, and whether the amount to be paid was defined by the agreement or left indefinite.

Where action brought to recover a just proportion of rents and profits under § 43, chap. 74, of the Minnesota Gen. Stat. of 1878, was framed with reference to a recovery for rent upon the basis of the relation of landlord and tenant existing between the parties, the two causes of action being inconsistent the court ordered the plaintiff to elect whether he would proceed under the statute, or upon the understanding that the relation of landlord and tenant existed. *Hause v. Hause* (1882) 29 Minn. 252.

Where the action agreed with the guardian of the plaintiff, who had legal possession, care, and management of his ward's estate, for rent of the premises held by the guardian as cotenant with the plaintiff, and the rent was paid in full and received by the plaintiff, a settlement being made with her husband after the marriage, and subsequently at the same rate without complaint and also with the plaintiff after her husband's insanity, and up till the time of his failure in business and her own impoverishment thereby, and she then sought, on the ground of infancy, to set aside her own as well as her husband's actions concerning such rents and demanded double the amount,—it was held the action would not lie. *Paxton v. Gamewell* (1887) 82 Va. 706.

An agreement entered into whereby the defendant in consideration of a certain commission paid to him for his services was to collect the rents and manage the property held by the parties in common and pay the taxes, expenses, etc., was held valid and sufficient to support a cause of action for damages. *Tuers v. Tuers* (1885) 100 N. Y. 196.

The guardian of infant heirs, himself a cotenant with them, in possession and use of the premises without any express agreement, making entries in his book charging the account with rent in favor of the infants, was held bound thereby and liable, 28 L. R. A.

both to the payment of rent, and to be surcharged in case the rent was not of sufficient value. *Laney's Estate* (1893) 2 Pa. Dist. Rep. 800.

c. When occupied by one alone.

Ordinarily, where there has been no denial of a right or title, or demand and refusal of rent, one cotenant is not bound in the absence of an express agreement to pay rent while in possession of the common property. *Carver v. Coffman* (1887) 109 Ind. 547.

A different rule, however, prevails in respect to any contract for the use or enjoyment of the common property, in which relation they may be deemed to place confidence mutually in each other. *Matthews v. Bliss* (1839) 22 Pick. 48.

There must be something more than a mere occupancy by one and a forbearance to occupy by the other. *Broyles v. Waddel* (1872) 11 Heisk. 32.

And in *Tyner v. Fenner* (1880) 4 Lea. 469, the court inclined strongly to the opinion that one tenant in common was liable to his cotenants at law for the use and occupation of the common property. *Blanton v. Vanzandt* (1852) 2 Swan, 274.

One tenant in common cannot make his own omission to occupy the joint estate a ground of action against his cotenant; and therefore, where one cotenant occupies and receives the income of the estate with the consent of his cotenant, he is not, in the absence of an agreement, liable to such cotenant for his share where the evidence does not show that he has received more than his proportion of the rents and profits. *Berry v. Whidden* (1883) 62 N. H. 473.

If one voluntarily abandons possession there can be no liability to account for the rent of the entire property by the tenant in possession further than the profits arising from the portion rendered productive by the efforts of such tenant. *Volentine v. Johnson* (1833) 1 Hill, Eq. 49.

Having the right to enjoy the premises to the extent of his interest he is not liable for rent in respect thereof, provided he does not, *inter alia*, cultivate to a greater extent than his interest. *Lyles v. Lyles* (1833) 1 Hill, Eq. 76.

When he uses the estate only to an extent less than his share, and not to the extent of an ouster or denial of the right of his cotenant, he is not liable to account. *Almy v. Daniels* (1887) 15 R. I. 318.

Such use cannot be offset against the excessive use of his cotenant, a charge for such use being a charge for the use of his own property and for the exercise of a legal right. *Ibid.*

The occupying tenant is liable for the rent of so much of the premises as was capable of producing rent at the time he took possession, but not for what it is rendered capable of producing by his labor. *Hancock v. Day* (1840) 1 McMull. Eq. 63, 36 Am. Dec. 233.

But is not liable for negligence or misuse of the common property, nor for what he might have

were old and almost untenable; and it would be the height of injustice to deny to the plaintiff the right of pulling down such a common wall, and of erecting a new one suitable to the value of the lot in the most crowded part of a commercial city. It would be equally unjust to oblige him to do it at his exclusive expense, when the lot of the defendant was equally benefited by the erection and much enhanced in value."

"The second diversity," says Coke, "is between chattels real that are apportionable or severable, as leases for years . . . and chattels real entire, as wardships of the body, a villein for years, etc.; for if one tenant in common take away the ward, or the vil-

leine, etc., the other hath no remedy by action, but he may take them again. Another diversity is between chattels real and chattels personal; for if one tenant in common take all the chattels personal, the other hath no remedy by action, but he may take them again. . . . If two tenants in common be of a dovehouse, and the one destroy the old doves, whereby the flight is wholly lost, the other tenant in common shall have an action of trespass; for the whole flight is destroyed, and therefore he (the defendant) cannot in bar plead tenancy in common. . . . If two tenants in common, or joint tenants, be of a house or mill, and it fall in decay, and the one is willing to repair the same and

made by diligence, unless appointed bailiff. Hall v. Fisher (1855) 20 Barb. 441.

If, as a tenant in common he only cultivates his own share of such lands, he cannot be made to account for anything. *Thomson v. Peake* (1893) 38 S. C. 440; *Jones v. Massey* (1880) 14 S. C. 222.

A tenant in common occupying the premises and cultivating them, investing his own capital and labor at his own risk, is entitled to the product thereof in the absence of a contract with his cotenant; if, however, he rents the property to others he is bound to account. *Howard v. Throckmorton* (1881) 59 Cal. 72.

For he is not to be deprived of the beneficial use and enjoyment of the land merely because his cotenant does not see fit to insist upon enjoying such use with him, nor is he required in such case to share with the other the benefits of his skill and labor bestowed in the proper use and enjoyment of the common property, the products of the skill and labor of such cotenant being his. *Shepard v. Pettit* (1883) 30 Minn. 119.

And this is so whether the Statute of 4 and 5 Anne, chap. 16, is in force or not; the tenant not in possession, nor demanding to be admitted, nor incurring any risk, or sharing any toil or outlay, must continue his abstinence at the harvest, and he can neither share the fruits of his fellow's industry, nor become his landlord without a contract creating that relation between them. *Akin v. Jefferson* (1865) 65 Tex. 137.

When the estate at the commencement of the tenancy yields no rent or profit, and one cotenant enters and by improving the same rent is a product, the other cotenant expending neither money nor labor, neither at common law nor under the statute of Virginia can the latter claim any proportion of the profit arising from such improvements. *Nelson v. Clay* (1833) 7 J. J. Marsh. 140, 23 Am. Dec. 587.

For as the cotenants do not share in the risks they ought not to share in the profits of an operation. *White v. Stuart* (1832) 76 Va. 544, 567.

There is no equity in a claim asserted by the plaintiff to share in profits resulting from the labor and money of the defendant cotenant when the former has expended neither and has never claimed possession and never been liable for contribution in case of loss, and there would be no equity in giving to the plaintiff, who would neither work himself nor subject himself to any expenditures or risks, any share in the profits of another's labors, investments, and risks. *Pico v. Columbet* (1890) 13 Cal. 414, 78 Am. Dec. 550.

And such tenant in common entering upon vacant and unoccupied land, and by his own labor and money reducing the same to cultivation, and without renting or ever having received rent therefor occupying and cultivating the same without objection, if liable at all, is only liable for a share of the actual profit made from the use of the

premises, after deducting taxes, the costs of improvements, and all other expenses. *Sconce v. Sconce* (1884) 15 Ill. App. 169.

The claimant of a share of the profits derived from the premises through the efforts of his cotenant, must show that he has expended either labor or money, or has claimed possession and become liable for the losses incurred. *Pico v. Columbet*, *supra*.

In an action of account of the profits made in carrying on a business by one cotenant upon property held in common, it must be shown that there was an express agreement to account for the profits resulting from improvements put upon the lots, or for labor and care invested in conducting the business. *Neil v. Shaakelford* (1879) 45 Tex. 119.

But by a cotenant using the portion of the land which by common consent was appropriated to the use of the other cotenant, and rendered productive by his own labor, a benefit is derived which ought to be accounted for. *Volentine v. Johnson* (1833) 1 Hull, Eq. 49.

When, however, such tenant in common uses all the arable land he is not liable for the rental value but only for the same over and above the cost of making the crop, that is the net rents and profits. *Thomson v. Peake* (1893) 38 S. C. 440. *Jones v. Massey* (1880) 14 S. C. 222, followed and approved.

Yet one tenant in common cannot so take possession of the whole estate and determine for himself that he will farm for himself and others only a certain portion, to the exclusion of all the rest from the profits of such portion. *Wickoff v. Wickoff* (1889) (N. J.) 19 Atl. Rep. 74.

He cannot cultivate for himself and some of the other cotenants so much of the whole as he regards as their share, and then say to the remaining tenant that he has no share in what is grown; the principle that each is alike seized of every part forbidding such appropriation. *Ibid*.

A tenant who cultivates the land and receives the entire proceeds is chargeable to the cotenant for his share of the profits. *Rowden v. Murphy* (1890) (N. J.) 20 Atl. Rep. 379, where the tenant claimed the entire property renting out a portion.

So he must account to his cotenant for the rents and profits. *Keisel v. Earnest* (1853) 21 Pa. 90.

And there is no difference whether a tenant in common uses the property merely for shelter and as a means of supporting himself and family, or makes money by selling the products, or receives money as rent; in either case he is bound to come to an account with his fellows, and can only avoid it by averring and proving that he has already accounted. *McPherson v. McPherson* (1850) 38 N. C. 301, 53 Am. Dec. 416.

Where the evidence showed that the complainant voluntarily left the premises on account of some disagreement with the defendant, the latter was held only chargeable with the rents, issues, and profits because of the cultivation of the land and

the other will not, he that is willing shall have a writ *de reparatione facienda*.

Whereby it appeareth that owners are bound in that case *pro bono publico* to maintain houses and mills which are for habitation and use of men. If one joint tenant or tenant in common of land maketh his companion his bailiff of his part, he shall have an action of account against him. . . . But although one tenant in common or joint tenant, without being made bailiff, take the whole profits, no action of account lieth against him; for in an action of account he must charge him either as a guardian, bailiff, or receiver. . . . Never his bailiff to render an account is a good plea. Co. Litt.

200a. 200b. In the section of Littleton on which this comment is made it is said: "If two be possessed of chattels personal in common . . . as of a horse, an ox, or a cow, etc., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong to occupy in common, etc., when he can see his time, etc. In the same manner it is of chattels real which cannot be severed.

Where two be possessed of the wardship of the body of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedy by an action by the law but to take the infant out of the

the receipt of the benefits of its entire product. Buckelew v. Snedeker (1876) 27 N. J. Eq. 82.

A tenant in common holding possession of the property is not chargeable with rents or profits where none have been made, provided he holds and has employed the property in good faith with a view to making it profitable but has failed in doing so, nor with speculative profits where the real profits are susceptible of being ascertained. Ruffners v. Lewis (1886) 7 Leigh, 720, 30 Am. Dec. 518.

There must, however, be some profit derived from the property for which the cotenant ought to account, to entitle a tenant in common to an account of the rents and profits for use and occupation. Barrel v. Barrel (1884) 25 N. J. Eq. 173.

And it must be distinctly shown that he has made a profit over and above the mere use and beyond his share. Tyner v. Fenner (1880) 4 Lea, 469; Schneider v. Taylor (1888) 16 Lea, 304.

It must be shown that he has occupied more than his just proportionate share of the common estate, and even then he will be liable only for the rent of the excess. Medford v. Frazier (1880) 58 Miss. 241.

As he is only liable, in the absence of ouster, for the rents and profits which he receives from the lands beyond his own share. Jones v. Massey (1880) 14 S. C. 292, where one tenant in common was in possession of slaves.

To the same effect are the following cases: Pope v. Harkins (1849) 16 Ala. 321; Pico v. Columbet (1859) 12 Cal. 414, 78 Am. Dec. 550; Bird v. Bird (1875) 15 Fla. 424, 21 Am. Rep. 296; Shiels v. Stark (1854) 14 Ga. 436; Huff v. McDonald (1857) 22 Ga. 131, 68 Am. Dec. 437; Bridgford v. Barbour (1882) 80 Ky. 629; Cutler v. Currier (1888) 54 Me. 81; Hudson v. Coe (1887) 79 Mo. 83; Hamilton v. Conine (1888) 28 Md. 640, 92 Am. Dec. 724; Gibbs v. Clagett (1829) 2 Gill & J. 17; Green v. Johnson (1831) 8 Gill & J. 394; Sargent v. Parsons (1815) 12 Mass. 149; Blood v. Blood (1873) 110 Mass. 545; Oldrom v. Lyford (1838) 9 N. H. 502, 32 Am. Dec. 387; Great Falls Co. v. Worster (1844) 15 N. H. 460; Smith v. Woodman (1854) 28 N. H. 523; Webster v. Calef (1887) 47 N. H. 289; Isard v. Bodine (1877) 11 N. J. Eq. 493, 60 Am. Dec. 595; Edsall v. Merrill (1883) 37 N. J. Eq. 114; McMurray v. Rawson (1842) 3 Hill, 50; Green v. Putnam (1847) 1 Barb. 500; Wagstaff v. Smith (1845) 30 N. C. 1; Northcott v. Casper (1849) 41 N. C. 303; McPherson v. McPherson (1850) 33 N. C. 391, 53 Am. Dec. 416; Roberts v. Roberts (1855) 55 N. C. 129; West v. Weyer (1888) 46 Ohio St. 66; Anderson v. Greble (1831) 1 Ashm. 136; Norris v. Gould (1884) 15 W. N. C. 187; Almy v. Daniels (1887) 15 R. I. 313; Jones v. Massey (1880) 14 S. C. 292; Scafe v. Thomson (1881) 15 S. C. 337, 387; Pearson v. Carlton (1882) 18 S. C. 47; Nell v. Shackelford (1876) 45 Tex. 119; Osborn v. Osborn (1884) 62 Tex. 496; Thompson v. Jones (1880) 77 Tex. 623; Akin v. Jefferson (1885) 65 Tex. 137; Brinsmaid v. Mayo (1837) 9 Vt. 31; Leach 28 L. R. A.

v. Beattie (1880) 33 Vt. 126; Hayden v. Merrill (1872) 44 Vt. 336, 3 Am. Rep. 372; Early v. Friend (1880) 16 Gratt. 21, 78 Am. Dec. 649; Grubam v. Pierce (1869) 19 Gratt. 23, 100 Am. Dec. 653; Paxton v. Gamewell (1887) 32 Va. 706; Fry v. Payne (1887) 32 Va. 759; Beer v. Beer (1852) 12 C. B. 60, 16 Jur. 233, 21 L. J. C. P. 124; Henderson v. Eason (1851) 17 Q. B. 701, 21 L. J. Q. B. 32, 16 Jur. 518, 9 Eng. L. & Eq. 367; Wheeler v. Horne (1740) Willes, Rep. 206; Denys v. Shuckburgh (1840) 4 Younge & C. Exch. 42, 5 Jur. 21.

The surplus being held by him as bailiff for the cotenant who stands to him as his principal. Huff v. McDonald (1857) 22 Ga. 131, 68 Am. Dec. 437.

Such receipt of the profits, although no ouster of a cotenant not affecting the possession of the land, imposes upon him an immediate accountability for the part of the profits to which the other is entitled. Wakstaff v. Smith (1845) 30 N. C. 1.

Yet when a tenant in common has the entire and exclusive occupation of the whole, or any part of the common estate, he is liable to account therefor. Almy v. Daniels (1887) 15 R. I. 313.

So the rule that for a mere occupancy the cotenant will not be liable to account, will not be extended to a case where the cotenant actually consumes or takes off and disposes of a part of the property held in common. McCabe v. McCabe (1879) 18 Hun, 153.

The action, however, is not for tort, is not based upon the wrong committed by one cotenant as against the other, but assumes that the cotenant acted as the agent of his tenant in common and thereby became a trustee of the property disposed of. Abbey v. Wheeler (1894) 10 Misc. 61.

In Wiswall v. Wilkins (1831) 5 Vt. 87, a cotenant in possession but not denying the right of his cotenant to participate in the profits arising from the premises, was held liable to account.

But a cotenant occupying the premises with the consent of his co-owner, for the erection of a steam saw-mill is not necessarily excused from the payment of rent, and it is not proper to assume nor to infer that in such consenting the cotenant intended to waive his right to rent, such question being one of fact to be submitted to the jury. Shiels v. Stark (1854) 14 Ga. 436.

Thus where, although it did not appear that there was any contract entered into between the parties that the defendant should occupy and enjoy the premises, he was regarded as in possession not only for himself but for his cotenants nothing appearing to show that he ever ousted them by setting up a title in himself, or denying the possession, or a participation in the rents and profits, the presumption being that he occupied by mutual consent of all concerned and was liable to be called upon to account by each of his cotenants. Wiswall v. Wilkins, *supra*.

If one tenant in common is responsible to his cotenant for his share of the rents received from one who enjoys without deteriorating the prem-

possession of the other when he sees his time."

"Other harsh and repulsive doctrines, as well as the feudal tenure of land (*Cole v. Lake Co.*, 54 N. H. 242, 279, 285, 286), growing out of social conditions that have ceased, and incompatible with the increase of trade, productive industry, and personal estate, have become obsolete." *Brooks v. Howison*, 68 N. H. 382, 386, 387. At the present day, the practice of snatching an infant ward by each of several guardians when he could see his time would not be tolerated. By a division of time, as in some cases of real estate (*Chesey v. Thompson*, 8 N. H. 9, 14 Am. Dec. 821), or by some other temporary or per-

manent regulation consistent with the interest of the ward (*State v. Libbey*, 44 N. H. 321), the evils that formerly attended a lack of specific remedy by legal process could be averted without a dissolution of the common right. The condition of a ward living in constant expectation of capture and recapture is not a necessary incident of wardship possessed by two. When there is a common right of possession of a person or chattel, and possession is taken by one, "the other," says Littleton, "hath no remedy by an action by the law; . . . no other remedy but to take this from him who hath done to him the wrong." This is the obsolete doctrine of a right and a wrong without a remedy by legal

ties, *a fortiori*, such tenant in common should be made liable where the amounts received by him are obtained by the eating away of the estate. *Curtis v. Coleman* (1875) 23 Grant. Ch. (U. C.) 561.

Upon the question whether one tenant in common using the entire property owned in common, without the application from other tenants in common to be let into the common enjoyment of the property, or without some act indicating an intention to use exclusively, could be held liable for the value of the use over and above such tenant's proportionate share of the property, was said to be a question upon which the authorities were in conflict. *Osborn v. Osborn* (1884) 62 Tex. 495.

If a cotenant leases his interest for a term of years, the lessee becomes tenant in common with the other tenants and as such liable to account. *Barnum v. Landon* (1856) 25 Conn. 148.

So a cotenant is entitled to an accounting of the profits made from the working of the joint property. *Anderson v. Clanch* (1887) (Tex.) 6 S. W. Rep. 760.

A cotenant in possession of the premises for the whole period, being allowed for improvements, must be charged with an occupation rent. *Hitchcock v. Skinner* (1839) Hoffm. Ch. 21, 6 L. ed. 1050.

And is not entitled to charge therefor unless he pays an occupation rent. *Rice v. George* (1873) 20 Grant. Ch. (U. C.) 221.

Under an order made to a commissioner to take an account of rents and profits he is not authorized to take an account of the expenses of running the property and conducting the business, and of the credits where one party has been in exclusive possession. *Reed v. Jones* (1855) 8 Wis. 421.

Where a lease was canceled on account of the property being destroyed by fire, the defendant, a cotenant, having realized considerable profit from the contract, the court held such profits were liable to distribution in the same manner as the rents would have been, and each tenant in common was entitled to share in the profits according to his interest in the land. *Pope v. Harkins* (1849) 16 Ala. 821.

In *Carver v. Coffman* (1887) 109 Ind. 547, a cotenant in possession denying the title of his cotenant and holding possession for a period of eight years, was bound to account to the excluded tenant for what he had received by such possession over and above his just proportion of the annual income or rents and profits of the property.

A cotenant in a gold mine who uses more than his just proportion is liable therefor and also for the overplus of gold where there is no proof of the profits actually made, the interest being presumed equal to the profits of the gold. *Huff v. McDonald* (1857) 22 Ga. 131, 68 Am. Dec. 437.

And an heir-at-law succeeding to the possession of his deceased parent to lands, obtaining exclusive possession cannot defeat a recovery by the coheirs of their proportion of the parts by setting up a 28 L. R. A.

title acquired from the owners of the land. In order to avail themselves of such title they must first surrender possession to the coheirs and then bring ejectment. *Phelan v. Kelly* (1841) 25 Wend. 890.

So a tenant in common taking exclusive possession of the premises, constructing a race-course thereon and using it exclusively; clearing the land of timber designed by them to be left standing,—was held to account as bailliff for the use of such race-course and for the timber so removed. *Hayden v. Merrill* (1872) 44 Vt. 336, 8 Am. Rep. 372.

An account of issues and profits as a mode of adjustment between tenants in common was resorted to in the case of a lead mine, the yearly value of which, and more especially of an undivided and uncertain portion, was incapable of ascertainment; the best method of settling such an account being to charge the tenant in possession with his receipts and credit him with his expenses on account of the operation crediting the tenant with necessary improvements. *Graham v. Pierce* (1869) 19 Gratt. 23, 100 Am. Dec. 653.

In *Puckett v. Smith* (1850) 5 Strobb. L. 23, 53 Am. Dec. 686, recovery was allowed by a tenant in common of a share of income derived from a ferry which under the South Carolina Act of 1827 was declared to be real estate, the court holding that the action would lie either in account or in case and that all damages which had arisen *pendente lite* were also recoverable.

A cotenant originally farming lands under an agreement to pay a certain proportion of the profits to each continuing in possession after notice to quit, but not farming as much as before, paying all his cotenants their proportions, but refusing to pay the complainant, was held liable to the latter for his full share of the produce notwithstanding such notice. *Wickoff v. Wickoff* (1889) (N. J.) 13 Atl. Rep. 74.

In a suit to recover money collected as the rents and profits of one-tenth interest in a water ditch, the defendants contended that the action would not lie as between tenants in common, and relied upon the case of *Pico v. Columbet* (1859) 12 Cal. 420, 73 Am. Dec. 550. The court held, however, that such case had no application to an action of money received by one tenant in common from sales of water profits derived from the business of a ditch or mine, such operations being looked upon as partnerships so far as the question of accounting was concerned, the shareholders being considered as partners entitled to participate in the profits derived from the business. *Abel v. Love* (1861) 17 Cal. 233.

In the above case the court looked upon the money as money had and received by the defendants to the plaintiff's use. *Abel v. Love, supra*.

In *Newman v. Newman* (1876) 27 Gratt. 714, the defendant, a joint owner, coheir, or devisee, conducting the business carried on upon the premises during the testator's lifetime and since his death

process. No writ was invented for such a case, or, if invented, its use was not allowed. The great mass of remedies was of common-law judicial origin; the rejection of necessary forms of action was arbitrary and capricious. In effect, a denial of remedy was so far equivalent to a denial of title that in the course of time what was characterized by Littleton as the infliction of a remediless wrong was not distinguished, by terms of qualification, from an exercise of a right. In the case of a chattel or land owned in common, and held by one of the owners, there was special need of an appropriate writ. The refusal of a remedy by action tends to disorder. "The common law, which is the

preserver of the common peace of the land, did abhor all force as a capital enemy to it; and therefore, against those who committed any force, the common law did subject their bodies to imprisonment." *Harbert's Case*, 9 Coke, 11, 12. In many cases, reasonable force without legal process is a necessary legal remedy. *Haley v. Coleord*, 59 N. H. 7-9, 47 Am. Rep. 176. But holding it to be the only remedy for a use of common property by one of the owners gives unnecessary occasion for proceedings likely to end in acts of violence. If a specific regulation of the exercise of common rights of possession and use cannot be made in a suit at law, there are cases in which the parties are entitled to

with the consent of the other cotenant, but without any special contract to account for rents and profits, was held bound to account for the issues and profits of the property while the same remained in his possession as joint tenant, but without any special contract, his duty being to keep proper accounts and to be ready to make a settlement, proper credits, however, being allowed, including an allowance for services, the court following the principles laid down in *Graham v. Pierce* (1899) 19 Gratt. 28, 100 Am. Dec. 658, but distinguishing *Early v. Friend* (1860) 16 Gratt. 21, 78 Am. Dec. 649.

The yearly value of the premises and especially of an undivided and uncertain portion being incapable of ascertainment, the court decreed an account of issues and profits. *Newman v. Newman*, *supra*.

The principle that a tenant in common who has been ousted by his cotenant cannot recover the increased amount of the value of the rents and profits arising from valuable permanent improvements put upon the premises by such cotenant does not apply to a case where the improvements were not made by them in the character of cotenants but in the character of naked trespassers, such improvements becoming a part of the land and the property of those who hold the title; the fact that defendant subsequently purchased and became cotenant with the plaintiff does not in any respect change their relation to the title of that portion of the land held by plaintiff. *Carpentier v. Mitchell* (1865) 29 Cal. 380.

A mortgage of a crop made by a tenant in common who holds exclusive possession is valid as against the cotenants and the mortgagee in possession will not be liable to account. *Bird v. Bird* (1875) 15 Fla. 424, 42 Am. Rep. 286.

V. The remedy as between cotenants.

a. Statutory action of account.

An action on account between tenants in common of land did not lie at law except under special appointment of one tenant as the bailiff of the other. *Brinsmaid v. Mayo* (1897) 9 Vt. 31.

The remedy for the proportion of the rents due from one cotenant to the other is by action of account under the statute. *Crow v. Mark* (1899) 52 Ill. 382; *Sherman v. Ballou* (1829) 8 Cow. 306; *Fowler v. Fowler* (1822) 50 Conn. 256; *Wheeler v. Horn* (1740) Willes, Rep. 206; *Kline v. Jacobs* (1871) 68 Pa. 57; *Edsall v. Merrill* (1888) 37 N. J. Eq. 114; *Isard v. Bodine* (1857) 11 N. J. Eq. 408, 69 Am. Dec. 598.

If one cotenant in common takes more than his share of the rents, the only remedy is account, either by action under the Statute 4 and 5 Anne, chap. 16, § 7, or by bill in equity. *Denys v. Shuckburgh* (1840) 4 Younge & C. Exch. 42, 5 Jur. 21.

Therefore a tenant in common cannot maintain an action for money received against his cotenant.

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Thomas v. Thomas (1850) 5 Exch. 28, 1 Lowndes, M. & P. 229, 19 L. J. Exch. 175, 14 Jur. 180.

In *Anderson v. Greble* (1831) 1 Ashm. 136, which was brought for the recovery of one third of the rents and income, it was stated that if the action had been technically instituted it would have assumed the form of an action of account-render, under the Statute of 4 and 5 Anne, chap. 16, § 7.

The statute, however, only gives the remedy where it is alleged and proved that the cotenant has received more than his just share of the profits of the estate. *Brinsmaid v. Mayo* (1897) 9 Vt. 31.

Where there is a liability between cotenants to account, it is a liability to account for rents and profits received as distinct from a liability in an action for conversion of the property, or other like actions based upon a right of property in the plaintiff. *Bird v. Bird* (1875) 15 Fla. 424, 21 Am. Rep. 286.

Under the English Statutes of Westminster 2, 6, 22, and 4 and 5 Anne, chap. 16, § 7, joint tenants and tenants in common were given actions for waste, and for an account of profits against their cotenants.

These statutes are said to be in force in Georgia, being part of the general law of the country; and therefore a joint tenant or tenant in common, who receives more of the rents and profits than come to his share, to be apportioned either according to his interest in the estate or the value of that proportion of the common property which he occupies, is liable to his cotenants for the excess of rents and profits of his share under the above statutory provisions, as well as upon the plainest principles of justice. *Shiels v. Stark* (1864) 14 Ga. 429.

Section 1 of chapter 2 of the Revised Statutes of Illinois of 1874 provides that where one or more joint tenants, tenants in common, or copartners in real estate, etc., shall take and use the profits or benefits thereof in greater proportions than his or their interest, such person shall account therefor to his or their cotenants jointly or severally.

Section 3 provides that when any person is liable to account and will not give an account willingly, then the party entitled to have an account may bring his action of account. The judgment as provided in section 6 of the same Act if the verdict shall be against the defendant, is that he do account.

And section 7 provides that the court shall then appoint one or more disinterested and judicious men as auditors to determine and adjust the accounts, who shall take and state the account between the parties and report.

Section 11 provides for the adjustment of an account and balances to whom due, and the report of the court which on approval of the same shall give judgment on such report for the amount found in arrear. *Hawley v. Burd* (1880) 6 Ill. App. 454.

Under the Illinois statute which differs materially from the English Statute 4 and 5 Anne, chap. 16, one tenant in common who so takes the use and benefit must account for the just proportion of

it in chancery. *Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 290, 390, 18 L. R. A. 826, 838. Under an equitable right of amendment, the question whether relief should be sought at law or in equity has lost much of its importance. In cases like the present, no specific regulation is necessary. An action of assumpsit, or case, to recover for the defendant's use of the plaintiff's property *quantum valebat*, would be convenient, and is necessary unless compensation is given in equity. Such an action, and the right of partition by sale or otherwise, would ordinarily be sufficient. Partition alone is not enough. It provides for the future, but leaves the past unsettled. If there were an ex-

pulsion, it was said that mesne profits were not recoverable in ejectment. *Co. Litt.* 199b. The plaintiff's right to take possession and hold the land, or cut wood and gather the crops, until he had taken enough of the defendant's property to pay for the defendant's use of the plaintiff's, might be inadequate. Before the account could be balanced in that way, the defendant might obtain partition. Taking payment by using the defendant's property without his consent is not the only remedy in a well-regulated community, where the law permits the use of convenient procedure instead of restricting the injured party to such compensation as he may be able to get without a suit.

the same, or for the share of the reasonable rental value of the premises. *Woolley v. Schrader* (1895) 116 Ill. 22.

In construing the Illinois statute, the court held that the language, "shall take and use the profits thereof in greater proportion than his or her interest," meant the gross profits and not the net profits, and that the issue in such a case was not whether upon the final settlement an account was balanced but whether there should be an account made, the adjusting of balances being left entirely with the auditors. *Hawley v. Burd*, *supra*.

Under section 236 of Ind. Rev. Stat. 1881, a joint tenant or tenant in common, or tenant in coparcenary, may maintain an action against his cotenant or coparcener, or their personal representatives, for receiving more than his just proportion, and the statute applies when a tenant in common receives rent from a third person and applies it to his own use. *Schissel v. Dickson* (1891) 129 Ind. 120, 152.

Such statute is substantially the same as the English Statute of Anne. *Crane v. Waggoner* (1866) 37 Ind. 52, 89 Am. Dec. 492.

Under section 83 of the Kansas Civil Code, a cause of action for rents and profits may be united with one in ejectment, and both actions may be united with one for partition. *Scantlin v. Allison* (1884) 32 Kan. 378.

In *Scantlin v. Allison*, *supra*, it was stated that under section 20 of the Landlord and Tenant Act (Kan. Comp. Laws 1879, chap. 56) a tenant in common actually ousted by his cotenant might recover for rents and profits against his cotenant in the same manner as though the parties were strangers to each other.

By the Act of the Legislature of Virginia of 1784, (Va. Laws, 186), actions of account may be brought and maintained by one joint tenant or tenant in common against the other as his bailiff for receiving more than comes to his just share or proportion. *Coleman v. Hutchenson* (1813) 3 Bibb, 209, 6 Am. Dec. 649. To the same effect, *Nelson v. Clay* (1838) 7 J. J. Marsh. 140, 33 Am. Dec. 337.

The Act of 4 and 5 Anne, chap. 16, is in full force in Maryland. *Flack v. Gosnell* (1892) 16 L. R. A. 547, 78 Md. 183, a case in which a tenant in common claimed a lien upon his cotenant's interest for rents received in excess of his share.

So under the Minnesota General Statutes of 1878, chap. 76, § 43, one tenant in common may maintain an action against his cotenant for receiving more than his just proportion of the rents.

Again one tenant in common actually receiving the rents, issues, and profits may be compelled to account, under the statute of New Jersey of 1794 (*Nixon Digest*, §, pl. 3). *Isard v. Bodine* (1857) 11 N. J. Eq. 408, 30 Am. Dec. 565.

And under the same statutes one tenant in common may maintain an action of account against another as bailiff, or for receiving more than comes to his or her just share or proportion. *Edsall v. Merrill* (1893) 37 N. J. Eq. 114.

Under the New York statute (1 Rev. Stat. 750, § 9), a right of action is given, the statute providing that one joint tenant or tenant in common and his executors or administrators may maintain an action of account, or for money had and received against his cotenant for receiving more than his just proportion, and the like action may be maintained by them against the executors or administrators of such cotenant; an action for use and occupation does not exist in the absence of an express agreement between tenants in common. *Joelyn v. Joelyn* (1876) 9 Hun, 383.

An action of account will lie whether the action be based upon the right of the plaintiff as cotenant in fee, or of a lease against a cotenant cutting down and selling the trees and timber, or removing the mineral from the mines and carting away the earth or stone, and disposing of what is removed for value, the value of the premises themselves being to that extent reduced. *Abbey v. Wheeler* (1894) 10 Misc. 61.

The English Statute 4 and 5 Anne, chap. 16, under which an action of account lies by one tenant in common against the other as bailiff for receiving more than his share, is in force in North Carolina. *Wagstaff v. Smith* (1845) 39 N. C. 1.

The Public Statutes of Rhode Island, chap. 336, § 1, give an action of account against the one receiving more than his just share as bailiff whenever two or more persons have and hold any estate, interest, or property, whether real or personal, in common, as joint tenants, tenants in common, coparceners, or joint owners.

By the adoption of the South Carolina code of procedure all prior recognized forms of action were abolished and one form of action for the enforcement or protection of a right, or the redress or prevention of a wrong established, but the repeal of the statute giving a particular form of action in any specified case does not prevent recovery upon other legal or equitable principles by an action under the code, and therefore a tenant in common may be required to account for rents and profits of so much of the common property as he may have used in excess of his share. *Scalfe v. Thomson* (1881) 15 S. C. 337, 337.

Section 14 of chapter 100 of the Code of West Virginia of 1863, p. 541, gives an action of account against the personal representatives of any guardian or receiver, and also by one joint tenant or tenant in common, or his personal representatives against the other receiving more than comes to his just share or proportion and against the personal representatives of any such joint tenant or tenant in common.

And section 14 of chapter 143 of the Virginia Code gives a like action of account by one joint

When a flock of doves, owned in common by two, was destroyed by one of the owners, the wrong was considered actionable for a reason based on the distinction between right and remedy. The injured party could maintain trespass because he was no longer a tenant in common. This explanation was satisfactory when his remedies were limited to that use of procedure that had been invented at an earlier day. Writs had not been invented for all cases in which his rights could be infringed by his cotenant without a termination of the cotenancy, but only for some of those cases. If a legal right would be violated by a refusal to account for the use and occupation of a house or mill owned in

common by the occupier and another, the invention of a fiction or a writ, or some other remedial measure, in such a case, was as indispensable as in the case of the same occupier's refusal to contribute to necessary repairs of the same property. The obligation to repair does not arise from contract, or from the court's opinion that the public good requires houses and mills to be kept in a condition fit for use, but from the nature and necessity of the case. Tenancy in common of a farm and live stock naturally and necessarily includes a common duty of reasonably protecting the common interest. The house or barn is not to go to ruin for want of repairs which a prudent owner would

tenant, or tenant in common, or his personal representative against the other as bailiff. *Paxton v. Gamewell* (1887) 82 Va. 706.

So section 14, chapter 145, of the Virginia Code gives a like action of account against the personal representatives of, *inter alia*, any bailiff, and also by one joint tenant or tenant in common or his personal representatives against the other as bailiff, and against the personal representatives of any such joint tenant or tenant in common.

And although it may be best for the interests of all the tenants in common to use the common property jointly by means of a contract of partnership between them, yet the individual owners have a right to decide that question for themselves and are not bound to enter into such contract of partnership, but may possess, use, and enjoy the property severally accounting to their cotenants for so much of the rents and profits as they may receive beyond their just share and proportion. *Graham v. Pierce* (1889) 19 Gratt. 28, 100 Am. Dec. 658.

Every tenant in common has a right to possess, use, and enjoy the common property without being accountable to his cotenant for rents or profits except under the statute, or so much as he may receive beyond his just share or proportion under the provisions of the Virginia Code, chap. 145, § 14, p. 658. *Ibid.*; *Fry v. Payne* (1887) 82 Va. 750.

b. Proceedings in equity.

An action of account cannot be maintained at common law by one tenant in common against another; a resort must be had to equity. *Wiswell v. Wilkins* (1832) 4 Vt. 187.

The extension of the action of account under the English Statute of Anne and the Vermont Statute to tenants in common and the like has never been regarded as interfering with the jurisdiction of the court of chancery in that respect, and under these statutes in matters of account between tenants in common a court of chancery by bill has concurrent jurisdiction with courts of law by action of account. *Leach v. Beattie* (1860) 33 Vt. 145.

Equity jurisdiction extends to matters of account where discovery is sought and for the adjustment and apportionment of rents and profits between tenants in common. *Berry v. Whidden* (1883) 62 N. H. 478; Gen. Laws, chap. 209, § 1.

A court of equity is the proper forum for the adjudication of accounts in which the parties are jointly interested. *Rush v. Rush* (1898) 58 Ill. App. 454.

Therefore a bill in equity may be instituted where a cotenant in common receives more than his share. *Denys v. Shuckburgh* (1840) 4 Younge & C. Exch. 42, 5 Jur. 21; *Terrell v. Murray* (1830) 2 Yerg. 384; *Crow v. Mark* (1869) 58 Ill. 322; *Sherman v. Ballou* (1828) 8 Cow. 306; *Wheeler v. Horne* (1740) Willes, Rep. 208.

And is the more general practice. *Hamilton v. Conline* (1868) 28 Md. 640, 92 Am. Dec. 724; *Gibbs v. 28 L. R. A.*

Clagett (1829) 3 Gill & J. 17; *Green v. Johnson* (1831) 3 Gill & J. 304.

As one partner or tenant in common cannot in general sue his partner or cotenant in an action in form *ex contractu*, but must proceed by action of account or by bill in equity. *Terrell v. Murray*, *supra*.

So one of several coheirs must account in equity for the just proportion of the rental value of the land no matter whether his possession is or is not with their consent. *Clayton v. McCay* (1891) 143 Pa. 225.

And a suit in equity may be had against a cotenant who has occupied the whole of the common property, for an account of rents and profits. *Dodson v. Hays* (1887) 21 W. Va. 577, 601.

The action of account is equitable in its nature even though by statute. *Wright v. Wright* (1879) 59 How. Pr. 178.

But in order to sustain such suit the plaintiff must show that the question is too complicated to be properly and conveniently adjusted in an action of contract. *Blood v. Blood* (1872) 110 Mass. 545.

Such a case existing, however, equity will assume jurisdiction where one is in exclusive possession. *Sanders v. Robertson* (1876) 57 Ala. 455.

The repeal of the English Statute of 4 and 5 Anne by the statutes of South Carolina simply destroyed the remedy given by it, an action of account, but did not affect the remedy administered in equity by virtue of its own inherent powers which were not derived from statute. *Scaife v. Thomson* (1881) 15 S. C. 337, 337. See this statute, *ante*, p. 841.

Where one received rent belonging to three infant tenants in common lawfully, as agent for the guardian of two, but without authority as to the other infant, the only remedy of the latter was by action of account or bill in equity. *Sherman v. Ballou* (1828) 8 Cow. 304.

In *Field v. Craig* (1864) 8 Allen, 357, a bill in equity was allowed by the administrator of the estate of one tenant in common against the survivor for an account of the transactions under an agreement entered into between the tenants by which the property was used in the business upon an understanding as to compensation of the one superintending the establishment.

Upon a bill filed, however, by one coheir against the widow and other children of the deceased praying an account for the rents of the parts occupied by them, it was held that plaintiff had no claim, the occupation being with his consent, and the portion occupied not more than a ratable part of the whole. *Roberts v. Roberts* (1855) 55 N. C. 129.

So in the case of a joint tenant or tenant in common deprived of his just rights to the possession, use, or fruits of the common property equity will give relief by decreeing a partition of the property, or a sale thereof where partition is impracticable, and a division of the proceeds. *Tinney v. Stebbins* (1858) 28 Barb. 220.

make; the cattle are not to be starved; the land is not to be sold for taxes (*Eads v. Retherford*, 114 Ind. 273); and one of the owners is not to gain by throwing upon his cotenant all the proper and inevitable expenses of ownership. In the absence of contract, express or tacit, their mutual rights and duties are comprehended in the relation of trust and confidence which is inherent in the undivided character of their interests. The rights of these parties, growing out of the situation of the property and the nature of their estate, are so completely equitable that the defendant's conveyance of a divided half of the farm to a third person might operate as a partition, if it did not in-

juriously affect the plaintiff's right of division, or any of the other rights of which his title is composed. *Holbrook v. Bowman*, 63 N. H. 313, 321. If they were owners in common of a bushel of corn, a just partition could be made by either, without a suit against the other's objection. *Haley v. Colcord*, 59 N. H. 7, 8, 47 Am. Rep. 176. If the defendant had occupied the east half of the farm, and given the plaintiff an opportunity to occupy or let the west half, and if such a division of the use would have been equal in every respect, but the plaintiff had chosen to leave the west half unoccupied, there would have been a question which the case does not present. *Hayden v. Merrill*, 44

And an accounting in partition will be decreed where there has been exclusive possession. *Bridgford v. Barbour* (1832) 80 Ky. 529; *Nell v. Shackelford* (1876) 45 Tex. 119; *Jones v. Massey* (1880) 14 S. C. 232.

Equity having power to enforce the trust between tenants in common at the same time making partition and taking an account of the rents and improvements or moneys paid for the common benefit. *Rozier v. Griffith* (1860) 31 Mo. 171.

The right to an account being an incident to a bill for partition in equity. *Tyner v. Fenner* (1880) 4 Lea, 469.

So a decree for an account is a necessary incident to the exercise of equity jurisdiction where equitable compensation is involved. *Rozier v. Griffith*, *supra*.

In such a bill for partition it is admissible to pray an account of the rents against cotenants who have been in possession of the common property. *Medford v. Fraizer* (1880) 58 Miss. 241.

It must be shown that the defendant has received a greater share from the estate than that to which he is entitled by the sale of that which composes the property, whether it be turf, brick, clay or plaster, or other such material. *Curtis v. Coleman* (1876) 23 Grant, Ch. (U. C.) 561.

Then equity will take jurisdiction and decree complete relief by requiring an account for such rents and profits. *Scalfe v. Thompson* (1881) 15 S. C. 337, 337.

And will not in analogy to proceedings at law for a partition confine its relief merely to partition. *Rozier v. Griffith* (1860) 31 Mo. 171.

There being no obstacle to its proceeding to complete justice by compelling such account. *Bridgford v. Barbour*, *supra*.

The right to recover has been considered an exception to the general rule and the account as a collateral incident to a claim for partition. *Goode now v. Ewer* (1860) 16 Cal. 461, 76 Am. Dec. 540.

The rents and profits claimed being due from the defendant, either as tenant of the plaintiff's interest, or were received by him when they belonged to both parties, or were the proceeds of their joint labor or expenditures. *Ibid*.

The general rule is, that the equitable claim of one tenant in common against his cotenant for rent and profits received in excess of his share is superior only to subsequent mortgages or liens, that prior mortgages or incumbrancers are not necessary or proper parties to partition proceedings between cotenants, and that the rights of such prior mortgages are not to be affected by such partition proceedings. *McArthur v. Scott* (1887) 31 Fed. Rep. 621.

There is no reason why there should be a charge or incumbrance on the estate of one joint owner either before or after partition to satisfy a claim of a cotenant for rents and profits received; the right of partition existing and being enforced. 28 L. R. A.

able, the chancellor has ample power to protect the rights of each joint owner by appointing a receiver or by other provisional remedy. *Burch v. Burch* (1885) 33 Ky. 622.

For there can be no ideal partition by which one in possession can cultivate his supposed part of the whole so as to save himself from accounting for the just proportion of what he actually raises to each of the other tenants in common. *Wickoff v. Wickoff* (1889) (N. J.) 18 Atl. Rep. 74.

The administrator of a tenant, who during his lifetime has received the rents and profits of the estate, is a proper party to such an action. *Scott v. Guernsey* (1866) 60 Barb. 163, affirmed (1871) 48 N. Y. 106.

A bill filed by one tenant in common for partition is not objectionable, upon the ground that he does not offer to pay for the use and occupation of the part of the land he has cultivated, where his entry and possession are not hostile or in exclusion of his cotenant, the latter having an equal right, if he chose to exercise it, to enter and occupy. *Wilkinson v. Stuart* (1888) 74 Ala. 198.

But the rents and profits received by one joint owner previous to the partition of the land do not constitute anything further than a personal charge against one. *Burch v. Burch*, *supra*.

So rents and profits of the premises sought to be partitioned, accruing while the land has been held adversely to the claim of the complainant, even if such rents and profits have been received by one who was a joint owner of the premises with the complainant, are not recoverable in equity upon a bill for partition. *Burhans v. Burhans* (1847) 2 Barb. Ch. 303, 5 L. ed. 900.

Upon a mortgage executed by a tenant in common before the institution of proceedings in partition, the mortgagee's lien will be superior to the claim of a tenant to rents and profits. *McArthur v. Scott* (1887) 31 Fed. Rep. 621.

The fact that the plaintiff has been in sole possession of the property, collecting the rents and profits, quarrying and selling the stone gathered therefrom, may be set up by a defendant in answer to partition proceedings, and he will be entitled to an account thereof with an allowance therefor. *McCabe v. McCabe* (1879) 18 Hun. 153.

In *New York & T. Land Co. v. Hyland* (1894) (Tex.) 23 S. W. Rep. 206, plaintiffs subsequently ratified the sale by defendant, as a tenant in common, and sought to charge him in partition proceedings of the remaining land, with the amount received on such sale without joining the purchaser as party. The court held them entitled to recover without making a purchaser a party of the action, as having ratified the sale it was binding upon him.

Where in the arranging of equities between the parties on the subject of rent, it was assumed that, until the filing of the bill, the defendant occupied, improved, and cultivated the whole farm as his

Vt. 836, 847, 848, 8 Am. Rep. 873. "The plaintiff cannot make his own omission to occupy the joint estate a ground of action against his cotenant." *Badger v. Holmes*, 6 Gray, 118, 190. The plaintiff's right to the balance found due him does not arise from his omission to occupy half of the land, but from the defendant's use and occupation of more than half. The defendant is bound to account, but not inequitably. The burden is on the plaintiff to show that, under all the circumstances of the case, upon a just accounting by him and the defendant, there is a balance due him from the defendant. Their community of title is an aggregate of many equities of which the right to an account is

one. No injustice is done in the allowance of interest (*Thompson v. Boston & M. Railroad*, 58 N. H. 524) or costs. *Bartlett v. Hodgdon*, 44 N. H. 472; *Smith v. Boynton*, Id. 529; *Whitcher v. Benton*, 50 N. H. 25; *Olcott v. Thompson*, 59 N. H. 154, 157, 47 Am. Rep. 184. "So intimate is the relation of cotenants that one cannot acquire by purchase an adverse and superior title, and set it up in opposition to his cotenants, unless they refuse to contribute their share of the expense of procuring the paramount title. The title is held to be acquired by one for the benefit of all." *Tiedeman*, Real. Prop. § 253; *Cooley*, Taxn. 467, 501, 502; *Barker v. Jones*, 62 N. H. 497. The rule is "based on a com-

mon under the belief that all he had was the original purchase money and rent for a portion which complainant had cultivated prior to a given date, the agreement being by parol, the complainant having availed himself of his right to disavow the same and insisted upon his portion of the land, the court held that as to the settlement of the question of rent he was to be held as having waived any claim therefor, except as to the portion specified, as to which it was admitted that the rents had been accounted for; partition was therefore decreed without accounting for rents. *Reeves v. Reeves* (1872) 11 Hask. 600.

And in *Varnum v. Leek* (1885) 65 Iowa, 751, the court intimated that there might be cases in which a tenant in common could be entitled to the appointment of a receiver where the occupying tenant held under such circumstances as would render him liable to an account, especially where it was shown that he was irresponsible.

In *Hodges v. Pingree* (1887) 10 Gray, 14, suit was brought by one tenant in common against his cotenant to obtain partition and to have an account of the profits received by defendant during his occupation of the premises. The court held that with regard to the partition the remedy at law was complete and adequate, and that the bill which was filed prior to the passing of the Massachusetts Statute of 1854, chapter 74, would not lie for partition and account, but might be maintained for the latter upon striking out the prayer for partition.

Where the property was sold under a private tax sale, the son-in-law of the defendant purchasing the same under the direction and guidance of the defendant, the rents and profits being subsequently received by the son-in-law by the defendant's directions, in partition proceedings the defendant was charged with the rental value of the premises retained and occupied by him, the court stating that the defendant could not by such an understanding as existed in that case overthrow the title or impair the rights of his cotenant, and thereby escape liability to account for the rents and profits of the premises. *Miller v. Mills* (1876) 4 Neb. 362.

Where upon a bill in partition filed, the question was whether the defendant should be charged for rent of the property occupied by her there being no ouster or obstruction of the other's interest, or claim made by such defendant in respect to repairs or improvements, the court declined to allow or charge a rent for mere occupation of the premises. *Schneider v. Taylor* (1866) 16 Lea, 304.

c. In action of assumpsit.

There is some little conflict of opinion as to whether or not an action of assumpsit is the proper remedy between cotenants.

Under the English statute the general rule is that assumpsit will lie to recover the due proportion of moneys in the hands of defendant received

from the income of the common estate. *Richardson v. Richardson* (1881) 72 Me. 408.

The rule as above stated is not, however, of universal application; the action being in assumpsit and not trespass or writ of entry, the disseisor of land cannot maintain assumpsit for rents against the disseisor. *Ibid.*

In some jurisdictions the courts hold that an action of assumpsit will lie by one cotenant in common against another to recover his share of the rents and profits, while in others the right to recover in such an action is denied.

Such an action has been allowed in the following cases:

In *Prince v. Pickett* (1832) 21 Ala. 741, the plaintiffs' action as tenants in common in assumpsit on the common counts for money had and received, for the recovery of rents, was allowed.

For if the subject-matter of the tenancy in common be reduced to money by one cotenant, the other may sue in assumpsit and recover his portion. *Cowles v. Garrett* (1857) 30 Ala. 341.

Again, in *Fowler v. Fowler* (1832) 50 Conn. 234, where a tenant in common sought to recover his share of expenses incurred in necessary repairs of property, the court held that an action would lie by statute against one cotenant who has received the rents and profits, and that previous to the practice act he could recover in assumpsit, it being found that the repairs were reasonable and necessary for the benefit of the estate.

So in the case of *Richmond v. Connell* (1837) 25 Conn. 403, which originated in the contract specified in the case of *Connell v. Richmond*, Id. 401, and was brought to recover certain moneys received for crops sold, the suit being based upon the provisions of the contract, the court held that by the terms of the agreement the defendant agreeing to account, the fact that they were tenants in common of the crop until sold did not affect the plaintiff's right to sue for money had and received by the defendant for such portions of the crop as were sold, the defendant as soon as the crops were sold holding to the use of the plaintiff one half of all the money received which was recoverable in assumpsit at common law under the Connecticut practice act, in an ordinary suit for the recovery of money.

In *Gardiner Mfg. Co. v. Heald* (1826) 5 Me. 361, 17 Am. Dec. 248, a tenant in common of personal property, such as timber, was held entitled to maintain an action in assumpsit for his proportion against the other tenant selling the common property and receiving all the money.

It has been held to lie where one tenant in common has received from others rents and profits of the common property. *Buck v. Spofford* (1849) 21 Me. 34; *Brigham v. Eveleth* (1812) 9 Mass. 538; *Munroe v. Luke* (1840) 1 Met. 459.

But before a tenant in common can be made liable for rents and profits received by him under the

munity of interest in a common title, which created such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the property so situated." *Rothrell v. Dewees*, 67 U. S. 2 Black, 613, 619, 17 L. ed. 309, 311. "Community of interest produces a community of duty." *Van Horne v. Fonda*, 5 Johns. Ch. 388, 407, 1 L. ed. 1118, 1124. "A tenant in common holds a several interest in the lands, which is so far identical with his cotenants' interest that, in all matters affecting the estate, he will be regarded as acting for them as well as himself." *Weare v. Van Meter*, 42 Iowa, 128, 129, 20 Am. Rep. 616.

Maine statute, it must be proved that he has actually received the same, the burden being upon the plaintiff to show that he has, and that he has in his hands more than his just share and proportion, otherwise no recovery can be had. *Gowen v. Shaw* (1855) 40 Me. 58.

So it must appear, not merely that the defendant has received more than his share after deducting all reasonable charges but that the balance is due to the plaintiff and not to the other cotenants. *Moses v. Ross* (1856) 41 Me. 390, 66 Am. Dec. 250.

In the above case the plaintiff failing to make out a sufficient case at common law sought to recover under and by virtue of section 1 of the Maine Statute of August 8, 1848, chapter 61, but the declaration in that case containing no allegation that the defendant had taken the common property "without the consent of his cotenant," and such fact being wholly unsubstantiated by the facts as agreed upon, the court held the case destitute of proof that the joint estate had yielded any rents, profits, or income and ordered a nonsuit. *Ibid.*

And it has been further held that such action may be maintained against him after demand, under section 13 of chapter 95 of the Revised Statutes of Maine. *Dyer v. Wilbur* (1880) 48 Me. 287.

So the remedy given by the Maine statute will not be withheld because the cotenant has not "taken and received the rents, profits, or income" of all the joint estate, for the reason that such a proceeding would be to sanction the lesser and punish the greater wrong, and to deny a remedy to the injured party in numerous cases. *Cutler v. Currier* (1866) 54 Me. 81.

The Maine Statute, chap. 61 of the Public Laws of 1848, Revised Statutes, chap. 95, § 16, giving further remedies to tenants in common, provides for a special action in assumpsit whenever any joint tenant or tenant in common shall take and receive the whole of the rents, profits, or income of the estate, or more than his share of the same, without the consent of his cotenant, and shall refuse within a reasonable time after demand to deliver and pay to such cotenant his share of such rents, profits, or income or of the joint proceeds of the same. Re-enacted in Revised Code Rev. Stat. chap. 95, § 16; *Cutler v. Currier* (1866) 54 Me. 81.

In *Cutler v. Currier*, *supra*, the above statute was applied to a case of receipt of rents by a subtenant.

The action may also be maintained independently of the Maine Revised Statutes, chap. 95, § 16, for a share of the money in the hands of a cotenant, the income of the common estate, unless the plaintiff has been dissatisfied by the defendant at the time the rents were received by him. *Richardson v. Richardson* (1881) 72 Me. 403.

The revised statutes not enlarging the remedy in this respect. *Ibid.*

The equitable action when resorted to at common law

Had these views been entertained in former times as distinctly and broadly as they are now, it is not apparent how an occupying tenant in common, regarded as acting for his cotenants as well as for himself, could have been exempted from an equitable liability for his fiduciary use of their property. If, in any view of rights or remedies, he is not chargeable as bailiff in an action of account, there is no more difficulty in inventing a writ, or the fiction of an implied promise in assumpsit, than in the introduction of a new form of action for a remainderman in *Walker v. Walker*, 68 N. H. 821, 56 Am. Rep. 514. If the relation of trust, as a ground of obligation, were held to render an action at law

mon law (the outgrowth of the Statute of Anne and independent of Maine Rev. Stat., chap. 95, § 20) by one tenant in common against the other, has, however, been restricted to cases where the money has been actually received and the liability to account has resulted in a duty to pay money or where the defendant holds the plaintiff's share as bailiff, or the occupation has been by consent. *Hudson v. Coe* (1897) 79 Me. 53.

In *Richardson v. Richardson*, *supra*, the court in passing upon the Massachusetts case of *Miller v. Miller* (1829) 7 Pick. 133, 19 Am. Dec. 264, in which the court seemed to regard the right of action as limited to cases in which the title of the plaintiff was an admitted fact, stating that a mere dispute about the title, provided the plaintiff proved the estate he claimed and seisin thereof at the date when the defendant took the income, more than his share of which he retained in money, could not have the effect to defeat the action, the plaintiff being in fact seized of the estate in common, when the defendant received in money the whole income thereof, and inclined to the opinion that the later cases in Massachusetts and that state clearly indicated that upon proof of these facts the plaintiff must have a remedy under the English Statute of Anne.

In the above case of *Hudson v. Coe*, plaintiff recovered his share collected by the defendant as part owner and retained in his hands, in general *indebitatus assumpsit* for money had and received, based on the Statute 4 and 5 Anne, chap. 16, and not under chapter 95, section 20, of the Revised Statutes of Maine relating to actions between tenants in common, the court considering it as an equitable form of action to recover money which the defendant in equity and good conscience ought not to retain.

In *Jones v. Harraden* (1784) 9 Mass. 540, note, a tenant in common was allowed to recover in *indebitatus assumpsit* for money had and received, being the amount of the moiety of the proceeds of the sale of a vessel and cargo after their recapture.

So one tenant in common has been allowed to recover in assumpsit against his cotenant a moiety of the profits received by him from the use of a machine held by them in common. *Brigham v. Eveleth* (1813) 9 Mass. 538.

And although it is generally true that a tenant in common cannot sue his cotenant in an action in form *ex contractu* for a share of the common property, or profits received, yet if the joint interest is determined, all accounts and liabilities being settled and discharged and a balance remain due from one cotenant to the other, it may be recovered in assumpsit and no express promise to pay is necessary. *Fanning v. Chadwick* (1826) 3 Pick. 420, 15 Am. Dec. 233, in which the doctrine was said to be well settled.

A tenant in common is liable in an action for money had and received for the price of growing

inappropriate or inadequate, no objection could be made to the jurisdiction of equity.

The only question of any substantial importance in the present case is whether an obligation of each owner to account was a part of the community of duty produced by their community of interest. It was not the defendant's duty to take or hold possession of the farm, or any part of it. But its possession was one of the matters affecting the common interest, in which, when he acted, it was his duty to act for the plaintiff as well as for himself. If he had evicted the plaintiff, and held adverse possession, he would have been liable in trespass for his use of the plaintiff's property. As there was no evic-

tion, and his possession was the plaintiff's possession,—in other words, as in living on the farm, cutting wood, and taking the crops, he acted for the plaintiff as well as for himself,—he would not have acquired the plaintiff's title by twenty years' use and occupation. *Campbell v. Campbell*, 13 N. H. 483. For the same reason he was bound to account. "Tenants in common are persons who hold by unity of possession. . . . The possession of one . . . is the possession of the other, and the taking of the whole profits by one does not amount to an ouster of his companions. . . . One . . . cannot bring an action of trespass against another for entry upon and enjoyment of the common

timber sold by him, grown on land which they hold as tenants in common. *Miller v. Miller* (1828) 7 Pick. 133, 19 Am. Dec. 264.

One tenant in common taking money for the common property, whether by design or mistake, being answerable in assumpsit to his cotenant. *Miller v. Miller* (1829) 9 Pick. 84.

So if he receive the whole or the greater share of the rents. *Munroe v. Luke* (1840) 1 Met. 459, 464; *Badger v. Holmes* (1856) 6 Gray, 118.

It lies to recover a share of rents received before and during partition proceedings, by a cotenant under a lease of the whole estate. *Munroe v. Luke*, *supra*.

Yet it has been held that where the parties are tenants in common, *assumpsit* only lies for use and occupation upon an express promise, a mere implied promise not being enough. *Wilbur v. Wilbur* (1847) 13 Met. 404; *Peck v. Carpenter* (1856) 7 Gray, 233, 66 Am. Dec. 477; *Gowen v. Shaw* (1855) 40 Me. 58; *Webster v. Calef* (1867) 47 N. H. 294; *Mussey v. Holt* (1851) 24 N. H. 248, 55 Am. Dec. 234.

The general rule of common law not being the law in Massachusetts. *Shepard v. Richards* (1854) 3 Gray, 424, 61 Am. Dec. 473.

And prior to the abolition of the action of account by section 43 of chapter 118 of the Massachusetts Revised Statutes, when the courts had no jurisdiction in equity between tenants in common, *assumpsit* lay by a tenant in common to recover from his cotenant any surplus over and above his share of the profits. *Id.*

The remedy in equity given by the statute does not affect the application of the rule to cases where the remedy at law is plain and adequate. *Id.*

So he has been held liable under an implied *assumpsit*. *Blood v. Blood* (1872) 110 Mass. 545.

Yet in order to maintain the action in Massachusetts, the plaintiff must show not only that the defendant has taken more than his proportion of a single article raised on the estate, but that he has received more than his aliquot part of the proceeds of all the products of the common property after deducting reasonable and proper charges, and there must be a balance due at the commencement of the plaintiff's action in the hands of the defendants as the result of a final settlement of the account between the parties relating to the estate. *Shepard v. Richards*, *supra*; *Peck v. Carpenter* (1856) 7 Gray, 233, 66 Am. Dec. 477.

The Massachusetts doctrine allowing the action in *assumpsit* is further supported by the case of *Brown v. Wellington* (1871) 106 Mass. 318, 3 Am. Rep. 380.

In *Fiquet v. Allison* (1864) 12 Mich. 329, 36 Am. Dec. 54, an action in *assumpsit* was allowed against a cotenant in common of crops put in upon shares to recover the proportion of the moneys realized by the other cotenant on a sale of the crops, as in such a case the plaintiff may waive the tort and sue in *assumpsit*.

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Such an action was allowed for the value of a share of a crop of wheat upon an agreement entered into by a landlord and tenant after the expiration of the lease, the parties being tenants in common with respect thereto. *McLaughlin v. Salley* (1881) 46 Mich. 219.

So in *Miner v. Lorman* (1898) 66 Mich. 530, plaintiff recovered in *assumpsit* averring specially that the parties were tenants in common and leased the premises, the defendant receiving rent in the firm name, the plaintiff as owner of one undivided half being entitled to half which the defendant refused to pay but applied in payment of an indebtedness to the lessees without express authority.

The law is well settled in Michigan that a tenant in common may maintain *assumpsit* against his cotenant for his share of the crops, they being divisible and the share of each easily ascertained; the refusal to recognize the right of a cotenant amounting to a conversion, the case not being like that of a tenant in common of a chattel where one has as good a right to possession as the other. *Loomis v. O'Neal* (1899) 73 Mich. 582.

So although an action of trover will not lie by one tenant in common against another to recover crops or a portion of them carried away by the other cotenant, yet under the New Hampshire statute *assumpsit* may be maintained. *Ballou v. Hale* (1867) 47 N. H. 347, 98 Am. Dec. 438.

In *Porter v. Eaton* (1891) (N. H.) 29 Atl. Rep. 1027, *assumpsit* was brought for the use and occupation of property owned in common. Plaintiff, having voluntarily refrained from occupying, upon filing a bill in equity as an amendment to his declaration was held entitled to judgment for rent.

The New Hampshire Statute, chap. 180, § 6, of the Revised Statutes, provides that if any cotenant of any real estate shall hold the exclusive possession and income thereof against the will and without the consent of his cotenant the cotenant so excluded may in an action of *assumpsit* recover of the person holding such possession the full amount of all damages he may have sustained thereby.

Such an action lies in the case of tenants in common selling and conveying land, one only receiving the purchase money, the action being against him for money had and received. *Coles v. Coles* (1818) 15 Johns. 159, 8 Am. Dec. 231; *Wright v. Wright* (1879) 59 How. Pr. 176; *Seldon v. Hickcock* (1804) 2 Cal. Cas. 167.

Also against a cotenant who has received the whole amount of damages assessed for the land owned in common taken for the construction of canals. *Brinckerhoff v. Wemple* (1823) 1 Wend. 470.

And where a receipt for money thus received was produced and the identity of the property conclusively shown, it was held unnecessary to produce the books of the appraisers showing a description of the premises. *Id.*

So it lies to recover a share of a gross sum received for the use or hire of property held by them

property." 4 Kent, Com. 367, 370. If mere entry and possession by the plaintiff or the defendant had been a trespass, their farm could not have been rightfully cultivated without an agreement. No agreement was necessary. The defendant's right to use his undivided share necessarily comprised a right to use property that belonged to the plaintiff. He could not enter without going upon the land of both. He could not cut and consume wood or hay without converting to his own use something that belonged in part to the plaintiff. His right to use what was not his, and his obligation to account, were incidents of their community of interest. So far as he exercised the plaintiff's right of use and

conversion, he acted for the plaintiff in matters affecting the undivided estate. His appropriation of the plaintiff's property to his own use was not wrongful; and, in the absence of contract, gift, and release, it could not be rightful unless he acted in a fiduciary capacity that involved an equitable liability to account for his exercise of the plaintiff's right. In using the plaintiff's property without such a liability, and without a power derived from contract, gift, or release, he would not act for the plaintiff, nor in furtherance of the plaintiff's interest, but against him, and to his prejudice. It was in reference to the duty of contribution resulting from the doctrine of equality applied

in common. *Cochran v. Carrington* (1841) 25 Wend. 409.

And it is not necessary to resort to an action of account or to a bill in equity in such a case. *Ibid.*

Such last-named proceedings being looked upon as dilatory and expensive, and though appropriate and necessary in complicated accounts between the parties, will not be resorted to where the item in dispute can be readily adjusted in assumpsit. *Ibid.*

Yet the plaintiff must prove the value of the products received there being no presumption that it is equal to the whole annual value of the premises held in common. *Joelyn v. Joelyn* (1876) 9 Hun, 266. *Sherman v. Ballou* (1828) 8 Cow. 306; *Woolever v. Knapp* (1854) 18 Barb. 265, followed.

The action under the New York statute being confined to the net amount actually received, the cotenant being liable only for the just proportions of what he receives, not for what he takes. *Joelyn v. Joelyn*, *supra*.

But the change of the action from a claim for use and occupation to one for money had and received is not authorized by section 173 of the New York Code which permits the pleadings to be amended. *Ibid.*

The action will not bar his remedy for an equitable adjustment and lien. *Wright v. Wright* (1879) 59 How. Pr. 173; *Scott v. Guernsey* (1871) 48 N. Y. 124.

Such an action lies by a guardian of an infant tenant in common for the latter's share against the cotenant of such infant receiving rents of the whole property. *Coakley v. Mahar* (1856) 36 Hun, 157.

It lies by virtue of section 1666 of the New York Code of Civil Procedure, and the construction put upon the English Statute of Anne has been adopted by the courts in construing the section of the New York statute. *Muldowney v. Morris & E. R. Co.* (1886) 42 Hun, 444.

The same rule would govern a case where the tenant in common removes from the premises held in common a portion thereof, receiving a valuable consideration therefor. *Abbey v. Wheeler* (1894) 10 Misc. 61.

They have been held liable in assumpsit in case of ouster. *Irvine v. Hanlin* (1823) 10 Serg. & R. 219.

Also for the share of rent received under a lease of the premises to a third party, where the whole rent has been received by the defendant and the latter has promised to pay. *Gills v. McKinney* (1843) 6 Watts & S. 73, wherein the rent was payable in lumber and converted by the defendant into cash, the court stating that the circumstances of its being payable in lumber made no difference after the defendant had converted it into money.

It lies where a receipt is shown, there being an implied promise to pay the cotenant's share. *Borrell v. Borrell* (1859) 38 Pa. 492.

Upon the question whether or not an action 28 L. R. A.

would lie in assumpsit by one tenant in common against his cotenant to recover the value of the crops raised by the latter on the common property, the court, in *Luck v. Luck* (1886) 113 Pa. 264, as constituted upon the hearing, were evenly divided, and the point was therefore not determined, the seventh justice being absent.

Yet as between the tenants themselves in order that such action may be sustained there must be an express contract to pay rent. *Kline v. Jacobs* (1871) 68 Pa. 57.

The right to recover in such action has been denied in the following cases:

The purchaser from the administrator of a tenant in common taking possession of the whole premises, under a conveyance purporting to convey the whole estate but in reality conveying but the deceased's undivided share, who claims exclusive and sole possession and appropriates the rents and profits to his own use, holds under color of title and cannot be made liable in assumpsit for use and occupation by the other tenants in common. *Felder v. Childs* (1888) 73 Ala. 567.

Where neither the first nor any of his subsequent grantees ever had actual possession of any portion of the land in question nor paid any taxes or assessments, and the subsequent grantees brought action for a proportion of the money received by defendant, it was held that for the purpose of order No. 800, which required action upon the part of each and every person having or claiming any interest in any portion of the land to be had by himself or some one for and on his behalf, the relation of tenants in common did not exist, although that relationship might have existed in the ownership of the lands, but in seeking the compensation provided for in the order each cotenant was to act for himself, the defendant not taking upon himself to act for plaintiff, the relationship of tenants in common not casting upon him that duty there being no agreement, express or implied, or any obligation showing that the moneys received by him were received in whole or in part on account of plaintiff's interest and therefore an action for money had and received would not lie. *Howard v. Donahue* (1882) 60 Cal. 264.

In *Connell v. Richmond* (1837) 55 Conn. 401, the case depended upon the construction of an agreement entered into between the parties which constituted them tenants in common and under which part was let to defendant to farm upon shares the lessee agreeing not to sell any of the produce from the farm but to manage it for the best interest of both parties, and to pay to the lessor one half of the amount from all sales of the farm, pledging certain articles as security for the performance of the agreement. The court held that under such an agreement the parties were tenants in common and that the defendant was not liable for the property so taken and appropriated, as the provision in the lease imposed no obligation

to such relations as those existing between tenants in common that *Lord Coke* declared the common law to be the perfection of reason. *Harbert's Case*, 3 *Coke*, 11, 18, 14; *Campbell v. Mesier*, 4 *Johns. Ch.* 334, 338, 1 *L. ed.* 858, 860, 8 *Am. Dec.* 570. The rule of equality compels the plaintiff to bear his share of necessary expenses incurred by the defendant in making repairs paying taxes, and removing incumbrances. In the adjustment of such claims, the plaintiff would be credited with the defendant's use of the plaintiff's property preserved by those expenses; and the defendant's obligation to account cannot depend on his having claims against the plaintiff. The theory that he

acted for the plaintiff as for himself in such matters affecting the common estate as repairs, taxes, and incumbrances, and so far acted for the plaintiff in occupying and using the same estate as to make his possession of the plaintiff's undivided half the plaintiff's possession, and avoid liability in an action of trespass, but so far acted against the plaintiff in the same occupation and use as to avoid accountability in every other form of action, is inconsistent with a system of law founded on reason. The plaintiff's claim not being defeated, as it formerly would have been, by a lack of remedy, cannot be disallowed without denying that one half of the farm was his property, and holding that the defendant

to make such sales, except so far as the party was obliged to act for the best interest of both.

One tenant in common of realty cannot maintain an action of assumpsit against his cotenant for his proportion of the rents, his only remedy being by action of account under the statute or by bill in chancery. *Crow v. Mark* (1869) 52 *Ill.* 322; *Wheeler v. Horne* (1740) *Willes, Rep.* 208.

Or against the guardian of his cotenant, or the agent of such guardian, for a portion of the rent received by the other, the only remedy is by way of action of account or bill in equity. *Sherman v. Ballou* (1828) 8 *Cow*, 804. But see the more recent New York cases *supra*, pages 846, 847.

So in the case of a disseisin of one cotenant by another during the period of disseisin assumpsit is not the proper remedy either at common law or under the statute. *Richardson v. Richardson* (1881) 72 *Me.* 403.

In *Caswell v. Districh* (1836) 15 *Wend.* 379, plaintiff sued as executrix in assumpsit for the rent of premises, under an agreement by which the defendant and the intestate had agreed to sow the lands in question and to yield a proportion of the crop to the landlord; the court held them tenants in common with respect to the crop, and the action therefore failed.

Where assumpsit was brought for use and occupation and money had and received, plaintiff and defendant being cotenants in common the defendant having possession and receiving the whole profits, the action was denied, there being no express promise to pay, the English Statute of Anne not being in force in North Carolina; the law not implying a promise as between cotenants in such cases. *Chambers v. Chambers* (1824) 10 *N. C.* 232, 14 *Am. Dec.* 585. But see *Wagstaff v. Smith* (1845) 39 *N. C.* 1, head *V. subdiv. a*.

The action will not lie by one tenant in common against another to recover back money paid under a mistake that it belongs solely to such tenant the proper remedy being account. *Irvine v. Hanlin* (1823) 10 *Serg. & R.* 219.

The action will not in general lie in form *ex contractu*. *Terrell v. Murray* (1830) 2 *Yerg.* 384. See also *McKay v. Mumford* (1833) 10 *Wend.* 361.

VI. Liability to account for rents received.

Notwithstanding the provisions of the Indiana Revised Statutes of 1881, § 288, declaring that a tenant in common may maintain an action against his cotenant for receiving more than his share or just proportion of the rents and profits, the settled rule is that a tenant can only be compelled to account in case *inter alia*, he has actually received rents from a third person. *Carver v. Fennimore* (1888) 116 *Ind.* 226.

In *Osborn v. Osborn* (1884) 62 *Tex.* 495, the question whether one tenant in common who uses the entire property owned in common, without appli-

cation from the other tenants in common to be let into the common enjoyment of the property, or whether some act indicating an intention to use exclusively, might be held liable for the value of the use over and above such tenant's proportionate share of the property, was said to be a subject upon which the authorities were in conflict, but that where the record showed that the common property had been rented to third parties from whom such cotenant had received rents there was no doubt as to his liability to the other cotenants for their *pro rata* share of the rents received.

In the absence of ouster he is only liable for the rents and profits which he receives from the lands beyond his own share. *Jones v. Massey* (1850) 14 *S. C.* 232; *Pearson v. Carlton* (1832) 18 *S. C.* 47.

For rents actually received from third parties cotenants are liable to account. *Terrell v. Cunningham* (1881) 70 *Ala.* 100; *Newbold v. Smart* (1850) 67 *Ala.* 325; *Gayle v. Johnston* (1868) 60 *Ala.* 305; *Pope v. Harkins* (1849) 16 *Ala.* 324; *Howard v. Throckmorton* (1881) 59 *Cal.* 79; *Barnum v. Landon* (1856) 25 *Conn.* 182; *Huff v. McDonald* (1857) 23 *Ga.* 161, 68 *Am. Dec.* 497; *Crow v. Mark* (1869) 52 *Ill.* 322; *Scounce v. Scounce* (1884) 15 *Ill.* App. 169; *Humphries v. Davis* (1885) 100 *Ind.* 309; *Davis v. Hutton* (1891) 127 *Ind.* 481, 485; *Schissel v. Diokson* (1891) 129 *Ind.* 139, 152; *Reynolds v. Wilmet* (1877) 45 *Iowa*, 693; *James v. Browa* (1878) 48 *Iowa*, 583; *Belknap v. Belknap* (1889) 77 *Iowa*, 71; *Scantlin v. Allison* (1884) 32 *Kan.* 576; *Bridgford v. Barbour* (1882) 90 *Ky.* 529; *Buck v. Spofford* (1849) 81 *Me.* 34; *Gowen v. Shaw* (1855) 40 *Me.* 56; *Moses v. Ross* (1856) 41 *Me.* 360, 66 *Am. Dec.* 260; *Shepard v. Richards* (1854) 2 *Gray*, 424, 61 *Am. Dec.* 473; *Sargent v. Parsons* (1815) 12 *Mass.* 149; *Re Final Settlement of Tyler v. Cartwright* (1890) 40 *Mo. App.* 378; *Izard v. Bodine* (1857) 11 *N. J. Eq.* 403, 69 *Am. Dec.* 595; *Davidson v. Thompson* (1871) 23 *N. J. Eq.* 83; *Abbey v. Wheeler* (1894) 10 *Misc.* 61; *Wagstaff v. Smith* (1832) 17 *N. C.* 264; *McPherson v. McPherson* (1850) 38 *N. C.* 391, 53 *Am. Dec.* 416; *Thompson v. Jones* (1890) 77 *Tex.* 626; *Neil v. Shackelford* (1876) 45 *Tex.* 119; *Akin v. Jefferson* (1835) 65 *Tex.* 137; *Dodson v. Hays* (1897) 29 *W. Va.* 577, 601; *Rust v. Rust* (1881) 17 *W. Va.* 901, 902; *Hice v. George* (1873) 20 *Grant, Ch. (U. C.)* 221.

For the *pro rata* share of rents so received. *Osborn v. Osborn* (1884) 62 *Tex.* 495.

And it matters not at what time they were received in the absence of evidence of an ouster, or of a demand and refusal. *Northcutt v. Casper* (1849) 41 *N. C.* 303, overruling *Wagstaff v. Smith* (1845) 39 *N. C.* 1 and affirming *Wagstaff v. Smith* (1832) 17 *N. C.* 264.

When therefore one cotenant takes the rents and profits of a specific portion of the property with the consent of the cotenant, the action will not lie. *Dyer v. Wilbur* (1860) 48 *Me.* 237.

A tenant in common is liable to account to his cotenant for moneys received by him from the pasturage of the common property the court con-

owned the whole. "Tenancy in common is a joint estate in which there is unity of possession, but separate and distinct titles. The tenants have separate and independent freeholds or leaseholds in their respective shares, which they manage and dispose of as freely as if the estate was one in severalty. There is no restriction upon their power of alienation. And the tenant may dispose of it by will, while the heirs of an intestate tenant will inherit the estate. In like manner, the husband or wife of a tenant in common will have, respectively, curtesy and dower. . . . The interest of one tenant in common is so independent of that of his cotenant that in a joint conveyance of the estate it

would be treated as a grant by each of his own share in the estate. And . . . in order to convey the share of one cotenant to another the same formal deed is required as in a conveyance of it to a stranger. . . . Tenants in common are not seised of the entire estate. They do not hold it *per my et per tout*." If repairs are necessary to prevent the property from going to decay, one "may either compel the others to join him in making the repairs, or, if he has notified them that repairs are necessary, bring an action against them for their share of the expenses. If one tenant cuts timber upon the land, and sells it, the cotenants are entitled to their share of the money so received. And so also

struing the money and profits produced thereby as rent. *Howard v. Throckmorton* (1881) 59 Cal. 79.

The liability being based upon the fact that the cotenant has received money for the use of the premises a part of which belongs to his cotenant. *Abbey v. Wheeler* (1894) 10 Misc. 61.

So a tenant in common who has a tax lien upon the premises is liable to account for rents received, such payment being made for the protection of his own interests and not as a volunteer. *Schissel v. Dickson* (1891) 129 Ind. 139, 152.

In *Pope v. Harkins* (1849) 16 Ala. 331, the complainants were the owners of one third of the property, and held in common with the defendant who leased the whole premises as if he had been the sole owner, the complainants not dissenting from such lease. The court held the complainants assenting to the lease were entitled to their *pro rata* proportions of the rents.

So a tenant in common to whom the entire estate has been conveyed for the purpose of raising money upon mortgage, renting out the property after the mortgage is paid off and receiving the rents and profits accruing therefrom, is liable to account for the same as a trustee and is chargeable with interest upon the amount found in his hands from the date of the receipt of the several items, and not with interest upon the amount actually received. *Tarleton v. Goldthwaite* (1858) 23 Ala. 346, 53 Am. Dec. 236.

Where the referees found that the parties were owners as tenants in common of land with a slaughter-house thereon, and the latter was let by one tenant in common who received the rent therefor, the court construing the report to be that the tenant in common leased the whole property but that the tenant did not use more than one half, the occupancy being entire and exclusive, the tenant in common was bound to account to his cotenant for what he received by such occupancy more than his just proportion without any agreement to that effect. *Holmes v. Best, Best v. Holmes* (1896) 58 Vt. 547.

Relief was denied in the case of *Sargent v. Parsons* (1815) 12 Mass. 149, upon the ground that the plaintiff had not charged defendant with having received the rents and profits "otherwise than by his occupancy," and for the reason that under the Statute of Anne the action is not of account, but under the statute or upon the particular circumstances which give the action.

Where the rents were received by one cotenant from a tenant of the premises to whom he had advanced money for crop supplies, it was held that such cotenant was not liable to account to his cotenant for the gross amount so received. *Gayle v. Johnston* (1895) 80 Ala. 395.

A widow occupying lands as tenant in common with the minor heirs is liable to them for their proportion of the rents collected by her from the common property other than the homestead, and the 38 L. R. A.

fact that the children are minors for a part of the time for which they seek to recover makes no difference as to their rights. *Lynch v. Broad* (1888) 70 Tex. 92. *Osborn v. Osborn* (1884) 62 Tex. 498, followed.

A tenant in common who makes a contract to sell the common property with the prior consent or subsequent ratification or affirmation of his cotenant, is not, in the absence of fraud or bad faith, liable to account for more than he actually receives. *Lewis & Nelson's App.* (1870) 67 Pa. 163.

Where a tenant in common leased part of the land as a stone quarry, it was held that the other was entitled to an injunction against the quarrying and to an account against the lessee for a moiety of what had been already quarried. *Goodenow v. Farquhar* (1873) 19 Grant, Ch. (U. C.) 614.

Upon the death of a tenant in common who has received more than his share of the rents and profits, the amount due to his cotenant, which is a personal charge, is payable primarily out of the personal estate of the deceased. *Hannan v. Osborn* (1834) 4 Paige, 386, 3 L. ed. 460.

In *Knope v. Nunn* (1894) 81 Hun, 349, a tenant in common taking a mortgage to secure purchase money in his own name and without the consent of his cotenant, is liable at the election of such tenant for the share of the proceeds of the sale.

VII. Lien for rents received.

Upon this subject, see *note to Flack v. Gosnell* (1892) (Md.) 16 L. R. A. 547.

VIII. The question, What is more than a just share?

The receipt of money, or other article given or paid by another, to which his cotenants are entitled by reason of their being cotenants, is a receipt of more than his just share if the amount so received and kept is more than his proportion. *Henderson v. Eason* (1851) 17 Q. B. 701, 21 L. J. Q. B. 82, 16 Jur. 518, 9 Eng. L. & Eq. 337.

But he does not receive more than his just share by merely having the sole enjoyment of the property, although by his own industry and capital he makes a profit and takes the whole. *Ibid.*

In estimating the value of that portion of the joint property occupied by one of the cotenants, with a view to the assessment of rent, it is immaterial what the element may be which contributes to increase the value, and it must be computed as though the estate were let to third persons as tenants. What the premises would be worth in the market, would be a proper test to determine whether one has received more than an equal share. *Shiels v. Stark* (1854) 14 Ga. 498.

Whenever the nature of the property is such as not to admit of its use and occupation by several, and it is used and occupied by one only of the tenants in common, or whenever the property, though capable of use and occupation by several, is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just

would he be liable to account for rents received by him from the tenant of the land over and above his share. But, in order that a cotenant may be held personally liable for rent through his own use and occupation of the land, a special agreement to that effect must be shown. An occupancy by one cotenant without the interference of the others is not sufficient. He is merely exercising his right of ownership." Tiedeman, Real Prop. §§ 239, 254, 255.

The proposition that the defendant merely exercised his right of ownership is not a denial of the plaintiff's title. The defendant's ownership included a right to exercise the plaintiff's right of occupation and use.

His exercise of the plaintiff's right being lawful, he is not liable as a trespasser. It was lawful because, in its legal character, it was fiduciary; he acted for the plaintiff, therefore he is liable as the plaintiff's representative. To say that his occupancy was not an exercise of the plaintiff's right as well as his own would be either a denial of the plaintiff's title or an admission that there was an infringement of the plaintiff's right for which there must be a remedy. On the general question of liability in some form of action, it is not material whether the defendant exercised the plaintiff's right or violated it. "The name of property belongs to some of the essential proprietary rights

share and proportion within the meaning of the West Virginia Code of 1860, chap. 100, § 14, p. 541, p. 586 of the Code of 1849. *Dodson v. Hays* (1887) 29 W. Va. 577, 601; *Rust v. Rust* (1881) 17 W. Va. 901, 906.

In *Dodson v. Hays*, *supra*, the court followed the construction placed upon the English Statute of Anne, which is in all respects similar to the case of *Henderson v. Eason*, *supra*.

IX. Necessity of a demand.

Before a tenant in common or a joint tenant can be held liable for the use and occupation of the premises there must be a demand of entry and an equal use of the lots or an express agreement to account for the profits of such occupation. *Nell v. Shackelford* (1876) 45 Tex. 119; *Reynolds v. Wilmeth* (1877) 45 Iowa, 693; *James v. Brown* (1878) 48 Iowa, 568.

And then not upon the improvements. *Thompson v. Jones* (1890) 77 Tex. 626.

Where there was no express demand but the defendant refused to recognize plaintiff's right and settle her demand, the court inclined to the opinion that under the circumstances sufficient demand was made. *Clow v. Plummer* (1891) 85 Mich. 550.

In *Corley v. Holloway* (1895) 22 S. C. 380, it was not shown that the tenant cultivated more than her share of the land, but it was shown that she used the same by the permission and acquiescence of the other cotenants, it was therefore held that such fact was sufficient to exclude the plaintiff's claim for rent prior to demand which was not made until action was brought.

See also *Cutler v. Currier* (1866) 54 Me. 81, decided under Maine statute, *supra*, head V. subdiv. c, page 845; *Purcell v. Harding* (1866) 15 Week. Rep. 123; *Wagstaff v. Smith* (1845) 39 N. C. 1, *infra*, head X.

X. Necessary allegations in action of account.

Privity of estate must be distinctly alleged as the foundation of the action. *Brinsmaid v. Mayo* (1837) 9 Vt. 81.

In an action under the English Statute of 4 and 5 Anne, the declaration must state that plaintiff and defendant were tenants in common and that the latter has received more than his share. *Wheeler v. Horne* (1740) Willes, Rep. 208.

There being no actual ouster the claim can only be supported by showing that more than the just share has been received, such claim depending upon the Statute of Anne. *Roberts v. Roberts* (1855) 55 N. C. 129.

As such tenant is not chargeable as a bailiff at common law. *Sturton v. Richardson* (1844) 2 Dowl. & L. 182, 18 Mees & W. 17, 13 L. J. Exch. 281, 8 Jur. 476.

Such an action must aver, not only that the defendant occupied the premises under an agreement with the plaintiff as receiver or bailiff of his share of the rents and profits, but the circumstances must exist and be alleged in the complaint. *Pico* 28 L. R. A.

v. Columbet (1859) 13 Cal. 414, 73 Am. Dec. 536; *Paxton v. Gamewell* (1837) 82 Va. 706.

A request and refusal to render an account should be averred and the declaration should be framed as for a breach and for non-accounting, and a mere averment that the defendant has received more than his just proportion and framed as for a liquidated demand, is bad. *Purcell v. Harding* (1866) 15 Week. Rep. 123.

But it is not necessary to allege or aver a receipt by defendant as bailiff. *Ibid*.

So the declaration need not allege that the defendant has taken more than his share, plaintiff having an interest in the whole rents and profits for which the defendant is liable to account. *Barnum v. Landon* (1856) 23 Conn. 148.

And the taking of the account must be limited to the time of the commencement of action. *Scaife v. Thomson* (1881) 15 S. C. 337, 337.

So it is sufficient, after setting forth the holding as tenants in common and the receipt of the whole rents, issues, and profits by the defendant, and the application for and refusal of defendant to render an account to the plaintiff of his share thereof, to aver as a breach that such account had not been rendered although the defendant "had been often required so to do." *Wagstaff v. Smith* (1845) 39 N. C. 1.

The practice of the court, however, in giving an account of rents and profits of real estate, depends upon the general principles of equity. *Scaife v. Thomson*, *supra*.

It has been held that a judgment in an action of account against the defendants, tenants in common with the plaintiffs, sued as bailiffs under the statute for using more than their just share and proportion of the profits, that it is necessary for the plaintiffs to prove to the satisfaction of the jury, not only that the defendants were tenants in common with the plaintiffs and had been in the pernanacy of the profits, but that they had received more than their just share or proportion, is error. *McPherson v. McPherson* (1850) 83 N. C. 391, 53 Am. Dec. 416.

See also *Lilly v. Menke* (1894) (Mo.) 23 S. W. Rep. 643, *supra*, head IV.

XI. In what character liable.

A tenant in common occupying the property is answerable as bailiff to his cotenant in an action of account if he receives more than his share but not otherwise, his liability extending only to the amount he receives in excess of his just share. *Henderson v. Eason* (1851) 17 Q. B. 701, 21 L. J. Q. B. 82, 16 Jur. 518, 9 Eng. L. & Eq. 337.

One tenant in common may not maintain an action of account at common law against another as his bailiff, unless the other has been so appointed, but under the Statute of 4 and 5 Anne, chapter 14, he can. *Wheeler v. Horne* (1740) Willes, Rep. 208.

At common law he must show that he made him

vested in the person called the owner of the soil. . . . Property is taken when any one of those proprietary rights is taken of which property consists." *Thompson v. Androscooggin River Imp. Co.* 54 N. H. 545, 552. If a railroad or other highway were laid out across the Gage farm, the public would only take a right of use. The fee of one half would remain in the plaintiff, but he would be entitled to compensation. By the defendant's use of the farm the plaintiff's property was taken, as it would have been if the defendant had acted as the state's superintendent in carrying on the farm for the purposes of a public school of agriculture. The defendant's power, as cotenant, to take

what did not belong to him, like the power of eminent domain, was legal because it was necessary, and because it did not unnecessarily withhold the compensation required by the plaintiff's ownership. A relation of trust, reaching far enough to authorize the defendant to convert the plaintiff's real estate to his own use, but not far enough to make him accountable for the conversion, cannot be sustained. In a case on the Statute of Anne for receiving more than came to the defendant's just share and proportion, Parke, B., expressed the opinion that when land, owned by A. and B., is cultivated by A., B. is equitably entitled to none of the profit, because he bears none of the loss. *Henderson*

his bailiff or receiver. *Green v. Putnam* (1847) 1 Barb. 500.

The English Statute of 4 and 5 Anne, chap. 16, § 27, provides that an action of rent may be brought and maintained "by one joint tenant and tenant in common his executors or administrators against the other as bailiff for receiving more than comes to his just share and proportion and against the executor and administrator of such joint tenant or tenant in common. *Webster v. Calef* (1867) 47 N. H. 239.

Prior to such statute, although an action of account lay between coparceners, it did not between joint tenants and tenants in common without an express agreement to act as bailiff and account when called upon, the effect of the statute being to create such an obligation in the absence of such an agreement from the mere relation of privity. *Northcott v. Casper* (1849) 41 N. C. 303.

If one joint tenant or tenant in common of land makes his companion his bailiff of his part he has an action of account against him, but although one tenant in common or joint tenant without being made bailiff take the whole profits, no action of account lies against him, for in an action of account he must charge him either as a guardian, bailiff, or receiver, which he cannot do unless his companion constitutes him his bailiff. *Early v. Friend* (1860) 16 Gratt. 21, 78 Am. Dec. 649, citing 1 Co. Inst. 787.

A joint tenant or tenant in common actually receiving more than his just share or proportion is a bailiff, not as a bailiff at common law, bound to manage the estate to the best advantage, and make all the profit he can for the owners; to keep and render them a full account of his transactions; to be held liable, not only for rents and profits actually received, but also for such as might have been received without his default; but he is in as of his own right not that of another and is made a bailiff by the statute, not by reason of his holding the property, but by reason of his receiving more than his just share, and in a case of account against him the declaration must aver that he has received more than his just share. *Paxton v. Gamewell* (1897) 22 Va. 708.

It being permissible for one tenant in common to make another his bailiff or receiver and thereby render him liable to account for rents and profits actually received beyond his share. *Sargent v. Parsons* (1815) 12 Mass. 149; *Pico v. Columbet* (1859) 12 Cal. 414, 73 Am. Dec. 550; *Norris v. Gould* (1864) 15 W. N. C. 487; *Huff v. McDonald* (1857) 23 Ga. 131, 68 Am. Dec. 437.

The application of the English doctrine, however, has been restricted to cases where the money has been actually received and the liability to account has resulted in a duty to pay money, or where the defendant holds the share as bailiff for the plaintiff or the occupation has been by consent. *Cutler v. Currier* (1866) 54 Me. 81.

28 L. R. A.

In order to entitle one tenant in common to recover at law against another, the defendant must occupy the premises upon an agreement with the plaintiff as receiver or bailiff of his share of the rents and profits and the circumstances must exist and be alleged in the complaint, the rule being that one cotenant in common has no remedy against the other who exclusively occupies the premises and receives the entire profits unless he is ousted of possession when ejectment may be brought or unless the other has acted as bailiff of his interest by agreement when the action of account will lie. *Pico v. Columbet* (1859) 12 Cal. 414, 73 Am. Dec. 550.

In *Pico v. Columbet*, *supra*, the court regarded the South Carolina doctrine as established by the cases of *Hancock v. Day* (1840) McMull. Eq. 69, 36 Am. Dec. 233; *Thompson v. Bostick* (1840) McMull. Eq. 75, and *Holt v. Robertson* (1840) McMull. Eq. 475,—as insufficient to overcome the force of the English, Massachusetts, New York, and Kentucky authorities, and stated that the reasons upon which such South Carolina decisions rested did not commend themselves to the judgment of the court.

Although under the English Statute of 4 and 5 Anne, chap. 16, § 27, action of account can be brought by one joint tenant in common against the other as bailiff for receiving more than comes to his just share or proportion, yet the more general practice is to proceed by bill in equity although the action of account may still be resorted to. *Hamilton v. Conine* (1868) 28 Md. 640, 32 Am. Dec. 724; *Gibbs v. Claggett* (1829) 3 Gill & J. 17; *Green v. Johnson* (1831) 3 Gill & J. 394.

In *Beer v. Beer* (1862) 12 C. B. 60, 16 Jur. 233, 21 L. J. C. P. 124, an action was maintained by the heirs of a cotenant against a surviving cotenant as bailiff for receiving more than his just share of the rents received by him under a lease executed by the joint tenants.

Where a cotenant, also the attorney and agent of the other cotenant, agreed to make a specific application of the funds without charge or compensation, and received moneys not within the terms of such agreement, he was looked upon as in the position of a trustee and as such not entitled to compensation and liable to account. *Shearman v. Morrison* (1862) 149 Pa. 336.

XII. Position of cotenant holding over.

A tenant in common who holds over after the expiration of his lease of the premises, will be held liable for rent as fixed by the agreement in the absence of evidence showing a change of value; the liability to account for the use of a cotenant's share used by the cotenant being an incident of such tenancy. *Clayton v. McCay* (1891) 143 Pa. 225.

So a tenant in common renting the share of his cotenant for a term at a specified rent and remaining in exclusive possession after the expiration of the term holds such possession in the character of

v. Eason, 17 Q. B. 701, 709-711, 720, 721. There being no partnership in the business of cultivation, A. assumes all the risk and has all the profit. But this state of things has no tendency to show that B. is not entitled to compensation for A's profitable or unprofitable use of his property. Equitable rent is one of the expenses of A's business; and, when he occupies the whole or more than his share of the common estate, his nonpayment of rent unjustly increases his profit, or unjustly diminishes his loss, at B's expense. In *Brooks v. Howison*, 63 N. H. 382, where carpets were used by one of the owners a year and a half in his hotel, the fact that his cotenants were not his copartners in the hotel

business did not make it unjust that he should pay for his consuming use of their goods. "It might be reasonable that a fair rent should be assessed. But that could hardly be worked out. The principle of justice in the common law is that there is no wrong without a remedy; but in the case of occupation by one cotenant, without an ouster, there is no wrong." Maule, J., in *Henderson v. Eason*, 17 Q. B. 701, 716. Both in equity and assumpsit for use and occupation, the problem of assessing a fair rent for the use of real estate can be worked out, as it has been in this case. *Early v. Friend*, 16 Gratt. 21, 47-55, 78 Am. Dec. 649; *Hayden v. Merrill*, 44 Vt. 336, 848, 8 Am. Rep. 372.

tenant. *O'Connor v. De Laney* (1893) 53 Minn. 247.

The same rule as to rent applies as in case of any other tenant holding over. *Ibid.*

Where the tenant was in possession of the whole premises under a lease executed by both tenants to a firm which excluded the tenant in common, with a provision for a renewal of the lease at the end of the term, it was held that the tenant holding over after the termination of such lease without electing to renew, held as tenant from year to year, and not under his own title as tenant in common. *Valentine v. Healey* (1835) 86 Hun. 259.

But a tenant in common holding over after the expiration of a lease from his cotenant was presumed to hold possession under his own title in the absence of evidence showing that he still held as tenant to his cotenant, in *Dresser v. Dresser* (1862) 40 Barb. 300.

In *Dresser v. Dresser*, *supra*, the court followed the ruling in the case of *McKay v. Mumford* (1833) 10 Wend. 351, to the effect that a tenant in common taking a lease of his cotenant's moiety for a term subject to a specified rent, and continuing in possession after the expiration of the term, cannot be considered as holding over under the lease, there being no express agreement for the subsequent use and occupation and no facts from which an implied agreement for such use can be drawn.

In such a case he is not liable in assumpsit for use and occupation, the presumption of law that he is in possession under his own title prevailing in the absence of evidence showing that he holds as tenant to his cotenant. *McKay v. Mumford*, *supra*.

So a tenant in common holding over after the expiration of a lease of the moiety from his cotenant is not liable to double rent under the New York statute, if, when demand of possession is made, he offers to deliver it to his lessor, as that is all the lessor is entitled to, the tenant still having the right to continue possession under his own title. *Mumford v. Brown* (1823) 1 Wend. 52, 19 Am. Dec. 461.

In *Harry v. Harry* (1891) 127 Ind. 91, plaintiff alleged that he and defendants were tenants in common and that he leased his share to the defendants for one year "for such rent as the same was reasonably worth" the defendants continuing in possession holding and occupying the premises after the termination of the lease, plaintiff claiming rent therefor. The court held that the settled doctrine of the law that where the duration of the tenancy is definitely fixed by the terms of the agreement under which the tenant goes into possession of the premises which he is to occupy, and he continues to occupy after the close of the term without a new contract, the rights of the parties are controlled by the terms and conditions of the contract under which the entry was made, applied to the case of a holding by tenants in common as well as to the relation of landlord and tenant, the court

distinguishing the case from that of *Crane v. Waggoner* (1886) 27 Ind. 52, 89 Am. Dec. 493, upon the ground that the rule therein laid down applied only in the absence of a contract, and where there has been no denial by the tenant in possession of the right of his cotenant.

XIII. Extent of liability.

While as between wrongdoers one may be charged not only with what he received or realized, but for what he could have realized by prudent management of the property, such rule does not apply to cotenants when there is no disseisin. *Scenes v. Sconce* (1884) 15 Ill. App. 169.

Although as a general rule where one tenant in common occupies and uses the common property to the exclusion or his cotenants, or occupies and uses more of the common property than his just share or proportion, the best measure of his accountability to his cotenants may be their share or proportion of a fair rent of the property so occupied and used by him as decided in the case of *Early v. Friend* (1860) 16 Gratt. 51, 52, 78 Am. Dec. 649, yet there may be peculiar circumstances which make it proper to resort to an account of issues and profits as a mode of adjustment between tenants in common. *Graham v. Pierce* (1859) 19 Gratt. 23, 100 Am. Dec. 658.

One tenant in common ousting another is liable to the ousted tenant to the extent of his share for rents and profits. *Annelly v. De Saussure* (1837) 25 S. C. 497; *Lyles v. Lyles* (1833) 1 Hill, Eq. 76; *Jones v. Massey* (1830) 14 S. C. 292.

For damages for use and occupation from the time his title became vested, such damages carrying costs. *Critchfield v. Humbert* (1861) 39 Pa. 427, 80 Am. Dec. 533.

Only for rents received, and not for the value of his occupancy. *Rich v. Rich* (1838) 50 Hun. 199.

Upon a cotenant's abandoning possession the remaining one is only liable to account for such portion as has been rendered productive by the labor of the abandoning tenant. *Volentine v. Johnson* (1833) 1 Hill, Eq. 49.

A tenant in common occupying and cultivating to the exclusion of his cotenant is liable to account for the profits derived from the crop, but not for the actual property in the crop. *Bird v. Bird* (1873) 15 Fla. 424, 21 Am. Rep. 236.

Such excluded cotenant is entitled to compensation to the extent of the value of the use of which he has been deprived, by the exclusive use by another cotenant of the entire common property. *Osborn v. Osborn* (1884) 62 Tex. 496; *Neil v. Shackelford* (1879) 45 Tex. 119.

He is bound to pay his cotenant the actual profits he has made out of the surplus as well as the surplus itself. *Huff v. McDonald* (1857) 22 Ga. 131, 68 Am. Dec. 487.

The compensation of a cotenant cannot, however, be made to depend upon the accident of the

When the value is found, the share of each owner is easily ascertained. The wrong on the part of the defendant was not in taking the plaintiff's property (the use of the plaintiff's land), but in not accounting for its value. In *Savings Bank of Stratford County v. Getchell*, 59 N. H. 281, the defendant occupied land rightfully; and as the plaintiff's right to rent or damages was not found, there was no obligation to be enforced by the fiction of an implied promise, which is used only for an equitable purpose. *Broom, Legal Maxims*, 90. In *Barron v. Marsh*, 63 N. H. 107, and *Durrell v. Emery*, 64 N. H. 223, it was held that assumption could not be maintained for use and occupation without evi-

dence of a contract express or implied; but the question was not raised whether compensation could be recovered in some other form of action. If the plaintiffs had moved to amend their declarations by adding new counts, there would have been a question whether justice required the amendments. *Wendall v. Mugridge*, 19 N. H. 109, 113, 114; *Baker v. Davis*, 23 N. H. 27, 33-35; *Redding v. Dodge*, 59 N. H. 98; *Edes v. Herrick*, 61 N. H. 60, 61; *Logue v. Clark*, 62 N. H. 184, 185; *Hardy v. Nye*, 63 N. H. 612. In *Welcome v. Labontee*, 63 N. H. 124, the plaintiff recovered on a count in trover. The question whether there was an implied promise to pay rent, and whether the plaintiff could have

* occupying tenant being a good or bad manager, a prudent and careful person, or a rude, reckless speculator. *White v. Stuart* (1882) 73 Va. 546, 587.

Under section 2617 of the Alabama Revised Code a tenant in common or a joint tenant is not liable for damages for rent for more than one year before the commencement of a suit in partition, regard being had to the improvements made by him. *Sanders v. Robertson* (1876) 57 Ala. 465.

When his occupation becomes exclusive, and thereby a cotenant who is entitled to use is prevented from using them, such cotenant excluded is entitled to compensation to the extent of the value of the use of which he has been deprived by the exclusive use of another cotenant of the entire common property. *Osborn v. Osborn and Nell v. Shackleford*, *supra*.

Where a tenant in common was in possession of negroes and employed them as his own, and removed a portion of them from the state, upon partition he was ordered to account for their full value with interest. *Lyles v. Lyles* (1833) 1 Hill, Eq. 78.

Under a bill charging defendant with the rent of the property while in the occupation of his brother-in-law, who was put in possession of the intestate, and also for rents during his own occupation, the defendant was held liable to the extent of his actual collections but not beyond. *Tyner v. Fenner* (1880) 4 Lea, 492.

Where the defendants were suffered to take the whole of a wharfage of a bulkhead upon the supposition that it belonged to them induced by long acquiescence and remissness on the part of the plaintiff, who by his action for the first time asserted and proved his right, he was held entitled to an account only from the time of filing his bill. *Roosevelt v. Post* (1833) 1 Edw. Ch. 579, 6 L. ed. 253.

See also head XV., *infra*.

XIV. When liable to pay interest.

Interest upon rents found due from one cotenant to another will be allowed. *Early v. Friend* (1860) 16 Gratt. 21, 78 Am. Dec. 649; *Rust v. Rust* (1881) 17 W. Va. 901, 909; *Dodson v. Hays* (1887) 29 W. Va. 577, 601.

After demand made and refusal to account, a tenant in common in possession will be liable to interest from the date of demand or of action. *Jolly v. Bryan* (1882) 88 N. C. 457.

Such interest being calculated upon the amounts due yearly. *Rust v. Rust*, *supra*.

Upon the amount found due from the date of the receipt of the several items and not on the amount actually received. *Tarleton v. Goldthwaite* (1853) 23 Ala. 346, 58 Am. Dec. 296.

Even though there may have been no demand. *Scott v. Guernsey* (1866) 60 Barb. 163, affirmed (1871) 48 N. Y. 103.

Yet where there is no demand for interest, nor for the value of the use of the premises until the suit is brought, the claim being one of unliquidated

damages and without warrant for charging him interest, upon such annual installment of the yearly rental value of the land the defendant is not chargeable with interest. *West v. Weyer* (1888) 46 Ohio St. 66.

XV. When held for the rental value.

It has been held that the cotenant occupying the whole of the property is in the position of a trustee and accountable for the share of the reasonable rental value during such occupation, the liability being thrust upon him to make his cotenant's share productive. *Re Final Settlement of Tyler v. Cartwright* (1890) 40 Mo. App. 378.

The just and true rule as to the extent of the accountability of a cotenant who, instead of renting out, occupies and uses the whole to the exclusion of his cotenants and thus becomes himself the rentor, is to charge him with all reasonable rent for such use and occupation of the property in the condition it was when he received it, and to hold him accountable to his cotenants for their just shares of such rent. *Early v. Friend* (1860) 16 Gratt. 21, 78 Am. Dec. 649; *Dodson v. Hays* (1887) 29 W. Va. 577, 601; *Rust v. Rust* (1881) 17 W. Va. 901, 909.

Where the defendant's acts constitute him a dispossessor of his cotenants, he is liable to pay the yearly rental value regardless of the profit he may have made from the land. *Austin v. Barrett* (1876) 44 Iowa, 488; *Sears v. Sellew* (1870) 23 Iowa, 501.

The rule is to estimate the rent of the whole premises and then value that portion of the premises occupied by the tenant in possession, in reference to the condition they were in at the time he took possession. *Shiels v. Stark* (1854) 14 Ga. 423.

In estimating the value of that portion with a view to the assessment of rent, it is immaterial what the element may be which contributes to increase the value, it must be computed as though the estate were let to third persons as tenants. *Ibid*.

In *McParland v. Larkin* (1895) 155 Ill. 84, a cotenant was held to an account for the reasonable rental value of premises of which he held exclusive possession and control by virtue of the provisions of the Illinois Statute, Rev. Stat., chap. 2, § 1.

A tenant in possession preventing his cotenants obtaining from the premises such profits as they are capable of yielding, or taking possession of the latter and using them as his own, thereby making a profit, must account either for their fair rental value or for the profits. *Edsall v. Merrill* (1883) 37 N. J. Eq. 114.

In *Hammond v. Cronkright* (1890) 47 N. J. Eq. 447, the infant children and widow of the testator, in exclusive possession and enjoyment of the testator's farm for a period of five years, were held accountable to the daughter of the testator for one half the fair rental value for the term for which they occupied.

And in *Early v. Friend* (1860) 16 Gratt. 21, 78 Am.

recovered compensation for the use of his shop in an action of contract or tort, or on a bill in equity, without a promise, express or tacit, was not decided. In *Berry v. Whidden*, 62 N. H. 473, the will of William Berry provided that "said Whidden is not to pay to my said son or sons anything for the use or income of said farm and estate during his occupancy." It was evidently the testator's intention that Whidden (who was the testator's son-in-law, residuary devisee, and executor) was not to be liable to the sons for his use of the farm (devised to him) so long as they allowed him to have the exclusive occupation of it, but was to have the use of it, without liability to account, until

they took or demanded possession after acquiring title in the manner provided by the will. It was not necessary to inquire whether he would have been liable to account if he and the sons had been tenants in common, without a controlling testamentary stipulation. The decision was right, and the question whether the defect of the old law was a defect of remedy was not considered.

The procedure established by the courts at an early day "furnished a fixed number of 'forms of action.' . . . A writ had been settled, not only for each of the different 'forms of action,' but for the facts, circumstances, and events which could constitute the subject-matter of the particular actions

Dec. 649, the cotenant was held accountable for a reasonable rent of the premises occupied by him, but not for the issues and profits of his operations thereon, the cotenants not sharing in the risks of such operations, the court distinguishing the case from *Ruffners v. Lewis* (1838) 7 Leigh, 720. 30 Am. Dec. 513, stating that there might be peculiar circumstances making it proper to resort to an account of issues and profits as a mode of adjustment, but such cases were merely exceptions to the rule.

Where the defendant, a tenant in common, entered, used, and occupied the premises for which the plaintiff claimed an account of the rents and profits, and also to be paid for the use of the same, upon demurrer the defendant was held liable for the value of the use of the premises, the law implying a promise to pay a reasonable value. *Estep v. Estep* (1864) 23 Ind. 114.

Again where a cotenant was in possession at the request or by the consent of all his cotenants with the exception of the complainant, in order to prevent the forfeiture of an insurance policy, cultivating the land and pasturing his cattle thereon, he was held liable to the cotenant, who was not a consenting party, for the fair rental value of the premises having possession of the entire estate. *Vass v. Hill* (1891) (N. J.) 21 Atl. Rep. 585.

So where the conduct of the defendant prevented an advantageous disposition of the property for the reason that he objected to an advantageous lease of a portion thereof and retained exclusive possession of the portion using it himself, it was considered an ouster and he was held accountable for the yearly value of the portion occupied by him. *Izard v. Bodine* (1857) 11 N. J. Eq. 403, 69 Am. Dec. 595.

And where the defendants exclusively used the manufacturing establishment consisting of real and personal estate in which the intestate was jointly interested, the business being such that he could claim no share of the profits and was not subject to the losses, the rental value of the estate as in an ordinary action for use and occupation was held to afford the fairest and most palpable test of the value of the use of the interest in it represented by the plaintiff and his intestate. *Knowles v. Harris* (1858) 5 R. L. 402, 73 Am. Dec. 77.

XVI. Position of purchaser of cotenant's share.

In the case of a purchaser of the shares of certain tenants in common, without the consent of another cotenant of the same premises, occupying the premises for several years receiving and enjoying the rents and profits thereof without accounting to such cotenant, the latter is entitled to receive his proportionate share of the same after deducting a proportionate share of the value of the necessary and proper improvements made by such purchaser upon the premises, and after adjusting the taxes paid by the parties. *Scantlin v. Allison* (1884) 32 Kan. 376.

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But the lien which exists between tenants in common under the equitable principle, that upon partition of the lands the court will direct accounts to be taken of the receipts and disbursements and order an apportionment, does not entitle a cotenant to priority over the right of a bona fide purchaser or incumbrancer of the interest of one cotenant in the common estate. *Burns v. Dreyfus* (1891) 69 Miss. 211.

As to the liability in assumption of a purchaser from the administrator of a tenant in common who takes possession of the whole premises, see *Felder v. Childs* (1883) 73 Ala. 567, *supra*, head V., subd. c, page 847.

Where a tenant in common owned four fifths of the property and conveyed the same to a purchaser who leased it, not claiming more than four fifths or receiving rents for more than such proportion, without interfering with the other cotenant's right to occupy his portion of the premises and enjoy the use thereof, such cotenant cannot recover from the purchase of such shares any proportion of the rents and profits. *Scantlin v. Allison*, *supra*.

XVII. As to coparceners.

The common-law rule that in the absence of ouster or exclusion, one cotenant is not liable for the use and occupation of the premises, is not changed as regards coparceners by section 14, chap. 100, of the Code of West Virginia. *Ward v. Ward* (1895) (W. Va.) 29 L. R. A. —.

A coparcener merely from sole occupation of the premises is not chargeable in favor of coparceners unless she excludes them. *Ibid*.

A coparcener in exclusive possession of land and receiving rents and profits is liable in equity to his coparceners for their shares of the same. *O'Bannon v. Roberts* (1834) 2 Dana, 54; *Graham v. Graham* (1828) 6 T. B. Mon. 562, 17 Am. Dec. 166.

If in a proper case improvements are allowed as between coparceners, a charge for use and occupation may be set off against such improvements. *Ward v. Ward*, *supra*.

An action of account lay between coparceners prior to the English Statutes of 4 and 5 Anne. Northcott v. Casper (1849) 47 N. C. 303.

XVIII. The question of deductions.

In cases where rents and profits are claimed by one cotenant from another the courts have in many instances taken into account the value of the improvements made by the tenant from whom such account is claimed, and allowed the same to be deducted from the amount found to have been collected and received by such cotenant.

Although at common law one tenant in common cannot recover of his cotenant a contribution for necessary repairs, where there is no agreement or request or notice to join in making them no ex-

embraced within each one of those several 'forms of action.' The precedents of all the writs which had been thus established were kept in an office connected with the chancery, called the 'Registra Brevium.' . . . If no writ could be found in the collection which substantially corresponded with the facts constituting the grounds of complaint, then the plaintiff could have no action. . . . The common law furnished a very meager system of remedies, utterly insufficient for the needs of a civilization advancing beyond the domination of feudal ideas. . . . No contract could be enforced unless it created a certain debt, or unless it was embodied in a sealed writing. No means

was given for the legal redress of a wrong to person or property, unless the tortious act was accompanied with violence, express or implied. The injuries and breaches of contract which now form the subject-matter of so much litigation were absolutely without any legal remedy." 1 Pom. Eq. §§ 21-23; Pom. Mun. Law, §§ 102, 175, 192-207. Since it is settled that the plaintiff is entitled to such legal process for the ascertainment and enforcement of his rights as justice and convenience require, the authorities on which the defendant relies are immaterial. They are mere iterations of the doctrine that in such cases as this there is no remedy. Bacon, Abr. *Joint Tenants* (L); *Henderson v.*

cause for such notice being given because both parties until this is done are equally in fault, one having as much reason to complain as the other, yet it does not follow that in a proceeding for an equitable accounting for the income, a part of which is produced by the repairs, the defendant may not be allowed for them, there being a wide difference between a right of action at common law to recover a contribution for repairs, and a right to have them recovered out of the income which exists in part through their having been made. *Pickering v. Pickering* (1885) 68 N. H. 468.

In an action of account the tenant who is called upon to account for rents and profits should be allowed a just proportion of such expenses as are from necessity disbursed for the common estate. *Anderson v. Greble* (1831) 1 Ashm. 136.

The proposition that at common law one tenant in common cannot recover against another for mere use and occupation being recognized, it does not follow that it may not be considered in connection with and made an equitable set-off against a claim for repairs, which at common law in the absence of agreement are not the subject of an action between cotenants. *Davis v. Chapman* (1888) 36 Fed. Rep. 43.

A tenant in common claiming the rents and profits must share the burden of the improvements made by the other cotenant upon the premises, and also the expenses, labor, and services of an unsuccessful experiment relating to such property, provided the same are incurred bona fide and such expenditure is not reckless, wild, or extravagant. *Rufners v. Lewis* (1836) 7 Leigh, 720, 30 Am. Dec. 518.

So in cases between joint tenants, the one receiving all the profits is bound to account to the others in interest for their respective shares making deduction for the proper charges and expenses whether such tenant acts expressly by authority or only by implication as manager. *Bridgford v. Barbour* (1862) 30 Ky. 529.

Where the land of which the tenant is in sole possession is incapable of division, he will be liable to the cotenant for the rent contributed by such cotenant's interest in the premises, but the rent received exclusively through improvements will be due to the tenant who made them. *Annely v. De Saussure* (1887) 28 S. C. 497.

Yet the profits are not liable to make good the charge for repairs, except during the life of the cotenant. *Carver v. Miller* (1808) 4 Mass. 556.

A tenant in common in possession accounting for such rents and profits is entitled to an allowance for taxes or assessments paid on the premises, or for keeping the same in ordinary repair. *Hannan v. Osborn* (1834) 4 Paige, 336, 3 L. ed. 450.

Equity requiring that the rents and profits shall be regarded as paid and discharged *pro tanto* by the increased value which may have been imparted to the premises by the improvements, and the same

equity should be enforced where there is no actual partition, but the land is sold for a division of the proceeds among them. *McGee v. Hall* (1888) 28 S. C. 532; *Sutton v. Sutton* (1886) 25 S. C. 33.

In partition proceedings a reference will be made or inquiry into the value of the improvements made and by whom paid for, and of the amount of rents and profits and by whom received, so that in case of a sale proper allowance may be made. *Hall v. Piddock* (1871) 21 N. J. Eq. 311.

And the matter will be referred to the master for account thereof, and of the amount of rents and profits received by the cotenant in possession. *Doughaday v. Crowell* (1856) 11 N. J. Eq. 201.

Where upon a bill in partition the rents and profits are demanded of a tenant in possession, who has without objection made valuable and permanent improvements upon the estate, it is inequitable to refuse him the value of such improvements to the extent of the rents, if in occupying the land, the tenant does no more than he has a right to do. *Broyles v. Waddel* (1872) 11 Heisk. 32.

The question of rents and profits is correlative to that of improvements. *Drennon v. Walker* (1890) 21 Ark. 559; *Jones v. Jones* (1861) 23 Ark. 212.

For permanent improvements allowances will be made in partition, where they constitute an addition to the present value. *Chinn v. Murray* (1848) 4 Gratt. 345.

They will be taken into account. *Curtis v. Poland* (1838) 66 Tex. 511.

It is the actual receipt of the excess which creates the liability, and as the claim is not of strict legal right if he is charged with an occupation rent he should be allowed such usual repairs as a prudent landlord would make on his own property or allow the tenant as a deduction from the rent and for permanent improvements as an offset. *Tyner v. Fenner* (1840) 4 Lea, 469.

The court should deduct a proportionate amount for any necessary and proper improvements made by the cotenant in possession. *Scantlin v. Allison* (1884) 32 Kan. 376.

And the same rule applies to taxes paid by such cotenant over his proportionate share. *Scantlin v. Allison, supra*; *Mahoney v. Mahoney* (1872) 65 Ill. 405.

So in the case of one of several coheirs having the sole use of improved lands. *Graham v. Graham* (1823) 6 T. B. Mon. 532, 17 Am. Dec. 166.

Yet labor performed in paying taxes, and not for taxes paid cannot be claimed as a defense to an action for rent, without alleging that the money was furnished in payment thereof. *Harry v. Harry* (1891) 127 Ind. 91.

Also in the case of one cotenant indebted to the other on account of purchase money, the rents and profits may be applied in payment of the debt. *Volentine v. Johnson* (1833) 1 Hill, Eq. 49.

And an occupant of lands holding bona fide under the belief that he is the sole owner being

Eason, 17 Q. B. 701, 718. The defense is a remedial defect that has ceased to exist in this state. There is "extreme difficulty in distinguishing between principles of substantive law and rules relating only to procedure, in the older books." Holmes, Common Law, 190, *note*. The inns of chancery "were designed as places for elementary studies," where students "learned the nature of original and judicial writs, which were then considered as the first principles of the law." 4 Reeve, English Law, 120. When remedies were considered first principles, and the development of substantive law was largely determined by the operation of modes of procedure (3 Quarterly Law Rev. 166), there

were no such understanding and observance of the distinction between remedy and right as are indispensable at the present time in this state. The ideas of the Middle Ages on the subject were full of confusion and error. The extent to which they have survived in other jurisdictions is an irrelevant inquiry. Under the law of remedy now in force here, rights can no longer be confounded with the inadequate relief afforded by English forms of action. "Previous to the Statute of Anne, . . . no action lay by a tenant in common against his companion for the profits of the property owned in common. A remedy was given in that act by an action of account." *Jones v. Harraden*, 9 Mass. 540, *note*. "One

entitled to the value of necessary improvements made by him thereon in case of eviction, is liable for the rents and profits from the time he has notice of an adverse claim. *Whitledge v. Wait* (1804) Sneed (Ky.) 385, 2 Am. Dec. 721.

If in partition proceedings an equal division cannot be made without allotting improvements, the party taking the improvements must pay for them but should have an allowance for rents. *Respass v. Breckenridge* (1820) 2 A. K. Marsh. 581.

So in an account of issues and profits between cotenants in mining operations, necessary improvements may be allowed. *Graham v. Pierce* (1859) 19 Gratt. 23, 100 Am. Dec. 658.

Yet the compensation for improvements must not exceed the amount of rents charged against the cotenant. *Ormond v. Martin* (1851) 37 Ala. 598; *Horton v. Sledge* (1856) 29 Ala. 478.

If the expenses exceed the rents the equities of the statute would require that the defendant recover the balance. *Fowler v. Fowler* (1882) 50 Conn. 256.

Where, however, they are not charged with the use and occupation of the premises no allowance will be made for improvements, or for money expended in necessary repairs, insurance, and taxes. *Ford v. Knapp* (1884) 31 Hun, 522.

So a cotenant claiming compensation for his services and being allowed therefor is justly chargeable with the income and profits of the property, both when he used and operated it himself, and when he rented it to others. *Sears v. Munson* (1867) 23 Iowa, 380.

Where the defendant was charged with the rent for the portion of the estate occupied by her, being less than her share as a cotenant with the plaintiff, and it was shown that defendant had received the entire rents and profits of the estate the auditor having ascertained the gross rents and profits deducting sums properly allowable for taxes, insurance, and repairs allowing one sixteenth of the sum remaining to the plaintiff, it was held there was nothing on the face of his report to indicate unfairness, or that the amount reported was greater than what the plaintiff was entitled to. *White v. Eddy* (1895) (R. I.) 31 Atl. Rep. 823.

But in taking an account of rents and profits in partition proceedings, the estimate should not be based upon improvements made by parties in possession under a former division of the estate. *Chinn v. Murray* (1848) 4 Gratt. 348.

As between tenants in common where one has held out the other ignorantly believing himself sole owner, and pending such exclusion has made permanent improvements, the cotenant, unless he resorts to equity himself, cannot be compelled to contribute anything for the costs or value of the improvements beyond such portion of the rents as may be chargeable to the party erecting them. *Bazemore v. Davis* (1875) 55 Ga. 504.

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In computing improvements in partition proceedings between cotenants, the cotenant against whom the improvements are charged should only be charged with his proportion of the amount, which at the time of partition such improvements add to the premises, deducting a just sum for use and occupation of his share by his cotenant. *Cooter v. Dearborn* (1888) 115 Ill. 508.

The act of a cotenant taking exclusive possession, rebuilding the woodshed and renting it to a tenant, is equivalent to an exclusion of his cotenant, and he is therefore accountable for rent, deducting necessary repairs and taxes. *Davidson v. Thompson* (1871) 22 N. J. Eq. 83.

A tenant in common who claimed the entire fee, renting the premises in his own name, has been disallowed the commission for services rendered by him although the parties against whom such charge was sought to be enforced subsequently established their rights as tenants in common with such plaintiff. *Hattersley v. Bissett* (1894) 52 N. J. Eq. 683.

It will be presumed that a widow in the possession of the premises as tenant in dower pays the mortgage of the premises from the rents and profits received therefrom. *Knolls v. Barnhart* (1877) 71 N. Y. 477.

In *Nelson v. Leake* (1853) 25 Miss. 190, suit was brought to recover the value and profits of land of which the parties were joint owners, the defendant having received the profits and refused to pay plaintiff anything on account of the same the bill praying a division of the property and an account of the profits. The court held that an account should be decreed including the value of the permanent improvements put by the defendants upon the portion of the property not sold, for which the complainant should account to the defendant in proportion to his interest.

In *Pickering v. Pickering* (1886) 68 N. H. 463, a bill was filed for an account of the rents and income of lands and buildings owned by the parties as tenants in common, of which defendant had been in possession and receipt of the income and had expended considerable moneys in necessary repairs, materially increasing the value of the property and the income. The plaintiff having had no notice of the repairs and not being required to join in making them, it was held that an allowance might be made to defendant for such repairs the property having been benefited thereby.

Where the land originally in possession of tenants was impoverished, the fences dilapidated, and the buildings permitted to decay, when taken possession of by one of several cotenants, and improved by him, he exercising full control of the whole declaring that he would hold possession until the difficulties between himself and his cotenant were settled, it was held he was liable to account for the rents and profits from the time he entered into possession with an allowance for the amount

tenant of real estate may recover," in an action of assumpsit "against another, for his share of any trees, fixtures, or other part of the estate destroyed, severed, or carried away by such other." Gen. Laws, chap. 220, § 8. "This statute . . . gives, not a new right, but a new remedy." *Olcott v. Thompson*, 59 N. H. 154, 155, 47 Am. Rep. 184. The Act of Anne is of the same kind. Such legislation, like 18 Edw. I., chap. 22, giving one tenant in common an action of waste against another (3 Bl. Com. 227), is a partial enactment of our common law, which provides the best inventible procedure. The rule against the retrospective operation of law allows the introduction of remedies

where none existed before, and their equitable application to existing causes of action. *Cooley*, Const. Lim. 847, 436, 442, 454, 477, 478; 1 Hare, Const. L. 421; *Boston, O. & M. Railroad v. State*, 32 N. H. 215, 225, 226; *Kent v. Gray*, 53 N. H. 576, 578, 579; *Walker v. Walker*, 63 N. H. 321, 56 Am. Rep. 514; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229; *Foster v. Essex Bank*, 16 Mass. 245, 268, 278, 8 Am. Dec. 135; *Baughner v. Nelson*, 9 Gill, 299, 809, 52 Am. Dec. 694; *Satterlee v. Mattheuison*, 16 Serg. & R. 169, 179; Id. 27 U. S. 2 Pet. 380, 7 L. ed. 458; *Hope v. Johnson*, 2 Yerg. 123, 125; *Bolton v. Johns*, 5 Pa. 145, 149, 47 Am. Dec. 404; *Pittsburgh & N. A. Turnp. Road Co. v. Com.* 2 Watts, 483,

spent by him in improvements, with the exception of the repair of fences. *Cooper v. Cooper* (1853) 9 N. J. Eq. 566.

In a case where the plaintiff sought the share of the profits made by the defendant by the use of the premises in the working of a mine thereon, the defendants dividing the capital, doing the work and furnishing the skill, the plaintiff keeping aloof and free from risk, it was held he was only entitled to claim his just share of the net gains which represented the surplus after deducting everything that went into the cost of production for market and selling it; and no profits being shown the plaintiff was without decree. *Edsall v. Merrill* (1833) 37 N. J. Eq. 114.

The fact that one cotenant occupies less than his share, making improvements and entering into business thereon is a sufficient consideration for a release of claim to profits from the storage of goods upon the premises. *Nell v. Shackelford* (1876) 45 Tex. 112.

Where one tenant in common leased his interest to a third party, and at the time the other cotenant was in possession, claiming in his own right by virtue of a tax sale, it was held that the purchase by the latter cotenant was in the nature of a trust for the benefit of his cotenant and his grantee, and that he must convey the legal title after satisfaction of all claims for taxes and for the purchase money paid out and for expenditures and improvements and for services rendered as agent deducting all moneys received by him from the letting of the premises. *Baker v. Whiting* (1890) 3 Sumn. 475, 485.

But in *Walter v. Greenwood* (1882) 29 Minn. 87, a tenant in common brought action under the provisions of the Minnesota statute, to recover an unpaid balance of her proportion of rents received the defendant claiming a certain amount paid by him for improvements. The court held such improvements were not recoverable either in an action brought by him for that purpose, or by way of set-off in an action brought against him by his cotenant.

So where the husband of a tenant in common agreed with the other cotenant, with the concurrence of his wife, for the erection of a building upon the premises, the cotenant to advance the money necessary therefor, the wife's share of the property to be mortgaged to such cotenant to secure her portion of the advances, the wife dying before the mortgage was executed, the cotenant seeking by bill in equity to enforce a lien upon the share of the infant child for which the father was appointed guardian and to have the mortgage executed by such guardian for the purpose of securing such proportion of the advances, the court held that inasmuch as the agreement was not binding upon the wife owing to her coverture, that no lien was created, and that even if a lien existed it could not be enforced against such infant until 28 L. R. A.

after his majority, and that therefore the plaintiff must look to the rents for contribution and indemnity, the infant not being bound to contribute until he claimed his share of the rents although before the plaintiff might be fully indemnified the defendant might arrive at full age. *Coffin v. Heath* (1843) 6 Met. 76.

The claim for improvements in a suit brought by one cotenant against another for an account of the rents received, was held not to be a case for betterments under the South Carolina act. *McGee v. Hall* (1868) 28 S. C. 562.

If a tenant in possession improved the property by building, it is sufficient that the cotenant take his share of the land increased in value by the improvements without charging the tenant at whose expense they were constructed with rent for the time they were used by him. *Annelly v. De Saussure* (1887) 26 S. C. 497; *Thompson v. Bostick* (1840) McMull. Eq. 75.

As between cotenants the occupying tenant is liable for the rent of so much of the premises as was capable of producing rent at the time he took possession, but not liable for what it was capable of producing by his labor, and if he makes improvements he is not entitled to raise a charge for them. *Annelly v. De Saussure*, *supra*; *Hancock v. Day* (1840) McMull. Eq. 73, 86 Am. Dec. 233.

The above rule, however, applies only in cases where the improving tenant was not entitled to compensation individually for his improvements, as he could not charge for the improvements, it was equitable that he should not be charged rent for those improvements.

In *Goodenow v. Ewer* (1860) 16 Cal. 461, 76 Am. Dec. 540, it was held that an accounting for the rents received by one tenant in common from tenants of the premises and not for the profits made by such cotenants for labor and expenditure while personally not in exclusive possession, was permissible in equity as an incident of a partition, such tenant being entitled to deduct taxes paid and expenses incurred in making necessary repairs and additions for the premises during the period for which the rents were collected, and also to deduct for his own individual property used in order to let the premises themselves.

As to deductions for improvements in an action for mesne profits, see *Jackson v. Loomis* (1825) 4 Cow. 163, 15 Am. Dec. 347, and *Moss v. Shear* (1864) 25 Cal. 38, 85 Am. Dec. 94, *infra*, head XX.

XIX. Mesne profits.

At common law trespass was not recognized as a remedy between tenants in common, except when mesne profits were sought to be recovered or there had been an actual ouster from and destruction of the property. *Bush v. Gamble* (1890) 127 Pa. 43.

If one tenant in common occupies the whole estate claiming it as his own, it is an ouster of his

485. "In . . . early times the chief judicial employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered." 8 Bl. Com. 50. The use of writs invented for such cases was not an infringement of vested rights, but an enforcement of them. "We are not intrusted with the power of infringing substantive rights by withholding the necessary incident and appurtenant right of complete remedy. The common-law duty of inventing necessary forms of action, pleading, trial, judgment, and initial, intermediate, and final process, is as imperative now as it was during the ages in which its perform-

ance produced all the common-law procedure that is obsolete, and all that is now in use. The precedent to be followed is the performance of this duty, and not a violation of it." *Boody v. Watson*, 64 N. H. 162, 178; *Melcaly v. Gilmore*, 59 N. H. 417, 434, 47 Am. Rep. 217; *Walker v. Walker*, 63 N. H. 821, 826, 56 Am. Rep. 514.

"Popham, *Ch. J.*, said that every act done by one joint tenant in benefit of himself and his companion is good; as payment of rent, etc., to the lord by one doth discharge the other; but one joint tenant cannot prejudice his companion as to any matter of inheritance or freehold, but as to the profits of the freehold the one may prejudice the other; for

cotenant who must first establish his right at law and recover his mesne profits, as one tenant is bound to account to another only as his bailiff appointed by contract, express or implied. *Izard v. Bodine* (1857) 11 N. J. Eq. 403, 69 Am. Dec. 595.

If there be exclusion or ouster of the other cotenants from the premises or the title be denied, the tenant may maintain ejectment to recover possession and bring action to recover mesne profits. *Zapp v. Miller* (1888) 109 N. Y. 51; *Norris v. Gould* (1834) 15 W. N. C. 187.

Either in that or an independent suit. *Childs v. Kansas City, St. J. & C. B. R. Co.* (1893) 117 Mo. 414.

A tenant in common can maintain ejectment against a cotenant in possession disputing his right. *Mable v. Whittaker* (1895) 10 Wash. 658.

And in such an action evidence is admissible of the rents and profits received and damages sustained by reason of such ejectment, under section 534 of the Code of Civil Procedure considered with section 124 of the same. *Ibid.*

And such a tenant having brought partition proceedings, is entitled to maintain an action in the nature of trespass for mesne profits and to recover the value of the use and occupation at least. *Cook v. Webb* (1875) 21 Minn. 423.

There must, however, be an actual ouster in order to entitle a tenant in common to maintain trespass for mesne profits. *Porter v. Hooper* (1836) 13 Me. 25, 29 Am. Dec. 480; *Booth v. Adams* (1839) 11 Vt. 156, 34 Am. Dec. 680.

The obtaining of title to the whole property held in common, by virtue of fraud and undue influence practiced on the tenant in common who thereupon leaves the premises, is an ouster of such cotenant and will entitle him to bring ejectment and to call for an account of rents and profits, and also to recover mesne profits. *Zapp v. Miller* (1888) 109 N. Y. 51.

And where there has been a recovery in ejectment by one tenant in common, ouster is established there being record evidence of the fact, and such tenant may therefore maintain trespass for his share of the rents and profits. *Norris v. Gould* (1834) 15 W. N. C. 187; *Critchfield v. Humbert* (1861) 39 Pa. 427, 80 Am. Dec. 533; *Lane v. Harrold* (1873) 72 Pa. 237.

The disseisor is a wrongdoer against whom a writ of entry or trespass for mesne profits in proper cases will lie. *Richardson v. Richardson* (1881) 72 Me. 403.

Yet the disseesee does not have the freehold or possession on which he must rely in order to prove a promise to pay rent to him, a disseisor being a trespasser and not a tenant; the tort cannot be waived for the purpose of trying the title to land in an action of assumpsit. *Ibid.*

There is no reason why a party who has been ousted by his cotenant should not recover the damages resulting from such ouster as well as when ousted by an entire stranger to the land, the injury inflicted being no less because done by a cotenant,

and the right to recovery of mesne profits following in all cases upon a recovery in ejectment. *Carpenter v. Mitchell* (1855) 29 Cal. 330.

After recovery in ejectment, the general rule is that the plaintiff may recover mesne profits against the defendant for such length of time as he can prove him to have been in possession if he goes beyond the time let in the demise; the defendant may controvert his title or may plead the statute of limitations if the plaintiff attempts to go back of six years. *Hare v. Fury* (1800) 3 Yeates, 12, 2 Am. Dec. 358.

An action of ejectment is a natural remedy for a cotenant to recover possession, and in that case, or subsequently in an action of trespass he may recover for mesne profits. *Bennett v. Bullock* (1860) 35 Pa. 364; *Carpenter v. Mitchell*, *supra*; *Langendyck v. Burhans* (1814) 11 Johns. 461; *Camp v. Homlesley* (1850) 33 N. C. 212; *Hare v. Fury*, *supra*; *Chambers v. Chambers* (1824) 10 N. C. 238, 14 Am. Dec. 585; *Critchfield v. Humbert*, *supra*; *Goodtitle v. Tombs* (1770) 3 Wils. 120; *Murray v. Hall* (1849) 7 C. B. 454, 13 L. J. C. P. 161, 13 Jur. 528.

Even though the plaintiff before the ouster had entered into an executory agreement for the sale of the premises, and his vendee was in possession at the time of the ouster. *Leland v. Touzey* (1844) 6 Hill, 823.

But the only damages which such plaintiff is entitled to recover are such as grow out of, and are incident to, the ouster upon which the recovery rests. *Carpenter v. Mitchell*, *supra*.

A proper measure of damages in an action for mesne profits is compensation; and the value of permanent improvements will be allowed. *Morrison v. Robinson* (1858) 81 Pa. 456.

Rents and profits, accruing while the land has been held adversely, received by a joint owner, are recoverable as mesne profits in an ejectment suit for recovery of possession of the undivided share of the plaintiff. *Burhans v. Burhans* (1847) 3 Barb. Ch. 398, 5 L. ed. 680.

But a cotenant can only recover mesne profits accrued within six years prior to the bringing of action, the statute of limitations applying after judgment in ejectment to all rents, etc., accruing previously. *Hill v. Meyers* (1863) 46 Pa. 15.

The New York statute abolishing the action for mesne profits and substituting a suggestion upon the record, applies only to mesne profits strictly, the right to which results from the recovery in ejectment, the original entry being still the subject of an action of trespass, and so are mesne profits where the plaintiff obtains possession without suit or without prosecuting the suit to judgment. *Leland v. Touzey*, *supra*.

And the record of the plaintiff's recovery in ejectment is not conclusive evidence of his title as against strangers to the record, but only as against parties and privies in an action for mesne profits. *Ibid.*

there is a privity and trust between two joint tenants, and therefore if one takes all the profits of the land, or the whole rent, etc., the other hath no remedy; for it was his folly to join himself in estate with such a person as would break the trust [*Tooker's Case*, 2 Coke, 66, 68], to remedy which an action of account is given by Statute of 4 Anne, chap. 16, although the defendant was not actually bailiff." *Ballou v. Hale*, 47 N. H. 347, 352, 93 Am. Dec. 438. Popham seems to have thought that the privity and trust between two owners in common is a reason why there should be "no remedy" when one of them takes all the profits, or the whole rent, and refuses to account. If the folly of the other

in joining himself with a person capable of a breach of trust is the reason why no writ for such a case was found in the office of precedents, it does not suspend the duty of inventing and using the remedial process that justice requires. The privity and trust of common ownership may be created by the law of descent, and by wills as well as by contracts. In neither case does the law regard its creation as an act of folly. Whether the property is real or personal, and whether the trust inherent in the undivided interests of common owners arises from the law, or from a will or contract, neither of the owners can "break the trust" with impunity. An exceptional lack of remedy in this class of

The New York statute not applying where the claim for mesne profits is not solely against the person who was defendant in the ejectment, but as against him and others jointly. *Ibid*.

In *Jackson v. Loomis* (1825) 4 Cow. 168, 15 Am. Dec. 347, an action for mesne profits, the defendant was allowed for improvements made by him while in possession under a bona fide purchase.

The value of improvements constitutes a counterclaim or set-off, and in order to make it valuable as a defense in an action of ejectment and claim by mesne profits, it must be pleaded as new matter. *Moss v. Shear* (1864) 25 Cal. 23, 85 Am. Dec. 94.

And must be asserted by proper averments in the answer, or the defendant will be precluded from doing so at the trial. *Ibid*.

In the case of one joint tenant or tenant in common recovering possession against their partners on an actual ouster, the defendants in such instances hold undivided interest and cannot be compelled to relinquish entire possession, and therefore where one tenant in common recovers in ejectment they are restricted to a reasonable time after judgment in their claim for mesne profits. *Hare v. Furr* (1800) 3 Yeates, 13, 2 Am. Dec. 368.

Under the Mississippi Code 1880, §§ 2506, 2512, a tenant in common who has been ousted by his cotenant may maintain ejectment against him and recover rents and profits in the same action. *Clay v. Field* (1885) 115 U. S. 260, 29 L. ed. 375.

The law is well settled in Pennsylvania that one tenant in common cannot maintain trespass for mesne profits against his cotenant without proof of an actual ouster, or acts amounting to it, and that he cannot maintain assumpsit for mere use and occupation except on an express promise of his cotenant, and that neither trespass nor assumpsit will lie for a mere permissive occupation. *Norris v. Gould* (1864) 15 W. N. C. 187.

The general rule as laid down in the case, *Bazemore v. Davis* (1875) 55 Ga. 504, ante, head XVIII., applies to the question of adjustment between improvements and mesne profits, under sections 2906 and 3468 of the Georgia Code.

XX. The application of the statute of limitations.

A tenant in common in possession of the premises is deemed in law to have by express contract assumed to receive for his companions their shares of the proceeds from time to time as they grow due, and so long as he continues to do so his agency lasts and there can be no adverse relations between them which will give rise to cause of action and consequently the statute of limitations is not allowed to prevail as a defense in that case. *Jolly v. Bryan* (1882) 86 N. C. 487.

The statute of limitations cannot be pleaded until three years after partition. *Wagstaff v. Smith* (1882) 17 N. C. 264.

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And a bill in equity being a mere substitute for an action of account, whatever time would be a bar at law will bar the account in equity. *Wagstaff v. Smith* (1845) 30 N. C. 1.

So long as the relation, or privity, or connection continues to exist between tenants in common, the statute of limitations does not commence to run, and during such period there is nothing adverse, no withholding by the one to the prejudice of the other. *Wagstaff v. Smith* (1882) 17 N. C. 264.

The statute does not commence running in the case of tenants in common till the relations are determined by partition, or there is a demand to be let into possession and an actual ouster, or a demand for an account and a denial of the right. *Northcott v. Casper* (1843) 41 N. C. 306.

It runs from the time a tenant in common denies the right of his cotenant, and such denial may be shown by a refusal to pay or account on demand, or of an ouster. *Almy v. Daniels* (1887) 15 R. I. 318.

Although a tenant in common is bailiff of his cotenant, yet if he denies the right of the cotenant and holds adversely to him, the confidential relation ceases and the statute begins to run. *Ibid*.

Where the ouster consisted in the exclusive appropriation of a portion of the land to the defendant's building, the statute began to run as to that portion when such appropriation took place, and not from the time of demand for an account. *Ibid*.

There cannot be an adversary position as to make the statute run in reference to the right to an account of the profits, when it does not also run in reference to the right of possession, which can only be when there is an ouster really made or presumed from lapse of time. *Northcott v. Casper*, *supra*.

The statute will run from the time adverse possession is taken, and therefore there can be no recovery of rents and profits where a tenant in possession claims them as his own, after the period limited by the statute. *Terrill v. Murry* (1839) 4 Yerg. 104.

The statute of limitations is applicable, *inter alia*, to an action of account or bill in equity between tenants in common, where one has received more than his just proportion of the profits, but it is not applicable to the equitable right of a tenant in common to an allowance for improvements made by him on a partition of the premises in equity. *Green v. Putnam* (1847) 1 Barb. 500.

Under section 2216 of the Alabama Code, persons holding possession under color of title in good faith are not responsible for damages or rent for more than one year before the commencement of the suit, and the section has been held applicable to proceedings in chancery in the nature of an equitable ejectment, such as partition proceedings. *Ormond v. Martin* (1861) 37 Ala. 598.

A tenant in common seeking to gain possession of property from which he has been ousted can only recover rents and profits for three years prior

cases of fiduciary rights and obligations is not a doctrine of our law. "At common law, if a man were disseised, and his entry taken away, he could never recover by any action the mesne profits. . . . But the chancery interposed, and at last carried the remedy farther than had been admitted at common law." Bacon, *Abr. Accompt* (B). The income of a farm belonged to the owner of the farm before the means of recovering the income was supplied by chancellors and parliaments. When there were several owners, the right of each to his share of the income existed before the Statute of Anne. To deny the vested right of each in the income is to assert that the land is not theirs. That right

is the substance of the title,—the whole of the beneficial interest. "A conveyance of the use of land forever is equivalent to a conveyance of the land." *Farrar v. Cooper*, 34 Me. 394, 398. "By the grant of the profits of land, 'the whole land itself doth passe; for what is the land but the profits thereof?'" Co. Litt. 4 b. A devise of the use and income of land is a devise of the land itself. *McClure v. Melendy*, 44 N. H. 469; *Wood v. Griffin*, 46 N. H. 230, 234. *Boston, C. & M. Railroad v. Boston & L. Railroad*, 65 N. H. 393, 453, 454. The referee has not found a sale or gift to the defendant of any part of the plaintiff's half of the profits. The defendant having converted to his own use

to action where the defendant relies upon the statute of limitations as a bar. *Carpenter v. Mitchell* (1885) 29 Cal. 330.

Where the defendants were naked trespassers and in the wrongful possession of the premises from the time of their respective entries until after commencement of suit the plaintiff is entitled to recover one half the rents and profits during the entire period of the continuance of such wrongful possession within the statute of limitations. *Ibid.*

Where one tenant in common is disseised either by a fellow tenant or a stranger he has his remedy in his own right on his own independent title and if he does not exercise that right within the time limited by statute he loses it. *Doolittle v. Blakesley* (1810) 4 Day, 265, 4 Am. Dec. 218.

While the parties are tenants in common, the Kentucky statute authorizes a recovery by one against the other without limitation as to the time of use. *Coleman v. Hutcheson* (1813) 3 Bibb, 209, 6 Am. Dec. 649.

So where there has been no change either in law or in the situation of the parties, except that produced by the party himself, through his purchase without the consent or even knowledge of his cotenant, the course of the law is not diverted to the overthrow of an existing right for the recovery of which a remedy has been provided without restriction or limitation as to time. *Ibid.*

There must be an adverse possession in order to enable the statute of limitations to run, and disseisin must be strictly proved. *Fairclain v. Shackleton* (1770-2) 5 Burr. 2804.

As to the application of the statute in cases of a claim for mesne profits, see *Hill v. Meyers* (1863) 46 Pa. 15, *supra*, head XIX.

XXI. Construction of the state statutes.

The construction placed upon the Indiana Statute (2 Gavin & Hood, § 16, p. 360), by the court in *Crane v. Waggoner* (1866) 27 Ind. 52, 39 Am. Dec. 493, limited the right to recover to cases in which the rent was actually received from a third person and retained by the defendant to his own use, the Indiana statute being taken from and being substantially the same as the English Statute of Anne.

The statutes were not designed to create a right in favor of a cotenant who expended nothing, to share the profits resulting from the money or labor expended by his companion; but were intended to give a remedy by which the profits of the estate growing out of its condition when acquired, or which the estate yields or would yield independent of any extraordinary expenditure by the party receiving the profits, might be apportioned according to the interest of the cotenants, and the receiver compelled to account to his cotenant for his share, the statutes enforcing no more than was required by the principles of morality. *Nelson v. Clay* (1833) 7 J. J. Marsh. 140, 23 Am. Dec. 387.
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Neither at common law nor under the English Statute of Anne can one tenant in common maintain assumpsit against another for use and occupation of the common estate, but the rule is modified by the Revised Statutes of Maine, chap. 95, § 16. *Richardson v. Richardson* (1881) 72 Me. 403.

The main purpose of the Maine statute was to extend the right of recovery in such actions to cases in which the defendant has had the use and occupation of the joint estate, or more than his share of it, or where he had himself received or taken more than his share of the rents or income thereof in the products of the soil, or otherwise than in money. *Ibid.*

The Maine statute which is to be construed the law of the state, expressly limits the liability to account in an action of assumpsit to the case where the possession is "without the consent of his cotenant." *Dyer v. Wilbur* (1860) 48 Me. 287.

The phrase in the Revised Statutes of Maine, chap. 95, § 16, "without the consent of their cotenant," does not refer to the case of a disseisor receiving rents under an adverse claim to his cotenant. *Richardson v. Richardson, supra.*

The words "taking and receiving the rents, profits, or income," contained in the Maine statute, have no technical or recondite signification, but are to be understood according to the ordinary exception, the words being often used synonymously and have substantially the same meaning in the statute, though in strict verbal accuracy,—the one more appropriately expresses the idea of accepting rents, and the other that of gathering crops. *Cutler v. Currier* (1866) 54 Me. 51.

Where the evidence negatived the fact that the money had been actually received and that there was a duty to pay or that the defendant held the share as bailiff, or the occupation had been by consent, and it was shown that the advantage had been derived by the defendant's intestate by his personal occupation of the premises, the Maine Statute of 1843 was held to apply, the statute being remedial and construed to give effect to the remedy where the construction was not inconsistent with the language used, or the fundamental law. *Ibid.*

The Minnesota statute gives a right of action against a cotenant appropriating more than his just share of the rents and profits, but it has been held that trees cut and removed from the land cannot be regarded as rents and profits within the meaning of the statute, nor can the money received upon a sale of them. *Shepard v. Petit* (1869) 30 Minn. 119.

The Missouri statute giving an action of account to joint tenants and tenants in common against each other are similar to the statutes of New York and the Statute of 4 Anne; the tenant is only liable as bailiff or receiver, and this relation can only arise by contract. *Ragan v. McCoy* (1890) 39 Mo. 356, 367.

The provisions of the New Hampshire statutes

apart of the plaintiff's half, and refused to account, the law of the case is what it would be if the defendant had refused to account for rent of the farm paid him by a third person, or for crops and provisions owned in common by the defendant and the plaintiff and consumed by the defendant. When one tenant in common "has laid out large sums in improvements on the estate, . . . although . . . the money so laid out does not, in strictness, constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account, and compelling the party applying for partition to make due compensation. So, where one tenant in common has been in the ex-

clusive perception of the rents and profits, on a bill for a partition and account, the latter will also be decreed." Story, Eq. Jur. § 655. Equitable adjustments between common owners do not depend upon the rule that he who asks equity must do equity. "In the courts of common law, both of England and America, there are certain prescribed forms of action to which the party must resort to furnish him a remedy, and, if there be no prescribed form to reach such a case, he is remediless; for they entertain jurisdiction only of certain actions, and give relief according to the particular exigency of such actions, and not otherwise. . . . Courts of equity . . . can administer remedies

were intended to provide a more simple and direct remedy for the cotenant excluded or ousted, but were not intended to change the common law in regard to the nature of such tenancies and confine the new remedy to cases stated in the statute, where the holding by one tenant was without the consent and against the will of the other.

An action of account at law is now maintainable under the New York revised statutes. *Green v. Putnam* (1847) 1 Barb. 500.

The New York statute giving a right of action on account of money had and received, applies to cases where the rent is received from a third person by a cotenant who holds it to his own use, and not to the case of a tenant in common solely occupying and farming the land at his own cost and for his own benefit. *Dresser v. Dresser* (1882) 40 Barb. 800.

Where the complaint did not allege that the defendant occupied the premises under an agreement with his cotenants, and it was not proved that he actually received any rents or profits, but the court found the annual value of the premises and held him liable to account for the use and occupation of the premises upon that basis, the court reversed the decision of the court below and held that a tenant in common under the New York statute was liable to account only for what he received and not for what he took, there being no alleged ouster shown. *Roseboom v. Roseboom* (1878) 15 Hun, 309, affirmed 81 N. Y. 256.

The New York statute giving the right of action between cotenants does not say of what it should be the just proportion, but it is left to apply generally to whatever is the subject of the tenancy, every case in which a tenant in common receives more than his just share being within the statute. *Wright v. Wright* (1879) 59 How. Pr. 176.

The New York statute providing for a remedy of a tenant in common by way of action to account for the amount received by a cotenant in excess of his just proportion, does include the value of the use or the products devoted to the tenant's own use. *Le Barren v. Babcock* (1857) 46 Hun, 598, in which the tenant was held entitled to a crop of oats sown and cut by him upon the land against his cotenants.

The object of the provisions of N. Y. Code of Civil Procedure are to provide no more than for the equality of partition and the adjustment of the rights of a tenant in common or joint tenant, to that equality by charging him with his proper proportion of the rents and profits received by him from the joint property. *Rich v. Rich* (1888) 50 Hun, 190.

The New York statute does not, either by its language or by implication, impose a liability not previously existing upon the tenant to pay for his occupancy of the joint property, when that may be all that is made to appear as the foundation for the claim against him. *Ibid.*

The language of section 1686 of N. Y. Code of Civil 28 L. R. A.

Procedure relating to the act of a joint tenant or tenant in common of real estate to maintain an action to recover his just proportion from his cotenant, is no broader than that contained in the revised statutes, and in no manner enlarges the right of the tenant who may be out of possession, neither does section 1589 of the same Code, which provides for the adjustment in the interlocutory or final judgment in partition of the rights of one or more of the parties as against any other party, by reason of the receipt by the latter of more than his or their proportion of the rents and profits of a share, confer any greater right in the party out of possession or create any greater liability of the party in possession to account for the rents and profits of the premises, while he may be only in their actual occupancy. *Ibid.*

In *Rich v. Rich*, *supra*, the case of *Scott v. Guernsey* (1871) 48 N. Y. 106, was not considered as a controlling authority, or one which should be followed in the disposition of controversies of this description, neither the statute nor the earlier cases defining the liability of joint tenants or tenants in common to account having been considered therein.

The enactment of the North Carolina statute that actions of account may be maintained by one joint tenant or tenant in common, his executors and administrators, against the other as bailiff for receiving more than his share and against the executors and administrator of such, is decisive that the action lies while the relation of a common holding continues, and consequently a cause of action may arise by the severance of that connection. *Wagstaff v. Smith* (1845) 39 N. C. 1.

If the statute has the effect for one purpose of establishing the contract on the part of the defendants to act as bailiff for the plaintiff, to receive and hold the profits as they accrue to their use, and to account for the same when demanded, it must do so for all purposes. *Jolly v. Bryan* (1882) 86 N. C. 457.

The effect of the North Carolina statute, Revised Code, chap. 31, § 99, is to introduce between the parties the relation of principal and bailiff as fully and effectually as if the same had been done by express agreement and stipulation on the part of one who acts for all, and that inasmuch as the statute would not begin to run in case there had been this express understanding between the parties until a demand and a refusal of the office of bailiff had terminated, so neither could take in the case of the implied agency under the statute. *Ibid.*

And the action given by the Ohio statute is a civil action for rents and profits "received" by a cotenant in excess of his full share "according to the equity and justice of the case," the action being one in which neither party has a right of trial by jury and which may be applied. *Conard v. Conard* (1882) 38 Ohio St. 467.

The Ohio statute differs from the English Stat-

for rights, which rights courts of common law do not recognize at all; or, if they do recognize them, they leave them wholly to the conscience and good will of the parties." *Id.* §§ 26, 29.

"Cases of account between tenants in common, between joint tenants, between partners, between part owners of ships, and between owners of ships and the masters, . . . involve peculiar agencies, like those of bailiffs or managers of property, and require the same operative power of discovery and the same interposition of equity" as other cases of fiduciary rights and obligations. "Indeed, in all cases of such joint interests, where one party receives all the profits, he is bound to account to the other parties in interest for their respective shares, deducting the proper charges and expenses, whether he acts expressly by their authority as bailiff, or only by implication as manager, without dissent, *jure domini*, over the property." *Id.* § 466; *Leach v. Beattie*, 83 Vt. 195, 200, 201. Whether the defendant's obligation to account is enforceable by a bill in equity, or in this action upon a promise implied by law, is a question of no practical importance. Time spent in considering it would be wasted. If, upon examination, it were found that the action in its present form cannot be maintained, the plaintiff would be allowed to amend his declaration by filing a bill in equity. *Peaslee v. Dudley*, 63 N. H. 220; *Sleeper v. Kelley*, 65 N. H. 206.

When such an amendment is made, he will be entitled to judgment.

Case discharged.

Allen, J., did not sit. **Doe, Ch. J.**, and **Clark and Blodgett, JJ.**, concurred.

Carpenter, J., dissenting:

The difficulty sometimes met in drawing the line between declaring and making the law (Broom, Common Law, 5) is not encountered here. Ever since estates in common have been known to the law, it has been the unquestioned legal right of a tenant in common—one of his essential proprietary rights—to occupy, use, and enjoy the common property without liability to account to his cotenants, so long as he does not prevent them from exercising the same right. The earliest reported judicial declaration of the doctrine to which attention has been called is found in the Year Book, 17 Edw. II. 552 (A. D. 1324), and the latest is the unanimous judgment of this court in *Berry v. Whidden*, 62 N. H. 473 (A. D. 1883). If in *Berry v. Whidden* the same result might have been reached on other grounds, its authority on the point decided is not thereby diminished. *Webster v. Calef*, 47 N. H. 389. The doctrine is the logical and necessary consequence of the nature of the estate. It is the law, not of remedy, but of right. In respect to occupation and the right to occupy, there is no difference between tenants in com-

ute of 4 Anne, chap. 16, § 27, in that the language in the English statute limiting the liability of the tenant in possession to that of bailiff is omitted and the words "rents and profits" are added. *West v. Weyer* (1888) 46 Ohio St. 63.

By section 5774 of the Revised Statutes of Ohio one tenant in common or coparcener may recover from another his share of the rents and profits received by such tenant in common or coparcener, from the estate according to the justice and equity of the case, and in the construction of the above statute, the court held that it applied to a case of a cotenant in common who simply pastured his cattle upon the premises the court holding him liable for the value of the use, upon the ground that the voluntary and profitable use, occupation and enjoyment by a tenant in common of the common estate creates a liability against him to account to the tenant as for his share of the rents and profits received by the former, according to the justice and equity of the case. *Ibid.*

By the Rhode Island Statute, Rev. Stat., chap. 102, § 1, the action is given as to all co-owners of property real or personal, and their representatives, where "one or more of the owners of such common property shall take, receive, or use or have the benefit thereof in greater porportion than his or their interest therein" and the account to be rendered is for "the use and profits of such common property;" and in the construction of this statute it has been held that the concluding words of the section, "for receiving more than his or their part or proportion," are thrown back upon their meaning to the preceding part of the section by the immediately succeeding words "as aforesaid." *Knowles v. Harris* (1868) 5 R. I. 402, 73 Am. Dec. 77.

In the headnote to the above case the report would seem to have been given the construction of the English Statute of 4 and 5 Anne for that of the Rhode Island statute (*Hazard v. Albrow* (1800) 17 R. I. 181), inasmuch as the opinion states that the 28 L. R. A.

English statute makes the tenant in common who receives more than comes to his just share, *pro facto*, bailiff of his cotenant for the excess, as far as necessary for the maintenance of the action, citing the English cases of *Henderson v. Eason* (1851) 17 Q. B. 701, 708, 21 L. J. Q. B. 82, 16 Jur. 513, 9 Enr. L. & Eq. 337; *Eason v. Henderson* (1851) 12 Q. B. 919, 998, and *Sturton v. Richardson* (1844) 13 Mees. & W. 17, 2 Dowl. & L. 182, 13 L. J. Exch. 281, 8 Jur. 476, in support of its statement.

The above statute has been given a broader construction than the Statute of Anne, being held to create a liability to account, even where there have been no actual receipts. *Hazard v. Albrow, supra*.

In *Early v. Friend* (1880) 16 Gratt. 21, 73 Am. Dec. 649, the court adopted the following rule in construing the provisions of the statute, that whenever the nature of the property is such as not to admit of its use and occupation by several and it is used and occupied by one only of the tenants in common, or wherever the property though capable of use and occupation by several is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just share and proportion in the meaning of the statute, and is accountable to the others.

Where the nature of the property is such as to admit of its use and occupation by several, and less than his just share and proportion of the common property is used and occupied by one tenant in common in a manner which tends in no way to hinder or exclude the other tenants in common from in like manner using and occupying their just share and proportion, such tenant does not receive more than comes to his just share and proportion in the meaning of chapter 100, section 14, of the West Virginia Code, and is not accountable to his cotenants for the profits of that portion of the property used by him. *Dodson v. Hays* (1887) 29 W. Va. 677.

See also *Early v. Friend, supra*; *White v. Stuart* (1882) 76 Va. 546, 576, *supra*, head III. R. W.

mon and joint tenants. Each of two cotenants is equally entitled to the possession and use as well of every parcel as of the whole. In occupying, each exercises his own, and not his companion's, right. Neither can lawfully exclude the other. No more can either, by his voluntary omission to exercise his own right of occupation, destroy or modify the other's right. Co. Litt. §§ 288, 292, 323; 2 Bl. Com. 182, 191, 192; 4 Kent, Com. 359, 367-369; *Daniel v. Camplin*, 7 Mann. & G. 167, 170, 172, note; *Murray v. Hall*, 7 C. B. 441, 454, 455, note; *Wood v. Phillips*, 43 N. Y. 152; *Calhoun v. Curtis*, 4 Met. 413, 38 Am. Dec. 880. For the exercise of his legal rights upon land of which he is lawfully possessed in his own right, no one is in law or in equity accountable to another in any form of procedure. No promise to account can be implied (*Seera v. True*, 53 N. H. 627), and any consequential loss must be borne by him on whom it falls. Sedgw. Damages, 29-32. The common law recognizes no right for the violation of which it does not provide a remedy. If it gives no remedy, it gives no right. 8 Bl. Com. 123; Broom, Legal Maxims, 198; *Ashby v. White*, 2 Ld. Raym. 988, 993; *Rich v. Flanders*, 39 N. H. 804, 851. In some cases it gives a remedy without legal process. 8 Bl. Com. 18-21; Co. Litt. 200a. To take away all remedy for its infringement is, in legal effect, a repeal of the law. *Squire v. Gretell*, 2 Ld. Raym. 961, 961, 1 Salk. 74; *Willard v. Harrey*, 24 N. H. 314, 353; *Rich v. Flanders*, 39 N. H. 804, 847, 351, 353, 374, 379, 385, 390. To give a remedy where none by law exists, is to enact a law creating rights. In each case alike it is legislation. Littleton (sec. 823) and Coke (Co. Litt. 197, 200) state the distinction between an indivisible chattel, of which the possession or use is of necessity exclusive, and apportionable lands, which may be possessed and enjoyed in common. The law governing the rights and remedies of joint owners of such a chattel has no application to the present question. It is irrelevant for the purpose of argument or illustration, until it is shown that the possessor of the chattel is bound by law to account for its use to his cotenant, who is free to take it into his own possession whenever he will. *Prentiss v. Ladd*, 12 Conn. 331, 333; *Southworth v. Smith*, 27 Conn. 355, 359, 71 Am. Dec. 73; *Brown v. Wellington*, 106 Mass. 318, 319, 8 Am. Rep. 330.

The plaintiff's position, that the exemption of the tenant occupying common lands from liability to account for the use of the property to his unexcluded cotenants was due to the want of remedial process by which they could enforce their rights, is without foundation. The reverse is true. The law provided no remedy, because there was no violation of right. It might as well be argued that the wife's common-law disabilities, and the husband's title to her property, were due to the lack of suitable process for the vindication of her rights, or that, on a recovery of land, the defendant's inability to obtain compensation for improvements made by him while in peaceable possession under a supposed legal title (Gen. Laws, chap.

232, §§ 6-8) was owing, not to the law of property, but to the neglect of the judges to invent a method of procedure by which his claim for betterments could be enforced. If the position is sustained, the unwritten laws of property are few that judges who happen to think them harsh or inequitable may not repeal under the guise of remedial invention. *Rich v. Flanders*, 39 N. H. 804, 390. Whether it would be wise in the legislature to repeal the law, and make a tenant's "own omission to occupy the joint estate a ground of action against his cotenant" (*Berry v. Whidden*, 62 N. H. 476; *Badger v. Holmes*, 6 Gray, 120), is a question upon which opinions may perhaps reasonably differ. It has been, and well may be, doubted whether justice would be promoted by giving a tenant, who voluntarily declines to occupy the common estate, the power to prevent his cotenants from occupying it except upon terms of paying him rent. *Henderson v. Eason*, 17 Q. B. 701, 710-716, 720, 721; *McMahon v. Burchell*, 2 Phill. Ch. 127, 184; *Sargent v. Parsons*, 12 Mass. 149, 153. The common law of tenancy in common has been modified by legislation in several particulars (3 Bacon, Abr. 699-704, 708; Gen. Laws, chaps. 141, 230, 247), but the law-makers, acquainted for six centuries with its practical operation, have seen no cause for depriving cotenants of the right in question. An excluded tenant in common may recover of his cotenant the possession in ejectment (Co. Litt. §§ 322, 323; 1 Chitty, Pl. 79, 191) and the mesne profits in a subsequent action (*Goodtitle v. Tombs*, 3 Wils. 118; 1 Chitty, Pl. 79, 195; *Runnington*, Ejectment, 443; *Stearns*, Real Act, 404), or he may maintain trespass for his damages. *Wood v. Griffin*, 46 N. H. 230. The rental value during the time of his exclusion—he may recover more (*Goodtitle v. Tombs*, 3 Wils. 120)—indemnifies him for the past, and partition will protect him in the future. If not excluded, he needs no remedy, because no right is infringed. Equity follows and is bound by the law. It can neither give to the plaintiff, nor take from the defendant, a legal right. Against established law it can afford no relief. 8 Bl. Com. 429-437; 1 Story, Eq. Jur. §§ 11-20. "In no case does it contradict or overturn the grounds or principles" of the law. "That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with." *Cowper v. Earl of Caceres*, 2 P. Wms. 720, 753, 754. It cannot compel a party to account who is declared by law to be under no obligation to account. Hence, though having full jurisdiction (1 Story, Eq. Jur. §§ 441, 466), it has never yet required, or attempted to require, an occupying tenant in common to account for the use of the property to a cotenant who may occupy whenever he will.

Courts of justice cannot lawfully make, or repeal, the law. The power is denied to them by the common law (Co. Litt. 115b, 282b, 379b; 1 Bl. Com. 70, 71, 142, 269, and *Christian's notes* 3 and 4 at p. 70; 1 Kent, Com. 476; *Brydges v. Duchess of Chandos*, 2 Ves. Jr. 417, 426; *Entick v. Carrington*, 19

How. St. Tr. 1029; *Mirhouse v. Rennell*, 1 Clark & F. 527, 607; *Egerton v. Brownlow*, 4 H. L. Cas. 128; *Atty-Gen. v. Dean & Canons of Windsor*, 8 H. L. Cas. 369, 391-393; *Beamish v. Beamish*, 9 H. L. Cas. 274, 337-339, 349; *Freeman v. Tranah*, 12 C. B. 406, 411-415; *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 738, 866, 6 L. ed. 204, 234; *Bellows v. Parsons*, 18 N. H. 256, 261-263), and for the soundest reasons. "It may be lamented that the law upon any subject is in such a state as to induce eminent judges and writers to express their disapprobation of it, and their regret that they are bound to give it effect; but it would be still more to be lamented if judges should be found who thought themselves at liberty to declare the law according to their own fancies of what it ought to be. All stability would be lost, and the law, which should be administered upon clear and fixed principles, would be involved in uncertainty and confusion." *Bullin v. Fletcher*, 1 Keen, 369, 379. "If law, well established, may be annulled by opinion, a foundation is laid for the most restless instability. The decisions of one court may be overruled by another court, and those of the latter will have only a transient efficacy until some future court, dissatisfied with them, shall establish new principles in their place. No system of inflexible adherence to established law can be as pernicious as such ceaseless and interminable fluctuations." *Palmer v. M. ad.* 7 Conn. 149, 157. "It is no part of my duty to make new law simply because I think the old law unreasonable; that is the province of the legislature. When I find a point decided, however I may lament the result, I think I am bound to follow the decision and to construe it fairly, and not seek to evade it or fritter it away by introducing distinctions only invented for the purpose of pronouncing another decision which in my opinion would be more in conformity with reason." Jessel, *M. R.*, in *Bellairs v. Bellairs*, L. R. 18 Eq. 510, 513. If it were otherwise at common law, the authority is denied to us by the express terms of the constitution. The legislature cannot confer it upon us. *State v. Hayes*, 61 N. H. 264. "All the laws which have heretofore been adopted, used, and approved in the province, colony, and state of New Hampshire, and usually practiced on in the courts of law, shall remain and be in force until altered or repealed by the legislature." Const. art. 90. A sufficient reason, if there were no other, for leaving the repeal of the common law of property rights to the legislature is that its enactments look to the future without disturbing the past. They have, and under the constitution can have, no retrospective operation (Bill of Rights, art. 23), while judicial law-making is necessarily retroactive, not only in the particular cause adjudged, but in all other similar and subsisting causes.

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By the established law of the land, the defendant, during all the time he occupied the premises, did the plaintiff no wrong, and incurred to him no liability. He exercised his legal right, and left the plaintiff at liberty to exercise his equal right. *Webster v. Calaf*, 47 N. H. 239; *Berry v. Whidden*, 62 N. H. 473. Whatever the plaintiff lost, he lost through no act of the defendant, but by his own laches. At the date of his writ he had no ground of complaint, in equity or at law. A judgment in his favor will impose on the defendant an obligation which prior to its rendition did not exist. Had the legislature at its last session enacted a statute having the same effect on the rights of the parties, it would be the duty of the court to pronounce it unconstitutional and void. *Woard v. Winnick*, 8 N. H. 473, 477, 14 Am. Dec. 384; *Toole v. Eastern Railroad*, 18 N. H. 547, 551, 47 Am. Dec. 163. A judgment for the plaintiff will be as "highly injurious, oppressive, and unjust" as the statute would be; it will be as obnoxious to the spirit, as the statute would be to the letter, of the bill of rights. *Cahoon v. Coe*, 52 N. H. 518, 526.

The doctrine of the Supreme Court of the United States, and of this court, that contracts valid under the settled judicial or practical construction of the constitution and laws when they are made, cannot be invalidated by a subsequent judgment of the court that the construction was wrong (*Douglas v. Pike County*, 101 U. S. 677, 686, 687, 25 L. ed. 968, 971, 973, and cases cited; *Opinion of the Justices*, 58 N. H. 623; *Willoughby v. Holderness*, 62 N. H. 227, 228), does not rest upon the provision of the Federal Constitution that no state shall pass any "law impairing the obligation of contracts" (*New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.*, 125 U. S. 18, 30-33, 31 L. ed. 607, 612-614, and cases cited), but on the principles of the common law,—"the soundest principles of justice." *Ohio Life Ins. & T. Co. v. Debold*, 57 U. S. 16 How. 416, 431, 14 L. ed. 997, 1008. "To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175, 206, 17 L. ed. 520, 526. Contractual rights are no more sacred and no more entitled to protection than other rights. To create a debt or duty where none by law exists is as unjust as to make a valid contract invalid. It is immaterial to the sufferers by what agency the result is wrought. If affected by judicial action, it affords them no relief to be informed that from a like injury at the hands of the legislature they are protected by the constitution, or that the established law, on the faith of which they acted, was bad law. The defendant is entitled to judgment.

Smith, J., concurred in this opinion.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Fourth Quarter of the Judicial Year Beginning with October 1, 1894, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.
- V. FIDUCIARIES.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; GIFTS; WILLS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Federal common law.

The question whether or not there is any common law rule applicable to interstate commerce cases in the absence of any provisions of congress on the subject is decided in the negative by an Iowa case holding that overcharges prior to the interstate commerce act for interstate shipments cannot be recovered by the shipper. (Iowa) 556.

Statutes.

The power of a court to interfere on the ground that the enrollment of a bill and the signatures thereto were procured by fraud is discussed by prevailing and dissenting opinions in a North Carolina case as a case of first impression distinguished from the cases relating to the power of courts to examine legislative journals. The court is held in this case to have no power in the matter. (N. C.) 787.

Public money.

The California constitutional provision against making gifts of public money is held not violated by bounties for killing coyotes. (Cal.) 187.

Delegation of power.

The constitutionality of the Iowa law providing for the suspension of the penalties of a prohibitory liquor law on certain conditions in any city or town is sustained against the objection that it was a delegation of power. (Iowa) 206.

The attempt of the legislature to give an insurance commissioner power to adopt a standard policy for exclusive use by insurers is held unconstitutional. (Minn.) 609.

Officers.

The creation of a board of examiners for ascertaining the fitness of applicants for office in city departments is held to be a proper method of performing the duty imposed upon the mayor and heads of departments to make rules and regulations and provide a systematic method for such selection of the best fitted. (Ind.) 732.

The provision of the new constitution of New York prohibiting public officers from receiving a free pass is held to apply to a notary public. (N. Y.) 894

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Judges.

A constitutional provision for "a judge" in each circuit is denied effect as a limitation of the number of judges, as the article "a" is held not to be used as a numeral. (Ark.) 153.

Schools.

The power to establish a kindergarten as part of a public school system provided for by the constitution is sustained in a California case in harmony with the Colorado decision in 19 L. R. A. 469. (Cal.) 594.

Public injury to property.

The right to compensation for injury to property by a change of an established grade, given by an Iowa statute, is held to extend to a building erected to conform to a grade established only by ordinance, without any change of the actual surface of the ground, when a subsequent ordinance changes the grade and improvements are made accordingly. (Iowa) 889.

Municipal corporations.

The forfeiture of the charter of a municipal corporation for omission to do what the statute requires is held not to constitute a forfeiture *ipso facto*, and such forfeiture is held not a matter to be alleged in collateral proceedings such as a suit to enjoin the collection of taxes. (W. Va.) 416.

A *de facto* municipal corporation is held competent to give bonds which can be enforced by bona fide holders. (N. Dak.) 649.

See also *infra*, II.

The liability of a city for injuries caused by fireworks which its officers were managing, is denied when their acts are *ultra vires*. (N.C.) 192.

The power of the legislature to provide for a city board of health with power to incur expenses without the consent of the city or its local officers is sustained in a case which declares the absolute power of the legislature in respect to the revenue of a city. (Mich.) 783.

Vaccination.

The subject of compulsory vaccination has again arisen in a New York case in which detention in quarantine for refusal to be vaccinated is held to be unauthorized where it is

not shown that the person is infected with or has been exposed to small-pox, although he is doing general express business in a portion of the city where numerous cases of the disease exist. (N. Y.) 820.

Garbage.

An exclusive contract for collection of garbage at the expense of those producing the garbage is held valid as a sanitary measure against the claim that it is in the nature of a confiscation or monopoly. (Ind.) 679.

Use of highways.

The rights of bicycle riders are upheld in a Minnesota case as equal to those of a driver of a horse on the highway. (Minn.) 608.

Tolls from bicycles are held collectible under a statute providing for tolls from carriages, although it fixes the amount only with reference to the number of horses and wheels. A toll of one cent per mile is held reasonable where sulkeys pay six cents for five miles. (Pa.) 458.

The cutting off of a private drain laid in a street with permission is held not to make a city liable because no vested right to such drain could be granted. (R. I.) 517.

Local assessments.

Lot owners cannot be required to grade for sidewalks, under power to compel them to build sidewalks. (Ark.) 496.

The liability of a railroad track and necessary right of way of assessment for street improvements is denied in Wisconsin. (Wis.) 249.

So in Michigan a street assessment on a railroad right of way is held to be invalid because the property cannot be benefited by the improvement. (Mich.) 793.

A Minnesota case denies that a telephone wire along a country highway constitutes an additional servitude, where it does not interfere with ordinary travel, or materially impair the special easements of the abutting owner. (Minn.) 810.

Licenses and taxes.

Municipal power to license and regulate such a business as the sale of milk is held to extend only to regulation and not to the raising of revenue from the license. (Neb.) 588.

The uniformity of taxation is held in a Ken-

tucky case to be violated by a municipal tax on personal property by way of a license tax, while real property is assessed by the *ad valorem* system. (Ky.) 480.

A tax on sales of oysters assessed and paid weekly at the same rate that other property is taxed is sustained against various objections to its constitutionality. (Va.) 110.

A license tax on the privilege of packing or canning oysters is sustained against the objection of want of equality and uniformity of taxation and that it interferes with interstate commerce. (Md.) 812.

An unconstitutional exemption from taxation is held to be attempted by an Illinois statute providing that stock and notes of a home-
stead loan association shall not be taxed. (Ill.) 65.

The constitutionality of a succession or inheritance tax is sustained in Tennessee including provisions for the exemption of direct descendants and of estates less than \$250 in value. (Tenn.) 178.

Voters and elections.

The right to make nominations in a mass meeting of voters is upheld in Minnesota, notwithstanding a statute providing for nominations in which nominations by an assemblage of delegates is regulated. (Minn.) 605.

A constitutional provision that qualified voters of a city shall have the right to vote for mayor and other elective officers is held not to prevent the election of aldermen by separate wards. (Tex.) 523.

The provision of a Kansas statute against counting ballots not properly marked in a square is held mandatory. (Kan.) 683.

Somewhat modifying its decision in an earlier case the supreme court of Montana holds that the details of the Australian ballot law are not all mandatory to the extent that deviation therefrom will invalidate a fair election. (Mont.) 502.

Navigable waters.

Navigable capacity of a stream and not its surroundings is held to be the test of the navigable character of the stream in an action concerning the right to land under water. (S. C.) 42.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

State contract.

The lowest bidder on a contract with the state furnishing board for the publication and annotation of codes is held not entitled as of right to a contract which the law requires to be let to the "lowest responsible bidder." (Mont.) 298.

City contract.

The failure of a water-works company to supply water to a city according to a contract is held in a Texas case, reviewing the other decisions on the subject, to give no right of action either on contract or *ex delicto* to a citizen whose property is burned on account of the failure of the water supply. (Tex.) 532.

Municipal bonds.

Some interesting and important questions
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respecting municipal bonds are decided in some North Dakota cases. Among other things it is held that bonds are illegal and void so far as they represent discount upon county warrants. (N. Dak.) 645.

The invalidity of municipal bonds is held in a North Dakota case to leave the original liability for which the bonds were given unaffected. (N. Dak.) 642.

Suretyship.

Fraudulent concealment of material facts which will release a guarantor or surety is considered in a Louisiana case, which denies that failure to disclose an embezzlement of the principal debtor will release a guaranty or suretyship to a limited amount for existing and future obligations. (La.) 255.

A surety company which indemnifies one of the sureties upon an official bond and is compelled to pay a judgment against all of them upon such bond is denied any right of contribution against the other sureties. (D. C.) 400.

Interest as penalty.

A stipulation in a mortgage for a larger rate of interest on a note secured thereby, in case of default, than the note itself calls for, is held inoperative in equity on the ground that it is a penalty. (Wash.) 676.

Insurance.

Sick headaches, though merely temporary and though the person was otherwise of robust health, were held sufficient to make a breach of a warranty against severe, protracted, or frequent headaches. (Tex.) 765.

An agreement to insure property which was all destroyed without the knowledge of either party, is held inoperative in the absence of any provision for its taking effect at any other time than its date. (Cal.) 692.

A provision against voluntary exposure to unnecessary dangers is construed to cover a case of attempting to walk on the ties of a railroad bridge where there was no railing, while there was a platform with a railing on the other side of the bridge. (Iowa) 78.

Insurance on horses and farming utensils on described premises is denied effect when they are taken twenty miles away to work on other land. (Iowa) 70.

A statute prohibiting stipulations in insurance policies to limit liability to less than the full amount of loss if this does not exceed the amount of insurance, is sustained against various objections, among them the objections that it denies equal protection or due process of law, and that it is an arbitrary, unreasonable, and unnatural classification. (Tenn.) 796.

The prohibition of insurance by unauthorized companies is applied to defeat an action for an assessment on a contract of insurance made through the mails with an unauthorized company in another state on the ground that it was in contravention of the state policy even if it evaded the statute. (Mich.) 490.

Instantane by an insurance company, or an appraiser appointed by it, on the selection of an umpire from a distant city in another state, and refusal to agree on any one living near the place of loss, is held to absolve the insured from the necessity of an award. (Wis.) 405.

Bailment.

The degree of care required of a bailee is illustrated in case of the loan of a picture for competitive exhibition at a fair and for the loss of which the corporation conducting the fair is held liable. (Ala.) 716.

Carriers.

The restriction by state statute on contracts to exempt a common carrier from liability as such is held not to constitute an unlawful regulation of commerce as applied to interstate shipments. (Iowa) 718.

The so-called New Hampshire rule under which the liability of a common carrier of goods continues after their arrival for a reasonable time to accept and remove them is adopted in Arkansas. (Ark.) 80.

The right of a passenger to have money carried as baggage is sustained even when the

amount is more than is needed for use on the journey if without knowledge of the carrier's rules to the contrary he delivered it to the baggage agent telling him of the amount and the latter accepted it as baggage. (Ark.) 501.

A case of fraud relieving a railroad company from liability for lost goods is held to be made out where a man of intelligence ships as "household goods" valuable goods, mostly intended for sale, in a basket with a rope around it. (Tenn.) 176.

The right of stop-over is held to be given by statute in California, and to be authorized at either of several regular stopping places in a city, even if there is no station or agent there. (Cal.) 773.

Since the death of each member of a family would terminate a contract to give them annually a pass for ten years and stop trains at their house for their convenience, such contract is held not within the statute of frauds. (Tex.) 526.

Sales.

The question of warranty is discussed in a case which denies that the words "fire-proof safe" in an order imply a warranty, and holds that parol evidence of a warranty is inadmissible. (Kan.) 53.

The place of sale is the turning point of a case in which an unlicensed dealer from outside of a restricted district brings meat on a telephone order and delivers it in such district, and it is held that the sale is in the district. (N. C.) 297.

Conflict of laws.

An oral contract to make a will that is valid in the state where made is denied enforcement in Massachusetts against inhabitants of that state. (Mass.) 57.

The illegality of a contract for the purchase of intoxicating liquors, under the Iowa laws, is held to extend to an agreement for the return of kegs, barrels, and cases in which it was sent, or pay therefor if not returned. (Iowa) 886.

The question of public policy in respect to the validity of negotiable notes, is presented in an Illinois case which denies the right of action in that state in favor of a bona fide holder of a negotiable note given to pay differences on an illegal option contract, which was valid in his hands in the state where it was made. (Ill.) 586.

Bills and notes.

A note on demand with a provision for payment when the payor and payee mutually agree is held to be due in a reasonable time if the payor refuses to agree. (Mass.) 759.

The right of an accommodation indorser, who indorses a note for the benefit of some person other than the maker, to recover against the latter when obliged to pay the note is sustained, even if after the indorsement he learned of a lack of consideration for the note. (Or.) 476.

Notice of protest is held to be properly served on an assignee for creditors where the indorser has made an assignment. (Tenn.) 492.

Banks.

The insolvency of a bank which was represented in a clearing-house of which it was not a member by a bank which was a member and was under contract to pay its checks until exchanges were completed on the morning fol-

lowing a notice to terminate the arrangement, is held not to make the payment of such checks according to the contract after the insolvency of the drawee was known, or the application of collateral held as security therefor, an illegal preference. (N. Y.) 361.

The claim of a bank to set off an unmatured debt of an insolvent depositor against a check is denied although he had made an assignment for creditors before the check was drawn. (Ky.) 760.

Wages.

Giving checks for merchandise in advance of pay-day is held not to violate a statute requiring pay in money. (Ky.) 273.

The constitutionality of a statute compelling weekly payments of wages by manufacturers is upheld in Massachusetts, where the constitutional provisions are perhaps broader than in most states. (Mass.) 344.

Insolvency.

The waiver of exemption of a nonresident from the discharge of a firm by proving a claim, voting for an assignee, and accepting a dividend is held not to extend to his claim against another firm composed of a portion of the partners of the former and which was discharged in the same proceeding. (Mass.) 451.

III. CORPORATIONS AND ASSOCIATIONS.

An attempt by a corporation to transfer all its property to another company for stock in the latter to be held as a permanent investment, is held *ultra vires* and set aside at the suit of a stockholder. (Conn.) 304.

The rights of foreign corporations which have not complied with the conditions of the right to do business are held to include the right to sue for negligent injuries to property. (Ark.) 83.

The question whether or not the property of an insolvent corporation constitutes a trust fund is discussed in an Alabama case which denies that it is such in any other sense than that it will be administered for the equal benefit of creditors. (Ala.) 707.

The doctrine that a railroad company cannot escape liability for injuries caused by the operation of the road by other persons is held not to extend to the liability to a servant of another company, who was injured by the negligence of a fellow servant. (Ind.) 216.

A judgment *ex delicto* is held to be enforceable against stockholders of a corporation under a constitutional provision that dues from corporations shall be secured by individual liability of stockholders. (S. C.) 402.

A college is held in an Ohio case to have a vested right in its property such that the legislature cannot in effect donate it to another institution. (Ohio) 409.

Officers.

An officer who is a general managing agent of a lumber company is held personally liable for negligence in setting an inexperienced and ignorant employé at work on a dangerous machine. (Wis.) 439.

The manager of a corporation is held liable jointly with the corporation for negligent failure to erect a scaffold or safeguard to protect people from falling brick when erecting a building. (Ala.) 438.

Partnership.

An expenditure by a partner for perfecting an apparently imperfect title to partnership real estate held in his name, without consulting his partner who was fully acquainted with the title and who in fact knew that the title was good, is held not chargeable to the partnership on an accounting between the partners. (Minn.) 86.

Permitting real estate purchased with partnership money to stand in the name of one of the partners is held not conclusive against partnership ownership as against one who had given that partner credit on the faith of his apparent title. Parol evidence is held admissible to show the true ownership. (Ala.) 161.

A conveyance of partnership real estate by a surviving partner, although purporting to convey only his interest, is held operative to the full extent of the partnership interest. (Wash.) 89.

IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.

The right to get married without consent of an employer is sustained in case of a house-keeper whose position required personal attendance upon the employer as well as the care of the house, when the husband would not in any way interfere with the performance of the contract. (N. Y.) 816.

An extensive discussion of the jurisdiction of a court to decree a divorce against a party outside its jurisdiction is furnished by a South Carolina case which denies validity to an Illinois divorce against a citizen of South Carolina. (S. C.) 655.

Infants.

Distinguishing the case as being in the nature of a suit *in rem* it is held that jurisdiction for a judicial sale of property may be obtained 28 L. R. A.

without actual service of process on infant defendants for whom an appearance is entered and a guardian *ad litem* appointed who defends for them. (N. Y.) 347.

Insane persons.

The fact of undisclosed insanity is insufficient to give a right of action against an attorney for the insane person, who receives money by telegraph from a third person on the client's request and retains it in payment for services. (Mass.) 694.

V. FIDUCIARIES.

Executors who have qualified as such are denied the power to change their capacity to that of testamentary trustees, although they are appointed such by the will, until their accounts as executors are settled and approved

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and an order of the court obtained for the transfer of the estate to them as trustees. (Mont.) 118.

The rule forbidding an agent to deal with himself is applied to defeat an insurance policy issued by an agent to himself as receiver of the property insured. (Miss.) 220.

An assignee for creditors and receiver is denied the right to attorney's fees for unsuccessfully defending an assignment against creditors asserting liens on the property, but allowed such fees for a successful defense against claims to the property by other creditors. (Miss.) 277.

The liability of a receiver on taking possession of premises leased by the corporation for which he is appointed is held, on a review of conflicting authorities, to extend only to the payment of rent while he may retain possession. (Mass.) 452.

The nature of partnership real estate is involved in a case in which a purchase thereof on a judicial sale by the administrator of the last surviving partner is held to be made in trust. (Ill.) 129.

VI. TORTS; NEGLIGENCE; INJURIES; LIBEL.

The expression of an opinion by pastors of churches to the effect that an academy is harmful to moral and religious interests because dancing is practiced there, is held actionable in a Missouri case where no dispute as to the facts appears other than a dispute as to the moral quality of dancing. The court held it to be a question for the jury whether the publication was justified on the ground that dancing was immoral. (Mo.) 667.

Mutual vituperation is held in a Louisiana case to justify a verdict for defendant in an action for slander, although slanderous words are proved. (La.) 721.

Fraud.

A Massachusetts case by a majority of the court decides that false representations which will sustain an action for fraud against one who made them in answer to an inquiry or voluntarily, on the faith of which a transaction between other persons was entered into, must have been made with intent to deceive. (Mass.) 753.

Negligence.

See also *supra*, II., *Officers.*

The contributory negligence of a parent as custodian of a minor is held to bar the parent's right of action as administrator for the death of the child where the parent would be the sole beneficiary of the action. (Tenn.) 486.

The fact that a trespasser was forbidden to leave the premises the way he came on, but was ordered to go another way which was not more dangerous, was held insufficient to make him anything but a trespasser while leaving the premises, while doing which he was injured. (C. C. App. 6th C.) 181.

The rule exempting a charitable institution from liability for negligence of its employés is denied application to the case of a nuisance

maintained by such corporation, even when it is regarded as an arm of the state. (Ky.) 894.

The right of a passenger to recover when thrown from the platform of a car to which he had gone with intent to get off, is sustained where the car suddenly increased its speed and the rule that recovery cannot be had for injuries received in jumping off is denied application. (La.) 811.

One riding upon a train by fraud or stealth without payment of fare is denied right to recover for injuries not due to recklessness or willfulness, and the Iowa statute making railroad companies liable for all damages from neglect of agents is held not to change this rule. (C. C. App. 8th C.) 749.

The statute requiring signals at railroad crossings is construed to apply to a road actually used by the public, though not dedicated; and to a person not using the crossing, but who had driven his team to a car on a side track with intent to unload. (Neb.) 824.

The fact that a team was running away will not prevent a railroad company from liability for injuries sustained by reason of its failure to maintain a gate at a crossing, as required by ordinance. (Kan.) 696.

A physician engaged by an employer to treat employes is held not to sustain the relation of servant to his employer so as to make the latter liable for his mistakes. (Tenn.) 552.

The question of the liability of a railroad company to furnish medical attendance to an injured servant is considered in a case which holds that it exists only in case of emergency and extends no further than that. (Ind.) 546.

Failure to raise electric light wires which run over the metallic roof of a hotel high enough to prevent contact of persons with them, is regarded as in itself sufficient proof of negligence in case a person is injured by a shock from them. (Cal.) 596.

VII. PROPERTY RIGHTS; GIFTS; WILLS.

The effect of bounding land on the "shore" of a lake is held to exclude from the conveyance land between high and low water mark. (Fla.) 891.

The rights of riparian proprietors to have surplus water of a dam made to supply a canal in aid of navigation flow in its natural channel is protected against an attempt by grantees of the state owning the water power 28 L. R. A.

which was created by the dam to divert water through the canal and sluice-ways cut therefrom to operate mills along the canal, and it is held the state could not take away the right of riparian proprietors for any private use. (Wis.) 443.

The right to take ice from a pond in a non-navigable stream, as between the owner of the pond with the right to flowage and the owner

of the land under it, belongs to the owner of the land over which the ice forms, subject to the dominant right of flowage which must not be impaired by the taking of the ice. (Neb.) 581.

An instrument giving consent without words of grant to the discharge of muddy waters from ore washers into a stream is held only a license which does not enure to the benefit of a grantee of the licensee. (Tenn.) 421.

Dedication.

The right of a railroad company to acquire a right of way by common law dedication is considered and denied in an Illinois case which states there is no authority in the common law for such dedication. (Ill.) 612.

Curtsey.

The rights of the parties in land conveyed to a man in trust for the use and benefit of his wife, especially after he has obtained a divorce from her, are discussed in a case which declares that his rights as tenant by the curtesy initiate continue, and that his possession under the deed is not adverse to her. (Ill.) 618.

Dower.

The enactment in Arkansas of a statute denying dower to a woman divorced for her misconduct, although implying an opinion of the legislature that she would be entitled to dower if divorced for other causes, is held not to change the common-law rule which denies dower after dissolution of the bonds of matrimony. (Ark.) 157.

Descent.

The share inherited by a grandson in lieu of

a deceased parent who would have been entitled thereto if alive, is not subject to deduction for the parent's debt to the grandparent. (Tex.) 521.

Trade-mark.

The rule that the name of a patented article cannot be claimed as a trade-mark after the expiration of the patent is applied in a case where there was nothing to show any intent to use the name as anything else than the description of the patented article. (Mass.) 448.

Lien.

The liability of a railroad company which has obtained its road under a receiver's sale is sustained for unpaid claims against the former railroad company on the ground that they constituted a lien on earnings of the road in the receiver's hands after the sale. (Tex.) 761.

Gifts.

Charitable uses are held to include a gift for the establishment of convenient and healthful tenements to be rented to laborers. (R. I.) 510.

Wills.

The revocation of a will executed by an unmarried woman under the provisions of a statute is held not to apply to the subsequent marriage of a woman who was a wife when the will was made. (Cal.) 414.

A gift to testator's grandchildren when the youngest reaches the age of forty years, although within the rule against perpetuities, is sustained by modifying it so that the age of twenty-one is substituted for that of forty. (N. H.) 328.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

A remarkable illustration of the development of remedies is given in a New Hampshire case holding that a tenant in common must account to his cotenant for the use of the premises. (N. H.) 829.

Jurisdiction.

The right to remit part of a debt by voluntary credits is sustained where the avowed purpose was to reduce the claim to an amount within the jurisdiction of a justice of the peace. (Ark.) 221.

Quo warranto.

The right to trial by jury on an information in the nature of a writ of quo warranto, brought as a substitute for the writ of quo warranto, is denied, in the absence of any statute providing therefor, and the proceeding held to be purely civil, on an extensive review of the authorities on the subject. (Mass.) 455.

Forfeiture of franchise.

A statute authorizing a court to declare a turnpike road abandoned because it had been out of repair for six months, without providing for the right to a jury trial in the first instance or on appeal, is in violation not only of the constitutional provision for trial by jury, but also of provisions as to due course of law and due process of law. (Ohio) 769.

Trespass.

A spur track built under parol agreement is held to give such possession that the owner

of the land cannot maintain trespass on revoking his permission. (Mich.) 519.

Garnishment.

Property in the hands of a common carrier in course of transit to another state is held exempt from garnishment on grounds of public policy and of injustice to the carrier. (Minn.) 600.

Receiverships.

The appointment of a receiver to hold subject to the order of the court the property of a corporation which had forfeited its franchise by conducting prize-fights is sustained in aid of an injunction against further abuse of the franchise. (Ind.) 727.

Contribution.

The claim that a right of action for contribution between co obligors on a written contract arises on such contract or by way of subrogation is denied in a case which holds that it is based on an implied promise raised by law in the absence of any security, lien, or priority held by the creditor. (Tex.) 528.

Injunctions.

A very important case denying an injunction against the continuance of a strike and boycott of a typographical union declares that the injury threatened and impending must be irreparable in order to justify that remedy. (Or.) 464.

The power of a court of equity to enjoin the

transfer or collection of a note which is void by reason of a material alteration is denied on the ground of an adequate remedy at law. (Neb.) 577.

Relief from compromise.

Fraudulent misrepresentations inducing another party to compromise through mistake as to his legal rights is held sufficient ground for relief to him. (Ky.) 478.

Limitation of actions.

A novel case of the running of the statute of limitations against unknown trespassers beneath the surface of the ground by wrongfully extending a coal mine into a neighbor's land, holds that in Pennsylvania where equity is administered in common-law actions the statute runs only from the time of discovery or reasonable opportunity for discovery, at least so far as it applies to the compensation allowable on a bill of account. (Pa.) 283.

Evidence.

A valuable opinion in a Connecticut case sustains the admissibility of a written statement of facts on testimony of a witness who knew it to be true when made although unable now to remember the facts. (Conn.) 143.

The claim that parol evidence is inadmissible entirely to defeat a mortgage and show that it had no operation whatever is discussed in a case which regards this as a somewhat shadowy distinction from the proof of a lack of consideration, and permits evidence that a mortgage was entirely without consideration. (N. Y.) 375.

Extrinsic evidence to identify land devised by incorrect description is permitted in an Illinois case which does not expressly overrule but in fact seems to overrule the case in 16 L. R. A. 321. (Ill.) 149.

The doctrine of the burden of proof as to contributory negligence is extensively discussed

in a Texas case which imposes the burden on the defendant. (Tex.) 533.

Damages.

The much disputed question of the right to damages for mental suffering in case of default in delivering a telegram is decided in Iowa in favor of such damages. (Iowa) 72.

A South Dakota case reviewing the authorities holds that pecuniary damages alone are recoverable in an action for death. (S. Dak.) 573.

Readiness to pay.

The effect of readiness to pay a note at the place and time at which it is payable, as a defense to an action on the note is destroyed by paying interest on the note after its maturity. (Fla.) 286.

Computing dividends.

What the court calls a new and important question for federal courts, as to the deduction of collections from collateral after the declared insolvency of a national bank from a creditor's claim, in computing dividends, is decided in the negative, on a full review of the authorities as to such deductions in other cases of insolvency. (C. C. App. 6th C.) 231.

Entry of judgment.

The entry of a judgment by the clerk in the judgment book is held in North Dakota to be absolutely necessary before the judgment can have any force or effect. (N. Dak.) 621.

Comity.

The principle of comity is held to preclude an action by an administratrix on a policy of life insurance at the home office of the insurance company in the state where the policy was issued and the insured then resided and where his widow still resides, if a prior action has been commenced by an administrator duly appointed in another state. (N. Y.) 379.

IX. CRIMINAL LAW AND PRACTICE.

Shooting across a state boundary and killing a person in another state is held to give no jurisdiction of the crime to the courts in the state from which the shot was fired. (N. C.) 289.

Arrest.

The fact that a disorderly person was arrested by an officer who had no warrant and did not see the offense committed is held not to make it unlawful where the officer was at the depot waiting in response to a telegram and arrested the passenger who was pointed out by the conductor. (Md.) 688.

Forgery.

An illustration of a worthless instrument which cannot be subject of forgery is a written request to pay money to a person named "and charge to him at my office." (Mont.) 127.

Extradition.

A case of great interest as to interstate extradition denies the power to surrender the murderer as a fugitive from the state in which his victim was killed by a shot across the state line. (N. C. 59.

That a person may be a fugitive from justice 28 L. R. A.

tice while at his own home is shown in a case where a purchaser of goods in another state made false representations on the strength of which they were subsequently shipped to him. (N. C.) 294.

An information is held insufficient as a substitute for an indictment as the basis of the surrender of a fugitive from another state, and affidavits accompanying the requisition are also held insufficient if not authenticated, recited in, nor used to obtain the warrants. (C. C. App. 4th C.) 801.

Indictments.

The general allegations made in an indictment are held in a Minnesota case to be limited by the specific allegations so that the indictment is invalid unless the specific allegations are sufficient to describe an offense. (Minn.) 395.

Grand jury.

A statute providing that ten persons shall constitute a grand jury of whom eight may find an indictment, is held to violate the constitutional requirement of indictment by grand jury, as this means a common law grand jury. (Neb.) 33.

Irregularities in grand juries are considered in an Iowa case in which it is held that an indictment will not be quashed because a brother of the man whose wife was indicted was upon the grand jury, but that having more members from a civil township than the law permits would make an indictment found by the grand jury void. (Iowa) 195.

That a grand juror was one of the witnesses upon whose testimony an indictment is found is held not to make the indictment void. (Mass.) 818.

A second indictment may be found by the same grand jury on the evidence originally presented where the first indictment has been dismissed. (Minn.) 824.

An inflammatory charge to a grand jury by the court is condemned in a Nebraska case and the description of the charge as inflammatory is found to be a merited criticism which does not constitute contempt of court. (Neb.) 867.

A summary commitment by a justice of the peace of a person who refuses to answer a
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proper question on an investigation before grand jurors is held in a Connecticut case to be authorized by Connecticut statute and not to violate the constitutional right to due process of law. (Conn.) 242.

Evidence.

Privilege as to information acquired by physicians in a professional capacity is held not to extend to dentists so as to exclude testimony to identify a person by reason of false teeth furnished by the dentist. (Mich.) 139.

The constitutional provision against compelling a person to be a witness against himself is held not violated by compelling him to stand up for identification by a witness. (N. Y.) 699.

Self defense.

The right of self defense is not cut off from one who has attempted to avoid any further struggle merely because he was originally the aggressor. (Cal.) 591.

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3. A corporation and an officer thereof, both being liable for some act of negligence, may be joined as defendants. *Greenberg v. Whitcomb Lumber Co.* (Wis.) 489

4. A single bill in equity by creditors of an insolvent corporation cannot be sustained to reach unpaid stock subscriptions, to recover funds transferred by it to preferred creditors, and to administer an assignment by the corporation for benefit of creditors. *O'Bear Jewelry Co. v. Volfer* (Ala.) 707

5. A pending action on a policy of life insurance, brought in another state by a duly appointed administrator of the insured, who died there having the policy, which was payable to his legal representatives, in his possession, service of process being duly obtained upon a designated agent of the company, will, on the principle of comity, defeat jurisdiction of an action brought on the policy in the state where it was payable at the home office of the insurer, and where the insured resided when the

policy was issued and his widow still resides, even if she has been duly appointed his administratrix in that state. *Sule v. Mutual Reserve Fund L. Assn.* (N. Y.) 879

6. An action at law is the proper remedy by an insurance company on subrogation to a claim against the party negligently causing the loss. *St. Louis, A. & T. R. Co. v. Fire Assn.* (Ark.) 88

7. The person to whom a message was addressed may maintain an action for damages sustained by him on account of negligence in its delivery. *Mentzer v. Western U. Teleg. Co.* (Iowa) 72

8. A contract by a city with a waterworks company for a water supply will not sustain an action against the company for a breach thereof, by a citizen whose property was destroyed by fire in consequence of such breach. *House v. Houston Waterworks Co.* (Tex.) 532

9. An action *ex delicto* against a waterworks company cannot be maintained by a private person on account of the failure of the company to comply with its contract with the municipality to furnish water, although the plaintiff's property was burned on account of such failure. *Id.*

10. A public duty which will sustain a right of action in favor of individuals injured by its nonperformance is not created by a contract with a municipality to furnish a water supply. *Id.*

NOTES AND BRIEFS.

Action; multifariousness of bill. 708
Comity in case of pending action in other state. 879

ADULTERY.

A divorce after the finding of an indictment for adultery is no bar to further prosecution of the indictment, although the statute says that no prosecution for adultery can be commenced but on the complaint of the husband or wife, since, after proceedings are once commenced, they may be carried on without further action on the part of the one who commenced them. *State v. Russell* (Iowa) 195

ADVERSE POSSESSION. See also **CURTESY, NOTES AND BRIEFS.**

1. Possession of land by a tenant for life cannot be adverse to the remainderman or reversioner. *Meacham v. Bunting* (Ill.) 618

2. Possession of land by a grantee as trustee for the use and benefit of his wife, so long as it continues to be held under the deed, is not adverse to her, even after he has obtained a divorce from her. *Meacham v. Bunting* (Ill.) 618

3. Deeds tending to show title in plaintiff, together with the possession, are sufficient color of title to support an action to try title to real estate. *Heyward v. Farmers' Min. Co.* (S. C.) 42

ALIEN.

NOTES AND BRIEFS.

As grand juror.

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ALIMONY. See REVIEW, 1.

ALTERATION OF INSTRUMENTS.

1. A material alteration of a promissory note invalidates the paper as to the maker, who has not assented to or ratified the change, even in the hands of a bona fide holder for value. *Krickson v. First Nat. Bank* (Neb.) 577

2. The fraudulent erasure of the name of the original payee of a promissory note after its execution, by a party to the instrument, and the substitution of another name without the consent of the maker, is a material alteration. *Id.*

APPEAL AND ERROR. See also JUSTICE OF THE PEACE.

1. An order of the district court directing a dismissal of an appeal from justice's court is one which looks forward to and requires the entry of a formal judgment, and therefore is not a final judgment, and is not an appealable order under the Nebraska statute regulating appeals. *Re Weber* (N. D.) 621

2. An order directing persons named both as executors and trustees in a will to render an account as executors, against their claim that they hold the estate as trustees, involves a decision that administration is necessary, and is therefore final so as to authorize them to appeal from it. *Re Higgins's Estate* (Mont.) 116

3. An appeal does not lie in Connecticut on the ground that the evidence does not support the facts found by the court below, but does support a state of facts which the court found not proved. *Curtis v. Bradley* (Conn.) 148

4. A decision of the general term reversing a judgment upon exceptions, and at the same time affirming an order separately appealed from which denied a motion for a new trial, can be reviewed by the New York court of appeals only upon questions of law arising upon the exceptions, and not in respect to sufficiency of evidence or excess of damages. *Edgcomb v. Buckhout* (N. Y.) 816

5. An objection cannot be first made on appeal, to the fact that the name of a witness was not indorsed upon an information. *People v. De France* (Mich.) 139

6. A finding by the presiding judge in a law case tried without a jury, that plaintiff in an action to try title to real estate has sufficiently connected himself with the original grant from the state to maintain the action, is a finding of

fact that cannot be reviewed by the supreme court upon appeal. *Heyward v. Farmers' Min. Co.* (S. C.) 42

7. A defense of former action pending may be waived by the failure to introduce evidence to support it at the hearing. *Id.*

8. An accused cannot complain that a view by the jury was had in his absence and without the presence of the judge, where it was taken on his motion and without any request to be present or any objection made by him, although he knew it was to be taken without the presence of the judge. *State v. Hartley* (Nev.) 33

9. The denial of a challenge to a juror for cause is not ground of error unless appellant exhausted his peremptory challenges. *Id.*

10. An erroneous order striking from the files a bill of review will not be reversed unless it is prejudicial. *Wood v. Wood* (Ark.) 157

11. Allowing a witness to give an opinion as to negligence is not ground for reversal, if the facts were fully shown and the negligence fully proved by other evidence. *Giraudi v. Electric Improv. Co.* (Cal.) 596

12. An appellate court will not determine in what precise manner an upper proprietor upon a stream may use the water, and at what specific place it must be returned to the stream so as not to infringe the rights of a lower proprietor, where no such issue was made in the lower court, and the record contains no evidence from which such questions could be determined. *Pattern Paper Co. v. Kaukauna Water-Power Co.* (Wis.) 443

APPRENTICES.

NOTES AND BRIEFS.

Duty to furnish medical aid to.

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APPROPRIATIONS. See also PUBLIC MONEY.

1. The presentation to the board of examiners, which, by Cal. Pol. Code, § 672, is required before the comptroller can draw his warrant for a claim, is not excused by Cal. Act March 31, 1891, in case of a claim for a bounty for killing coyotes, although that Act provides for proving the claim and obtaining a certificate thereof from the board of supervisors. *Ingram v. Colgan* (Cal.) 187

2. No appropriation is made by a statute providing for the payment of a bounty of \$5 out of the general fund in the treasury for each coyote which shall be destroyed, since the total amount which may be devoted to such purpose is not specified. *Id.*

ARBITRATION. See INSURANCE, 9-12.

ARREST.

The arrest of a disorderly passenger without a warrant, by an officer who was waiting at the depot for that purpose in response to a telegram from the conductor, who pointed out the passenger as the party to be arrested, was not unlawful because made without a warrant and for an offense not committed within the view of the officer. *Baltimore & O. R. Co. v. Cain* (Md.) 668

NOTES AND BRIEFS.

Arrest of disorderly passenger without warrant. 688

ASSESSMENTS. See PUBLIC IMPROVEMENTS, NOTES AND BRIEFS.

ASSUMPSIT. See also ACTION OR SUIT, 2.

An attorney is not subject to an action for money received by the one sending him the money in response to a telegram from his client, but who was not a party to a contract between the attorney and client under which he retained the money. *Atwell v. Jenkins* (Mass.) 694

NOTES AND BRIEFS.

Assumpsit; proper party to sue in. 144
Against cotenant. 844

ATTEMPT. See EXTORTION.

ATTORNEYS. See also ASSUMPSIT; CONTEMPT, 2, 8.

Acts of record by counsel, consenting to the allowance of alimony in a gross sum, are binding on the client. *Wood v. Wood* (Ark.) 157

ATTORNEYS' FEES. See COSTS AND FEES; RECEIVERS, NOTES AND BRIEFS.

BAGGAGE. See CARRIERS, 10, 11.

BAILMENT. See also CONTRACTS, 8; EVIDENCE, 18.

1. The degree of care required of a bailee depends on the nature and value of the thing bailed and its liability to loss or injury. *Prince v. Alabama State Fair* (Ala.) 716

2. A lack of proper care which will create a liability for the loss of a painting on the part of a corporation to which it has been loaned for a competitive exhibition at a fair is shown where, after the close of the fair and the withdrawal of policemen, the duty of repacking and re-shipping it is entrusted to an agent or officer who is not informed that the painting has been exhibited or in the possession of the corporation, and servants are employed to aid him who are unknown to him and of whose skill or integrity there is no evidence. *Id.*

3. A general proposal to all persons having articles deemed worthy of exhibition to entrust them to a corporation for a competitive exhibition at a fair, with a promise of redelivery when the exhibition is closed, becomes a special contract with each person sending articles for exhibition, when they are received and accepted. *Id.*

4. The essential elements and characteristics of a lucrative as distinguished from a mere gratuitous bailment exist in the case of the loan of a painting for a competitive exhibition at a fair. *Id.*

BANKS. See also INTEREST; SET-OFF.

1. A bank which is a member of a clearing-house and bound by contract and the constitution of the clearing-house to clear checks drawn 28 L. R. A.

on another bank, which is not a member, until the completion of exchanges on the morning after notice to terminate the arrangement, is not relieved from paying such checks on the morning after such notice by reason of the known insolvency of the bank on which they were drawn. *O'Brien v. Grant* (N. Y.) 861

2. A preference to creditors of an insolvent bank in violation of the New York Corporation Law of 1902, chap. 687, § 48, prohibiting transfers with intent to give a preference when the corporation is insolvent or its insolvency is imminent, is not made by the payment of checks drawn on an insolvent bank, in the course of exchanges at a clearing-house, by a member of the clearing-house which knew of the insolvency, but by its contract and the constitution of the clearing-house was under obligation to pay them, and held securities which it was entitled to and did apply to its own reimbursement. *Id.*

3. An arrangement between a clearing house and a bank which is one of its members and another bank which is not a member, whereby the latter pays the clearing-house a fee for the privilege of being represented by such member, and makes a certain deposit of money and securities with such member in consideration of the latter's agreement to clear through the clearing-house checks drawn upon the other bank, while the constitution of the clearing-house prohibits the discontinuance of such arrangement without previous notice, which notice shall not take effect until the exchanges of the morning following the receipt of the notice shall have been completed,—constitutes a tripartite agreement, upon ample consideration, for the mutual benefit of all the parties who enter into it. *Id.*

4. The fact that an officer authorized to borrow money for a bank is engaged in defrauding it will not prevent the liability of the bank on a loan obtained by him for the bank from another bank which has no knowledge of his fraud. *Chemical Nat. Bank v. Armstrong* (C. C. App. 6th C.) 231

5. To charge a national bank on a loan of money, the persons making it must see that the officer or agent acting for the bank has special authority to borrow money, or that his act is ratified. *Id.*

6. The claims of creditors of an insolvent national bank cannot be reduced by any credit for collections from collateral made after the declared insolvency of the bank, whether before or after proof of claims. *Id.*

NOTES AND BRIEFS.

Banks; set-off against check. 760

Dividends on claims against, when insolvent; deduction of collections from collateral; interest on dividends. 281

BICYCLES. See also TOLLS; TURNPIKE COMPANIES.

1. A bicycle is a vehicle, and may be lawfully ridden upon the public highway for convenience, recreation, pleasure, or business. *Thompson v. Dodge* (Minn.) 608

2. A person driving a horse on a highway

has no rights superior to those of a person riding a bicycle. *Thompson v. Dodge* (Minn.) 608

NOTES AND BRIEFS.

1 Bicycles; charging tolls for. 462

BIDS. See **CONTRACTS**, 6, 7.

BIGAMY.

The fact that, at the time one accused of polygamy contracted his alleged polygamous marriage, he had a bona fide and reasonable belief that his former wife was dead, does not constitute a defense under the Massachusetts statutes. *Com. v. Hayden* (Mass.) 818

BILLS AND NOTES. See also ALTERATION OF INSTRUMENTS; CONFLICT OF LAWS, 2; INJUNCTION, 5.

1. A negotiable note given for differences on a settlement of an illegal option contract which the statute expressly declares shall be void is not itself void in the hands of an innocent holder for value before maturity, unless the statute expressly or by necessary implication declares that such note shall be void. *Pope v. Hanks* (Ill.) 568

2. Payment of interest on a note after maturity waives the defense of failure to present the note for payment at the place where it was payable. *Greeley v. Whitehead* (Fla.) 286

3. An assignee of the indorser, under a general assignment for creditors, so far stands in the shoes of his assignor that notice to him of nonpayment of the indorsed paper will bind the indorser. *American Nat. Bank v. Junk Bros. Lumber & Mfg. Co.* (Tenn.) 492

4. An indorser for whose benefit an accommodation note was made, being bound to provide funds to meet it at maturity, is not released by lack of presentment, protest, or notice. *Id.*

5. An accommodation indorser of a negotiable note which he is compelled to pay on the maker's default can enforce it against the maker if his indorsement was made in good faith, although it was for the accommodation of a third person, and although after his indorsement he may have learned of a failure of consideration. *Sheahan v. Davis* (Or.) 476

6. A promissory note on demand "payable when payor and payee mutually agree" is due within a reasonable time if the payor will not agree. *Pape v. Cook* (Mass.) 759

NOTES AND BRIEFS.

See also **EVIDENCE**.

Note; payable when mutually agreed. 759
Accommodation indorsements; rights of indorser. 476

Dishonor and protest of; diligence as to notice; notice to assignee of insolvent. 493

BONDS. See also ESTOPPEL, 5, 6.

1. Bonds issued under a statute authorizing the issue of municipal bonds payable in not less than ten years from date are void even 28 L. R. A.

in the hands of a bona fide purchaser, where by their terms they are payable in eleven days less than ten years from date. *People's Bank v. Barnes County School Dist. No. 52* (N. D.) 643

2. Even bona fide purchasers of negotiable municipal securities are charged with knowledge of all the requirements of the statute under which such securities were issued. *Id.*

3. Bonds issued upon a vote at a school meeting held in a district organized by the county superintendent under Dak. Laws 1879, chap. 14, in which district officers were elected and exercised their functions, teachers were employed, and school taught, are not void because of failure to comply with statutory provisions regulating the organization of such district, as to matters going to the jurisdiction of the superintendent to organize the district, since the district is a *de facto* municipal corporation. *Coler v. Dwight School Trp.* (N. D.) 649

NOTES AND BRIEFS.

Bonds; validity of; power of municipality to issue. 643, 649

Rights of bona fide holders; estoppel as to: procedure to issue; legal existence of corporation. 649

BOUNDARIES.

A description of land as running "to the shore" of a lake, and thence "with said shore" to a certain point, does not include the shore or extend to low water mark so as to make the grantee a riparian proprietor entitled to submerged lands included in the Florida grant of 1856, which is limited to owners of lands "actually bounded by, and extending to, low-water mark." *Azline v. Shaw* (Fla.) 391

BOYCOTT. See **INJUNCTION**, 3.

BROKERS.

A broker who is privy to the unlawful design of the parties to an option contract, and brings them together for the purpose of making it, cannot recover for any services or losses incurred in the transaction. *Pope v. Hanks* (Ill.) 568

BUILDING AND LOAN ASSOCIATIONS. See **TAXES**, 8, 9.

BURDEN OF PROOF. See **EVIDENCE**, 6-15.

CARRIERS. See also **ARREST**; **COMMERCE**, 2; **EVIDENCE**, 3, 4; **GARNISHMENT**; **OFFICERS**, 8.

1. The relation of carrier and passenger is not established between a railroad company and one who gets upon a passenger train with the deliberate purpose not to pay his fare, and adheres to that purpose, or who, being on the train and having money with him with which he could pay his fare, falsely and fraudulently represents to the conductor that he is without means, and thereby induces the conductor to permit him to remain on the train without

paying his fare. *Condran v. Chicago, M. & St. P. R. Co.* (C. C. App. 8th C.) 749

2. One riding on a railroad train by fraud or stealth, without the payment of fare, takes upon himself all the risk, and, if injured by an accident happening to the train, not due to recklessness or willfulness on the part of the company, cannot recover. *Id.*

3. The rule that one riding upon a train by fraud or stealth, without payment of fare, cannot recover for injuries not due to recklessness or willfulness of the company, is not modified or abrogated by *McClain* (Iowa) Ann. Code, § 2002, making every railroad company liable for all damages sustained by any person in consequence of the neglect of agents, or by mismanagement of the engineers or other employes. *Id.*

4. If there are two or more regular stopping places for trains in a city, where passengers are allowed to enter and leave trains, either of them may be chosen as the place to stop off, under Cal. Civ. Code, § 490, although no station-house is there located. *Robinson v. Southern P. Co.* (Cal.) 778

5. The junction of a ferry and a railroad is an intermediate station within Cal. Civ. Code, § 490, giving the right of stop over where a ticket is sold for transportation over both ferry and railroad. *Id.*

6. The right to ride to "destination or any intermediate station, and from any intermediate station to the depot of destination," declared in Cal. Civ. Code, § 490, to be given by a railroad ticket, cannot be construed to give merely the right to begin a journey at an intermediate station, but includes the right of stop-over. *Id.*

7. A railroad company cannot deprive a passenger who pays the regular rates for a ticket to a certain destination entitling him to go by a certain route, of his right given by statute to stop over at an intermediate point on such route by giving him a ticket purporting to entitle him to transportation to either the point of destination or the intermediate point. *Id.*

8. Negligence of a passenger is not shown by the fact that he was thrown from a car on the side opposite his station, just after it had passed the station without affording opportunity to alight, and after he had crossed to the other side under a reasonable expectation that the train would be slowed at a mill just beyond. *Brashear v. Houston, O. A. & N. R. Co.* (La.) 811

9. A passenger on a railroad train, with a ticket for a station at which it is customary for the train not to stop, but to slow its movement so as to allow passengers to alight, will be entitled to damages if, called to the platform by the announcement of the station, he is thrown from the steps of the car and injured, his fall being caused by the sudden increase of the speed of the train when it should be slowed or stopped. *Id.*

10. A carrier is liable for the transportation as baggage of money in an amount more than is needed for use on the journey, where the passenger, in ignorance of the carrier's rules and instructions to the contrary, delivers

it to the baggage agent and informs him of the amount, and he accepts it to ship as baggage. *St. Louis & W. R. Co. v. Berry* (Ark.) 501

11. Money sufficient for personal use on the journey may be included in baggage for which the carrier will be liable as an insurer, if no more is taken than is necessary or usual for persons of like station, habits, and condition in life on similar journeys. *Id.*

12. A constructive, if not an actual, fraud to obtain cheap rates of freight, which relieves the carrier from liability for loss of the goods, is shown where a man of intelligence ships in a basket with a rope around it, without making known its contents, a quantity of silks, satins, laces, curtains, silver spoons, and other valuable articles, most of which were for sale by his wife in her business as a dressmaker and milliner and remains silent when he hears the carrier's agent designating them as "household goods," the rate on which is very much less than that on merchandise. *Shackel v. Illinois C. R. Co.* (Tenn.) 178

13. Overcharges by a common carrier on interstate shipments made prior to the taking effect of the interstate commerce act of congress cannot be recovered by the shipper by the application of common law doctrines. *Catton v. Chicago, R. I. & P. R. Co.* (Iowa) 556

14. A mob of rioters is not a public enemy, within the exception to the rule that makes a common carrier an insurer of goods carried. *Missouri P. R. Co. v. Nevils* (Ark.) 80

15. Reasonable time to accept and remove goods after their arrival is given before the liability of a carrier is reduced to that of a warehouseman. *Id.*

NOTES AND BRIEFS.

See also GARNISHMENT.

Carriers; right of passenger to stop over:— in general; rule in case of coupon tickets; effect of particular stipulations, agreements, or representations; statutory permission; limited tickets; special rates or contracts; rules and custom of carrier; effect of delay of train; through train to be taken; no stop-over without ticket; time within which stop-over must be used; right to take up ticket. 778

Liability of, as warehousemen; liability for acts of mob. 80

Contracting to limit liability. 718

Fraud in description of property shipped. 176

CERTIFICATES. See SCHOOLS, &

CHARITIES. See also PERPETUITIES, 1.

1. A nuisance is subject to injunction and abatement in a suit for that purpose, although the defendant is a corporation maintaining a lunatic asylum at the expense of the state,— especially when the statute creating it has provided that it may sue and be sued. *Herr v. Central Kentucky Lunatic Asylum* (Ky.) 394

2. The immediate and unconditional devotion of a fund to charity, and not the time or manner of the administration or distribution

of the fund, is the test of the validity of its creation. *Webster v. Wiggins* (R. I.) 510

3. A charitable trust in the legal sense is one which originates from a gift, and which limits its property to any public use to which it is lawful to devote property forever. *Id.*

4. A trust for the erection of convenient and healthful tenements for the laboring classes, and their maintenance in proper repair and in a clean and tidy condition, providing that no intemperate, disorderly, or filthy person shall be allowed to occupy them, although they are to be let to laborers for rent, and not gratuitously furnished to them,—creates a charity. *Id.*

5. A gift to promote the efficiency of public schools, or, in the alternative, to establish schools for the education of children residing in tenements, is charitable. *Id.*

NOTES AND BRIEFS.

Charities; bequest for; when valid. 511

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CIVIL RIGHTS.

Negroes as grand jurors. 204

CIVIL SERVICE. See also OFFICERS, 1, 2.

NOTES AND BRIEFS.

Civil service; character of board. 738

CLEARING-HOUSE. See also BANKS, 1-8.

NOTES AND BRIEFS.

Clearing-house; relation of banks to; representation of outside bank which becomes insolvent. 362

COLLATERAL-INHERITANCE TAX. See TAXES, 10-12.

COLLEGES. See also CONSTITUTIONAL LAW, 7.

A statute giving absolute control and management of the affairs and property of a college to the directors of another similar institution is a donation of the property of the former to the latter, and violates the constitutional provision which declares that private property shall be held inviolate. *State, White, v. Neff* (Ohio) 409

NOTES AND BRIEFS.

Colleges; property rights of. 409

COLOR OF TITLE. See ADVERSE POSSESSION, 8.

COMMERCE. See also CARRIERS, 13.

1. Interstate commerce is not subject to common law regulations as to discriminating charges of common carriers, in the absence of congressional action. *Gatton v. Chicago, R. I. & P. R. Co.* (Iowa) 556

2. Neither the common-law rule nor a state statute denying validity to a contract exempt-
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ing a common carrier from liability can be regarded as a regulation of commerce, although applied to an interstate shipment. *Solan v. Chicago, M. & St. P. R. Co.* (Iowa) 718

3. A license tax on all those engaged in packing or canning oysters for sale or transportation, whose places of business are in the state, is not an unconstitutional interference with interstate commerce as applied to those who may sell or transport their oysters beyond the state. *State v. Applegarth* (Md.) 812

NOTES AND BRIEFS.

Commerce; injunction against strikes affecting. 464

COMMITMENT. See CRIMINAL LAW, 1.

COMMON LAW.

There is no national common law. *Gatton v. Chicago, R. I. & P. R. Co.* (Iowa) 556

NOTES AND BRIEFS.

Common law; of the United States. 556

COMPROMISE AND SETTLEMENT.

Relief from a settlement and compromise of a claim for insurance will be granted where the insured acted without any real consideration, in ignorance of the rights and obligations of the parties, while the insurer had full knowledge thereof and of his ignorance, and induced him to act by false and fraudulent misrepresentations, although his mistake was in respect to his legal rights. *Titus v. Rochester German Ins. Co.* (Ky.) 478

CONFLICT OF LAWS.

1. Comity between different states does not require a law of one state to be executed in another, where it would be against the public policy of the latter state. *Pope v. Hanke* (Ill.) 568

2. The validity of a negotiable note in the hands of a bona fide holder in the state where the contract was made, although the consideration of the note was the settlement of differences under an illegal option contract, does not require its enforcement by the courts in another state in which the statutes make such notes void even in the hands of a bona fide holder, and make the transactions out of which the consideration arose criminal. *Id.*

3. The doctrine of state comity will not be applied in behalf of a corporation seeking to recover upon a claim on a contract expressly prohibited by law, or which is clearly at variance with the settled policy of the state. *Seamans v. Temple Co.* (Mich.) 430

4. A discharge of two firms in the same insolvency proceeding does not affect the claim of a nonresident creditor against one of the firms, merely because he proved a claim against the other firm, which included the partners in the former, and voted for its assignee, and accepted a dividend on the claim. *Pattée v. Paige* (Mass.) 451

5. An oral contract to make a will, although valid in the state where it is made, cannot be enforced in Massachusetts against

inhabitants of that state, since an action must be controlled by the policy of Mass. Stat. 1888, chap. 372, which requires such agreements to be in writing. *Emery v. Burbank* (Mass.) 57

NOTES AND BRIEFS.

Conflict of laws; law of place as to contract. 57

As to legality of contract; effect of comity. 570

CONSPIRACY. See also INJUNCTION, 2, 8, NOTES AND BRIEFS.

1. Civil liabilities may ensue by reason of a conspiracy to commit that which is not made unlawful by statute. *Longshore Printing & Pub. Co. v. Howell* (Or.) 404

2. A combination of laborers to maintain wages or limit the number of apprentices is not contrary to public policy. *Id.*

3. An agreement of employes between themselves to quit their employer is not unlawful. *Id.*

4. Communicating to their employer the reasons for the design of employes to quit the service, and signifying their intention, is not unlawful. *Id.*

5. Trades unions are not within and of themselves unlawful combinations. *Id.*

CONSTITUTIONAL LAW. See also COLLEGES; COURTS, 1; GRAND JURY, 1; TAXES, 2.

1. The contemporaneous interpretation of a constitution by those who had opportunity to understand the intention of the instrument has a strong presumption in its favor. *State, Guergun, v. McAllister* (Tex.) 523

2. A constitutional provision that no foreign corporation shall do business except while it has a known place of business and an authorized agent in the state is not self-executing without any provision as to how the agent shall be designated or the place of business made known. *St. Louis, A. & T. R. Co. v. Fire Assn.* (Ark.) 83

3. A statute providing for the preparation of a standard policy of insurance and its adoption by an insurance commissioner, after which no other form of policy can be lawfully issued, is an unconstitutional attempt to delegate to him legislative power. *Anderson v. Manchester F. Assur. Co.* (Minn.) 609

4. A statute providing, among other things, that on consent of a city council to which the consent of a majority of the electors is a condition precedent, certain penalties of a prohibitory liquor law may be suspended, is not unconstitutional as a delegation of legislative power to the people. *State, Witter, v. Forkner* (Iowa) 206

5. Due process in the imprisonment of a witness for refusal to answer a proper question on an investigation by grand jurors does not require a regular trial and judgment, but is complied with by the issue of a writ, on complaint of the grand jurors, to a justice of the peace as provided in Conn. Gen. Stat. § 91. *Re Clark* (Conn.) 242

6. Compelling the defendant in a criminal case to stand up for the purpose of identification does not violate the constitutional provision against compelling one to be a witness against himself. *People v. Gardner* (N. Y.) 699

7. The property of a private eleemosynary corporation, although charged with the maintenance of a college or other "public charity," is private property, within the meaning and protection of that clause of Ohio Const. art. 1, § 19, which declares that "private property shall ever be held inviolate." *State, White, v. Neff* (Ohio) 409

8. The charter reservation of power to amend it does not destroy the constitutional protection of the vested rights of the corporation against legislative interference. *Id.*

9. A statute authorizing a court to declare a turnpike road abandoned and vacated as a toll road, and thereby a free road, on the ground that it had been out of repair for the preceding six months, without the intervention of a jury or the right of appeal whereby the question of its being out of repair for six months could be determined by a jury, is in conflict with constitutional guaranties of a remedy by due course of law and against deprivation of property without due process of law. *Salt Creek Valley Turnp. Co. v. Parks* (Ohio) 789

10. A statute requiring manufacturers to pay wages of their employes weekly, although applying to individuals as well as to corporations, is within the power of the legislature under the Massachusetts constitution, which extends such power to "all manner of wholesome and reasonable orders, laws, statutes, and ordinances," and does not in terms make any provisions as to freedom or liberty of contract. *Re House Bill No. 1,230* (Mass.) 844

11. Excepting insurance upon cotton in bales from the provision in Tenn. Acts Gen. Assem. 1893, chap. 107, § 1, making void all stipulations limiting liability to less than the full amount of loss, if this does not exceed the amount of insurance, does not make an arbitrary, unreasonable, and unnatural classification in violation of Tenn. Const. art. 11, § 8. *Dugger v. Mechanics & T. Ins. Co.* (Tenn.) 796

12. The equal protection of the laws is not denied by Tenn. Acts Gen. Assem. 1893, chap. 107, § 1, making void all stipulations in insurance policies limiting liability to less than the full amount of loss, if this does not exceed the amount of insurance. *Id.*

13. Disseisin of privileges or deprivation of property otherwise than by the law of the land or due process of law contrary to Tenn. Const. art. 1, § 8, or U. S. Const. 14th Amend. § 1, is not made by Tenn. Acts Gen. Assem. 1893, chap. 107, § 1, making void all stipulations in insurance policies which limit liability to less than the full amount of loss, if this does not exceed the amount of insurance. *Id.*

14. The transfer of money from one fund of a city to another to pay a debt does not deprive the city of its property within the constitutional provision as to due process of law. *Dacock v. Moore* (Mich.) 788

15. A municipal contract for the removal of garbage, giving the contractor an exclusive right to remove it at a certain price per pound, payable by the persons who produce the garbage, is simply a sanitary regulation, which cannot be considered as in the nature of a confiscation or an attempt to create a monopoly. *Walker v. Jameson* (Ind.) 679

16. The right of succession to the property of a deceased person, whether by law or inheritance, is a creature of statute law, and not a natural right beyond legislative control. *State v. Alston* (Tenn.) 178

17. To provide adequate means of defense against coyotes is within the general police power, and does not violate fundamental principles of free government or infringe upon the original rights of the citizen. *Ingram v. Colgan* (Cal.) 187

NOTES AND BRIEFS.

See also CRIMINAL LAW.

Construction of constitution. 153
As to statutes requiring wages to be paid in lawful money. 273
Validity and effect of statutes regulating time and payment of wages. 344
Extent of police power. 679
Unjust classification or discrimination as to business; police power as to contracts. 796

CONTEMPT.

1. A summary enforcement of an answer by imprisoning a witness is not an exercise of judicial power to punish contempt of court as a criminal offense, but of administrative power to enforce a law which, if enforced at all, must be enforced at once. *Re Clark* (Conn.) 242

2. It is not contempt for an attorney to characterize as "inflammatory," in a motion to quash an indictment, a charge to the grand jury which assumes that the crime of bribery has been committed and that it is the duty of the jurors to indict therefor, and concludes as follows: "There comes up from the people a command for a forward march all along the line of your duty. You should give heed to that cry, for it comes from a patient and long-suffering endurance which has at last reached its limit." *Clair v. State* (Neb.) 867

3. Contempt of court is not shown by the act of counsel of one indicted for a crime, in alleging in respectful language, as one of the reasons for quashing the indictment, that the judge's charge to the grand jury was inflammatory and prejudicial in that it aroused the prejudice of the grand jury so that they were not fair and impartial; and the fact that the remedy was by plea, instead of by motion, does not affect the question of contempt. *Id.*

NOTES AND BRIEFS.

Contempt; by refusal to testify. 242

CONTRACTS. See also **BILLS AND NOTES**, 1; **BROKERS**; **CONFLICT OF LAWS**, 5; **CUSTOM**, 1; **PRINCIPAL AND SURETY**, 3.

1. An instrument creating an easement is within the operation of the statute of frauds. *Nunnally v. Southern Iron Co.* (Tenn.) 421
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2. An agreement to give a pass to a man and his family annually for ten years, and to stop trains at his house to let them on and off during that period, is not within the statute of frauds as an agreement which cannot be performed within one year, since the death of each member of the family within the year would end the contract. *Weatherford, Mineral Wells & M. W. R. Co. v. Wood* (Tex.) 526

3. A legal consideration for the loan of a painting for a competitive exhibition at a fair is furnished in the detriment and inconvenience to which the sender is subjected, and the indirect and contingent benefit to the person conducting the exhibition. *Prince v. Alabama State Fair* (Ala.) 716

4. An agreement to return or pay for beer barrels, kegs, and cases in which beer is shipped contrary to law, is a part of the illegal contract, which cannot be enforced, when these articles were sent merely for the purpose of completing the sale of the beer. *Gipps Brewing Co. v. De France* (Iowa) 336

5. The mere fact of a contemplated marriage, or marriage itself, will not as matter of law justify the discharge of a woman who is engaged under a contract as housekeeper and to render services of a personal nature necessitating constant attendance upon her employer. *Edgecomb v. Buckhout* (N. Y.) 816

6. A corporation is not disqualified to bid for a contract to be let by the state furnishing board, by reason of the fact that its business manager, who is not a stockholder or officer of the company, and whose salary or position will not be in any way affected by the contract, was a member of the legislative assembly which passed the act providing for the letting of such contract. *State, Exes. v. Rickards*, (Mont.) 296

7. The lowest bidder, although offering a bond for the performance of the contract, cannot compel the award to him of a contract for the publication and annotation of Codes, which by the Montana Constitution and the Act of March 7, 1895, the state furnishing board is required to let to the "lowest responsible bidder therefor," the statute also requiring that the typesetting, printing, and binding shall all be done within the state, and that the publisher shall keep sufficient copies to supply all demands for not less than eight years, and a full complete set of stereotype matrices of every page of type used. *Id.*

NOTES AND BRIEFS.

Contracts; when complete; law of place to determine legality of. 387
Possibility of performance within year. 526
Illegality of; contrary to public policy. 796
Effect of marriage on employment. 816

CONTRIBUTION. See also **LIMITATION OF ACTIONS**, 3.

The right of action of a co obligor or surety who satisfies the debt, for contribution from those who are liable with him, rests upon the implied promise raised by law, and not upon subrogation, where the creditor has no security, and the debt creates no lien upon property

and is entitled to no priority over other debts.
Faires, v. Cockrill (Tex.) 528

COPARCENERS. See COTENANCY, NOTES AND BRIEFS.

COPYRIGHT.

NOTES AND BRIEFS.

Liability of officers of a corporation for its infringement. 426

CORPORATIONS. See also ACTION OR SUIT, 3, 4; COLLEGES; CONFLICT OF LAWS, 8; CONSTITUTIONAL LAW, 2, 7-9; CONTRACTS, 6; TAXES, 7.

1. A transfer by a corporation of its entire assets and property of every description, to another company, in consideration of shares of stock in the latter, not made with the intention of winding up its affairs and dividing the stock among its own stockholders, or as a temporary arrangement, but as a permanent investment, is *ultra vires* and may be set aside in an action by a nonassenting stockholder. *Byrne v. Schuyler Electric Mfg. Co.* (Conn.) 804

2. The profitableness or unprofitableness of a transaction by a corporation, which is *ultra vires*, does not affect the right of a stockholder to contest it. *Id.*

3. The manager of a corporation in charge of its work in constructing a building is personally liable for negligent failure to erect a scaffold which is needed to protect persons near the walls. *Mayer v. Thompson-Hutchison Bldg. Co.* (Ala.) 438

4. An officer who is the general managing agent of a lumber company may be held personally liable for setting an inexperienced and ignorant employé at work on a machine which the former knows to be dangerous. *Greenberg v. Whitcomb Lumber Co.* (Wis.) 439

5. The president and general manager of a corporation are personally liable for damages caused to a riparian proprietor by the long-continued discharge of muddy water into a stream from ore washers operated by the company with their sanction and their knowledge of the damage caused thereby. *Nunnally v. Southern Iron Co.* (Tenn.) 421

6. A demand arising *ex delicto* may be enforced against the stockholders of a corporation under a constitutional provision that the dues from corporations shall be secured by individual liability of the stockholders. *Fleniken v. Marshall* (S. C.) 402

7. Stockholders in a corporation cannot defeat all recovery against them for an amount in addition to the value of their stock, because the act providing for it does not fix the amount, but simply fixes a limit beyond which it shall not extend, since the liability will be regarded as extending to such limit if necessary. *Id.*

8. The property of an insolvent corporation is not a trust fund for the benefit of creditors in any sense other than that when a chancery court takes possession of it upon some general principle of equity jurisdiction, wholly independent of any idea that the property consti-

tutes a trust fund, it will be administered for the equal benefit of creditors. *O'Beir Jewelry Co. v. Volfer* (Ala.) 707

Foreign.

9. The exemption of a previously chartered railroad company from a statutory provision respecting the sale and effect of tickets does not extend to a foreign corporation subsequently created which leases the road of the former. *Robinson v. Southern P. Co.* (Cal.) 778

10. The institution or prosecution of a suit is not a "doing business" within the meaning of laws prescribing conditions of business by foreign corporations. *St. Louis, A. & T. R. Co. v. Fire Asso.* (Ark.) 83

11. The failure of a foreign corporation to comply with the conditions of the right to do business in a state will not preclude an action by it, or by an insurance company subrogated to its rights, for negligent injuries to its property within the state. *Id.*

NOTES AND BRIEFS.

Corporation; restrictions on business by foreign company. 796

Property rights of private eleemosynary corporation. 409

Personal liability of officers of, for its torts or negligence:—(I.) in general; (II.) fraud; (III.) conversion; (IV.) trespass; (V.) infringement; (a) of patent; (b) of trademark; (c) of copyright; (VI.) injury to persons generally; (VII.) injury to employé; (VIII.) libel; (IX.) negligence. 421

Subscription to stock of other company; transfer of entire assets to other company. 804

Liability of stockholders for torts of company. 402

Forfeiture of charter by wrongdoing. 727

Constitutionality of procedure to forfeit franchise. 769

Trust fund of insolvent company. 708

COSTS AND FEES.

1. For successfully defending claims to the assigned property by an attempted rescission of sales, an assignee for creditors may be allowed attorneys' fees, although the assignment is set aside on a cross-petition by other creditors. *Perry Mason Shoe Co. v. Sykes* (Miss.) 277

2. Attorneys' fees cannot be allowed out of the assigned property as against creditors successfully asserting liens thereon, for an unsuccessful defense of the assignment by an assignee for creditors, although the assignment is declared void, not for actual fraud, but by reason of failure to comply with some positive requirement of statute law, and although the assignee is also a receiver of the court, since it is not his duty as receiver to defend the assignment. *Id.*

COTENANCY. See also ACTION OR SUIT, 2.

A tenant in common may be compelled to account to his cotenant for the use of the lands held in common, although he has re-

ceived the benefits thereof without any attempt to exclude the other, or any promise or mutual understanding to give any compensation for the profits taken by him. *Gage v. Gage* (N. H.) 829

NOTES AND BRIEFS.

Cotenancy; liability of cotenants to account for use and occupation and rents and profits:—(I.) the common-law doctrine; (II.) reason of the common-law doctrine; (III.) states not adopting the English statute; (IV.) when held liable: (a) in case of ouster; (b) in cases where an agreement exists; (c) when occupied by one alone; (V.) the remedy as between cotenants: (a) statutory action of account; (b) proceedings in equity; (c) in action of assumpsit; (VI.) liability to account for rents received; (VII.) lien for rents received; (VIII.) the question, What is more than a just share? (IX.) necessity of a demand; (X.) necessary allegations in action of account; (XI.) in what character liable; (XII.) position of cotenant holding over; (XIII.) extent of liability; (XIV.) when liable to pay interest; (XV.) when held for the rental value; (XVI.) position of purchaser of cotenant's share; (XVII.) as to coparceners; (XVIII.) the question of deductions; (XIX.) mesne profits; (XX.) the application of the statute of limitations; (XXI.) construction of the state statutes. 829

COUNTIES.

1. A good-faith purchaser of county warrants occupies no better position than the seller, as they are non-negotiable within the meaning of the law merchant. *Erskine v. Steele County* (N. D.) 645

2. A portion of a county warrant issued by the county commissioners, which represents the discount at which the warrant will be sold, is illegal and void. *Id.*

3. A county warrant issued by the commissioners of a newly formed county, in the absence of legislative authority, for transcribing from the records of the counties out of which it is formed such part as relates to real estate situated in the former county, is illegal and void. *Id.*

NOTES AND BRIEFS.

Counties; validity of warrants of. 645

COURTS.

1. The power of the legislature to provide for more than one judge in a judicial circuit is not limited by the provision of Ark. Const. art. 7, § 18, that for each circuit "a judge" shall be elected. *State, Kinsworthy, v. Martin* (Ark.) 153

2. A first cousin of one of the parties is not within the terms of the statute prohibiting a judge from acting who is related to one of the parties within the third degree, where the statutes provide that in the collateral line the degrees are counted by generations from one of the relatives up to the common ancestor and from the common ancestor to the other relation, excluding one, including the other, and counting the common ancestor but once. *Robinson v. Southern P. Co.* (Cal.) 773

3. A creditor may remit a portion of his debt by voluntary credits in order to bring his 28 L. R. A.

claim within the jurisdiction of an inferior court. *Hutton v. Luce* (Ark.) 221

4. Fraud in procuring the enrollment of a bill and the signature thereto by the president of the senate and the speaker of the house of representatives, but which is on its face regular and in due form, gives the courts no power to order its removal from the files of the secretary of state, or to enjoin him from delivering a copy to the public printer, but the remedy, if any, is with the legislature. *Carr v. Coke* (N. C.) 737

5. An assessment of personal property by the *ad valorem* system, like that applied to real property, may be ordered by the court on behalf of the owners of real estate, where a city has illegally attempted to tax personal property in another manner, even if the illegal mode attempted would be as just as the other. *Levi v. Louisville* (Ky.) 480

6. The court may compel a city government to correct an error in the mode of levying a tax, although it cannot appoint an assessor or correct the error itself. *Id.*

7. There is no jurisdiction in North Carolina of the crime committed by persons who, while standing in that state, shoot across the state boundary and kill a person in Tennessee. *State v. Hall* (N. C.) 59

NOTES AND BRIEFS.

Courts; locality of crime committed by shooting or striking across state boundary:—(I.) what constitutes the offense; (II.) the question of locality; (III.) statutory provisions regarding; (IV.) constitutionality of such statutes. 59

Voluntary credits to bring debt within jurisdiction of court:—(I.) the rule permitting remission; (II.) the rule as affected by the character of the claim: (a) actions for an uncertain amount; (b) actions for an amount certain; (c) actions in which jurisdiction depends upon the value of the property in suit; (III.) remission of interest; (IV.) rule denying the right to remit; (V.) what constitutes a remission; (VI.) when made. 221

CRIMINAL LAW. See also CONSTITUTIONAL LAW, 5, 6.

1. The power to issue a mittimus without a regular trial and judgment is given to a justice of the peace by Conn. Gen. Stat. § 91, when complaint is made to him, by grand jurors, of a refusal to give testimony before them. *Re Clark* (Conn.) 242

2. A motion to dismiss an indictment cannot be based on facts not appearing on the record. *Com. v. Hayden* (Mass.) 318

3. The dismissal of an indictment on the motion of the county attorney after it has been attacked by demurrer is not equivalent to a decision of the court sustaining the demurrer, so as to prevent the case from being resubmitted to the same or another grand jury without order of the court, as would otherwise be required under Minn. Gen. Stat. 1894, §§ 7397-7399. *State v. Peterson* (Minn.) 324

NOTES AND BRIEFS.

Criminal law; for locality of crime, see COURTS.

Right to compel accused to exhibit himself

for identification:—(I.) cases denying the right; (II.) cases asserting the right; (III.) comparison of cases; (IV.) waiver of the constitutional exemption; (V.) the English rule. 699

CRITICISM. See LIBEL AND SLANDER, NOTES AND BRIEFS.

CURTESY.

1. A divorce obtained by a husband from his wife does not defeat his tenancy by the curtesy initiate, where the statute has made no provision for such a case, but has declared that a divorce obtained for his fault and misconduct shall defeat a husband's right as tenant by the curtesy. *Meacham v. Bunting* (Ill.) 618

2. A tenancy by the curtesy initiate is created in the trustee, where land purchased by a husband is conveyed to him for the use and benefit of his wife, with nothing to indicate a purpose to exclude him from a right by the curtesy. *Id.*

NOTES AND BRIEFS.

Curtsey; estate by; adverse possession in case of. 618

CUSTOM.

1. A known usage of trade forms a part of a contract made in that trade. *Union Ins. Co. v. American F. Ins. Co.* (Cal.) 692

2. Custom cannot excuse a failure to make a scaffold or other safeguard on the side of a brick wall which is being built within a few feet of the entrance of a schoolhouse then in use. *Mayer v. Thompson, Hutchison Bldg. Co.* (Ala.) 453

NOTES AND BRIEFS.

Custom; usage of trade. 692
Validity of. 863

DAMAGES.

1. A contract to pay a stipulated sum as damages will be given effect only where the damages provided against are uncertain and not ascertainable by any satisfactory and certain rule of law. *Krutz v. Robbins* (Wash.) 676

2. The larger sum will be held a penalty, and not liquidated damages, where the payment of a smaller sum is secured by an agreement to pay the larger. *Id.*

3. The measure of recovery for injury to chattels which are not wholly destroyed is the difference between the value immediately before and immediately after the injury; and the owner cannot recover more than this by reason of voluntary abandonment of what remains. *Chicago, B. & Q. R. Co. v. Metcalf* (Neb.) 824

4. Pecuniary damages sustained are all that can be recovered for the death of a person under Dak. Comp. Laws, § 5499. *Smith v. Chicago, M. & St. P. R. Co.* (S. D.) 573

5. A verdict for nominal damages only can be recovered by the father for the death of a son who has attained his majority, although he had lived with his father thereafter and was strong, healthy, and a good laborer. *Id.*

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6. Mitigation of damages for fraud in representing the title of mortgaged property to be perfect, on the faith of which mortgage bonds were purchased, when in fact there was a prior mortgage thereon, cannot be claimed by virtue of the tender of a discharge on the trial of the action, after the expiration of a long time, when the market for the bonds may have changed. *Nash v. Minnesota Title Ins. & T. Co.* (Mass.) 753

7. Rescission or attempted rescission of a contract of purchase made on the faith of false statements by a third person as to the title will not make him liable in an action for fraud beyond the difference between the actual value of the property and its value as it would have been if the representation had been true. *Id.*

8. Damages for false representation as to the title of property of another person, on the faith of which it was purchased, include only the difference between the value of the property as it was and the value as it would have been if the representation had been true. *Id.*

9. Damages for mental suffering, independent of any physical injury, may be recovered for negligence in delivery of a telegram the character of which is known to the telegraph company. *Mentzer v. Western U. Teleg. Co.* (Iowa) 72

NOTES AND BRIEFS.

Damages; stipulated. 676

For fraud or deceit; inducing contract with third person; effect of rescission of such contract. 754

DAMS.

Surplus water of a dam lawfully made in a river to supply a canal past rapids in aid of navigation, although under a statute declaring that the water-power created should belong to the state, cannot be diverted from its natural channel to the detriment of the lower riparian proprietors, by the state or its grantees, through the canal and sluice-ways therefrom, for the operation of mills on the canal bank. *Patten Paper Co. v. Kaukauna Water-Power Co.* (Wis.) 443

DEATH. See DAMAGES, 4, 5; NEGLIGENCE, 1.

DEBTOR AND CREDITOR. See PARTNERSHIP, NOTES AND BRIEFS.

DEDICATION.

1. A railroad corporation cannot acquire title to or an easement in land by common-law dedication. *Lake Erie & W. R. Co. v. Witman* (Ill.) 612

2. A village plat showing a strip of land 100 feet wide on each side of a railroad track, but which is not marked or noted on the plat as donated or granted to the railroad company, in order to make a conveyance thereof under Ill. Rev. Stat. chap. 109, § 8, cannot be made to operate as such conveyance by the aid of proof of contemporaneous or subsequent acts of the parties tending to show dedication thereof as part of the right of way. *Id.*

NOTES AND BRIEFS.

Dedication; how made; for railroad; revocation. 613

DEEDS. See also HUSBAND AND WIFE, 1.

1. A conveyance of partnership real estate by the surviving partner as such will not in a court of equity have the effect of conveying only his individual interest, although upon its face the deed purports to convey only such interest, and is joined in by the wife of the grantor. *Dyer v. Morse* (Wash.) 89

2. A complete description by metes and bounds of land between a certain block and the north line of a quarter-section does not limit a conveyance to that land, when followed by a sentence declaring that it is all the land that lies between the north line of such quarter-section and two blocks named, only one of which is mentioned in the preceding description by metes and bounds. *Lake Erie & W. R. Co. v. Whitham* (Ill.) 612

DEFINITIONS. See also CHARITIES, 8.

The term "housekeeper," as used in a complaint to recover for services, is not so limited in meaning as to exclude evidence that the services include work as seamstress. *Edgecomb v. Buckhout* (N. Y.) 816

DELEGATION OF POWER. See CONSTITUTIONAL LAW, 8, 4.

DENTIST. See EVIDENCE, 24.

DOWER.

1. A divorce from the bonds of matrimony bars a claim of the divorced wife to dower, notwithstanding an implication from a statute denying dower in case of divorce for her misconduct, that the legislature supposed she would be entitled to dower after divorce not based on her misconduct. *Wood v. Wood* (Ark.) 157

2. A void divorce granted to a wife in another state will not be given effect on the theory that she is estopped, so as to relieve her husband's land, in a suit between him and a third person, from her inchoate dower right,—especially where the question of dower was reserved in the decree of divorce. *McCreery v. Davis* (S. C.) 655

DRAINS AND SEWERS. See HIGHWAYS, 1.

EASEMENTS. See also CONTRACTS, 1.

The privilege to discharge water from ore washers into a stream, given without words of grant by a lower proprietor to an iron company, as long as it "may wish to run or have run," said washers, with an agreement to accept a certain sum as the full amount of damages by such waters,—is a license, not an easement, and does not extend to the grantees of such iron company. *Nunnally v. Southern Iron Co.* (Tenn.) 421

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EJECTMENT.

For plaintiff in ejectment to trace his title to an alleged common source is prima facie sufficient under Ill. Rev. Stat. chap. 45, § 25, where he has stated on oath that defendant claims title from that source and this is not denied on oath. *Lake Erie & W. R. Co. v. Whitman* (Ill.) 612

NOTES AND BRIEFS.

Ejectment; rule as to title in; estoppel in. 613

ELECTION DISTRICTS.

NOTES AND BRIEFS.

Division of city into. 524

ELECTRICAL USES AND APPLICATIONS. See also TRIAL, 7.

1. A presumption that the public know enough of the nature of electricity to avoid the danger is not created by the mere fact that some persons use that agency. *Giraudi v. Electric Improv. Co.* (Cal.) 596

2. One who is ignorant of the danger that may result from contact with electric-light wires over the roof of a building in which he is employed is not required to exercise the same degree of care that would be required if he knew the danger. *Id.*

3. Placing electric-light wires over the metallic roof of a hotel, where persons may come in contact with them, without raising them high enough to prevent such contact, is sufficient proof of negligence in case of injury to a person by an electric shock from such wires. *Id.*

NOTES AND BRIEFS.

Electric uses; negligence as to wires. 597

EMINENT DOMAIN.

1. The establishment of a street grade several feet above the natural surface of the ground by a mere ordinance, without any actual improvement of the street in accordance therewith; and a subsequent ordinance changing the grade line to conform to the surface of the ground; and a permanent improvement of the street on that grade,—entitle one who erected his building to conform to the grade established by the first ordinance while that was in force, to the benefit of Iowa Code, § 469, which provides for compensation to a person whose property is injured by the change of an established grade of the street. *Ressegieu v. Sioux City* (Iowa) 889

2. A telephone line consisting of poles and wires along a country highway, which does not interfere with the safety and convenience of ordinary travel, or unreasonably or materially impair the special easement of an abutting owner, does not impose an additional servitude upon the highway. *Cater v. Northwestern Teleph. Exch. Co.* (Minn.) 810

3. Riparian rights of the lower owners of land upon the bank of a stream are property such as cannot be taken by the state, even for a public use, except in aid of navigation, with-

out compensation to the owner, and cannot be taken at all or impaired for a private use. *Patton Paper Co. v. Kaukauna Water-Power Co.* (Wis.) 443

NOTES AND BRIEFS.

Eminent domain; additional servitude on highway; right to take private property. 810

EQUITY.

1. The refunding, with interest, of money advanced by a person from whom the legal title to land is taken, in equity may be made a condition of the relief. *Galbraith v. Tracy* (Ill.) 129

2. A court of equity has no jurisdiction to enjoin the transfer or collection of a note which is void by reason of a material alteration, since the maker has an adequate remedy at law. *Erickson v. First Nat. Bank* (Neb.) 577

ESTOPPEL. See also ACTION OR SUIT, 1; PLEADING, 1.

1. A license cannot operate as an estoppel against the licensor in favor of a grantee of the licensee, because an estoppel must be mutual. *Nunnally v. Southern Iron Co.* (Tenn.) 421

2. A creditor who attaches property on a claim which includes the debtor's liability to the plaintiff as guarantor is estopped from denying liability as such guarantor, although a remittitur is entered in the attachment suit for the part of the claim based on the guaranty after the holder of the guaranty has made demand on him for payment. *Lachman v. Block* (La.) 255

3. Permitting real estate purchased with partnership money to stand in the name of one of the partners will not estop the partnership from claiming the title as against one giving the partner credit on the faith of his apparent title to the property. *Goldthwaite v. Janney* (Ala.) 161

4. The widow and heirs of a deceased partner, who recover the legal title to lands on the basis of a trust in the administrator of the surviving partner of their intestate, cannot deny that he was their trustee for the purpose of avoiding the duty to account to him for advances for the purchase and improvement of the property. *Galbraith v. Tracy* (Ill.) 129

5. Recitals in municipal bonds, to estop the corporation, need not state in detail that all the necessary preliminary steps have been taken, but it is sufficient that they declare that the bonds are issued in pursuance of a specified statute. *Coker v. Dwight School Twp.* (N. D.) 649

6. Municipal corporations are estopped, as against bona fide holders of their bonds, from setting up as a defense thereto that all the preliminary steps necessary to authorize their issue were not taken, where the officers having charge of such issue are specially or impliedly authorized to determine the performance of all the conditions precedent, and the bonds recite such compliance. *Id.*

NOTES AND BRIEFS.

Estoppel; against state. 48

Of partner as to real property. 105

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EVIDENCE. See also CONSTITUTIONAL LAW, 6; DEFINITIONS; TRIAL, 8; WILLS, 6.

Judicial notice.

1. The significance of the word "kindergarten" is within judicial cognizance. *Sinnott v. Colombet* (Cal.) 594

2. That coyotes are a pest and scourge to the breeders of sheep and other small domestic animals is a matter of common knowledge. *Ingram v. Colgan* (Cal.) 187

3. It is a matter of common knowledge of which the court will take judicial notice, and of which the public are bound to take notice, that railroad passenger trains are operated to carry passengers for hire. *Condran v. Chicago, M. & St. P. R. Co.* (C. C. App. 8th C.) 749

4. The court will take judicial notice that the authority of a railroad conductor does not extend to the carrying of passengers without the payment of the regular fare. *Id.*

5. Judicial notice is taken by the supreme court of Michigan that sufficient moneys will come into the hands of the treasurer of Detroit from the liquor fund to replace a loan of \$12,000 credited to the board of health. *Davock v. Moore* (Mich.) 788

Presumptions and burden of proof.

6. An ordinance is presumed to be reasonable until the contrary is shown, when clearly within the general powers of the municipal body. *Littlefield v. State* (Neb.) 588

7. The mere fact of injury raises no presumption of negligence against either plaintiff or defendant. *Gulf, C. & S. F. R. Co. v. Shieder* (Tex.) 588

8. A suspicion of plaintiff's negligence is not enough to throw on him the burden of proof as to that fact, unless it amounts to prima facie evidence thereof. *Id.*

9. Defendant has the burden of proving plaintiff's contributory negligence, unless that is established prima facie by the legal effect of facts stated in the petition, or by undisputed evidence adduced on the trial. *Id.*

10. There is no presumption of contributory negligence of a woman who drove across a railroad side track where her view was obstructed, before discovering the approach of an engine, and then tried to turn her horse, which, frightened by the approaching engine, jumped on to the main track in front of it. *Id.*

11. Negligence cannot be assumed from the fact of the running away of a team. *Missouri P. R. Co. v. Hackett* (Kan.) 696

12. In case a child is struck by a street car while in a dangerous and exposed situation, the plaintiff in an action for the death of the child has the burden of proving absence of negligence on the part of the child or its custodian. *Bamberger v. Citizens' Street R. Co.* (Tenn.) 486

13. A presumption of negligence arises from the loss of property in the hands of a bailee who is answerable only for losses occurring through negligence. *Prince v. Alabama State Fair* (Ala.) 716

14. An accused person is presumed to be sane until the contrary is shown. *State v. Hariley* (Nev.) 33

15. One bringing an action under the South Carolina Code to try title to real estate, and alleging that he is seised in fee, has the burden of proving the allegation,—especially in an action against the state to recover land under tidewater, as to which the prima facie title is in the state. *Heyward v. Farmer's Min. Co.* (S. C.) 42

Best.

16. To prove the value of services as house-keeper in a stylish establishment, including personal attendance on the employer, where no situation exactly similar can be shown, the compensation of other housekeepers who do not perform all the services that were performed in the case at bar may be shown as the best evidence the nature of the case affords. *Edgecomb v. Buckhout* (N. Y.) 816

Documentary.

17. A letter by the president of a corporation reciting a statement of fact by a third person, the truth of which it assumes, is admissible in a subsequent suit against the corporation in which the existence of such fact becomes an issue. *Nash v. Minnesota Title Ins. & T. Co.* (Mass.) 758

18. A written statement of relevant facts is admissible in evidence on testimony of a witness that he knew when it was made that the facts were correctly stated therein, but cannot now remember them. *Curtis v. Bradley* (Conn.) 143

19. Testimony of a witness that facts known to him to be true were stated by him to another who wrote them down, and testimony of the latter that he wrote them as they were stated by the former, may be given to justify the admission of the writing, although neither of the witnesses can now remember the facts stated therein. *Id.*

20. A record of marriage attested by an assistant registrar is admissible in evidence under statutes making such records made by town clerks admissible, providing for registrars in certain places, to whom the statutes relative to clerks shall be applicable, and permitting them to appoint assistants whose attestations shall be of the same effect as the registrars.' *Com. v. Hayden* (Mass.) 818

Oral or extrinsic as to writings.

21. Parol evidence is inadmissible to prove a warranty made at the time of a written order for a No. 4 fireproof safe. *Diebold Safe & L. Co. v. Huston* (Kan.) 53

22. Evidence is admissible on the trial of a foreclosure suit, as against the mortgagee's executrix, to show that the mortgage was without any consideration, but was taken by the mortgagor from his son merely because of a fear that the latter might not be able to take care of the property, but might lose it in speculation or otherwise; and it is immaterial whether or not the purpose was lawful or practicable or possible. *Baird v. Baird* (N. Y.) 875

23. Extrinsic evidence is admissible to determine as to the existence of latent ambiguity in a will, and enable the court to look upon the will in the light of the facts and circumstances surrounding the testator at the time it was made, for the purpose of determining his

intention, although not to contradict or add to its terms. *Whitcomb v. Rodman* (Ill.) 149

Privilege.

24. A dentist does not "practice medicine or surgery," within the meaning of a statute prohibiting the disclosure of information acquired in such practice, so as to exclude testimony of false teeth furnished by him to a person whose identity is in question. *People v. De Frances* (Mich.) 139

Relevancy.

25. Circumstantial or presumptive proof of authority to solemnize a marriage, admissible under Mass. Pub. Stat. chap. 145, § 31, is shown by testimony of the one claiming authority that he is an ordained minister and pastor of a certain church. *Com. v. Hayden* (Mass.) 818

26. The understanding and intention of a person in regard to the meaning of an alleged misrepresentation which was acted on in a transaction between other parties may be proved by him in an action against him for fraud in making the statement. *Nash v. Minnesota Title Ins. & T. Co.* (Mass.) 753

27. A person charged with extortion, who is proved to have been much in the company of the alleged victim, is entitled to show that he was acting under the directions of officers of the society for the prevention of crime, to obtain the confidence and goodwill of such person in order to secure an affidavit for use in another case. *People v. Gardner* (N. Y.) 699

28. Evidence of persons who rendered bills, to the effect that those which indicate that the items went to a specified house represent orders made for that house by a person named, is admissible where the fact that money was paid for materials ordered by him for that house is in issue. *Curtis v. Bradley* (Conn.) 143

Sufficiency.

29. The presumption that a deed was delivered on the day of its date is not overcome by the fact that it was acknowledged at a later date, and thereafter came into the personal possession of the grantee, where it was procured for him by an attorney in another county in which it was executed and acknowledged. *Lake Erie & W. R. Co. v. Witham* (Ill.) 612

30. Plaintiff's testimony that suit was not commenced until after a deed was delivered to him is prima facie sufficient to show the fact, although on cross-examination it appears that the events took place on the same day at different places. *Id.*

NOTES AND BRIEFS.

Evidence; before grand jury, see GRAND JURY.
See also CRIMINAL LAW.

Burden of proof as to negligence. 496, 539

Burden of proof in case of negotiable paper. 643

Parol as to consideration of mortgage. 375

Parol to explain will. 151

Parol as to warranty. 54

Use of memoranda. 144

Of intent. 754

EXECUTION.**NOTES AND BRIEFS.**

Execution; purchase of real estate of partnership under. 161

EXECUTORS AND ADMINISTRATORS. See also **APPEAL AND ERROR**, 2.

1. The share inherited by a grandson in lieu of a deceased parent who would have been entitled thereto if alive is not subject to deduction for the parent's debt to the grandparent. *Powers v. Morrison* (Tex.) 521

2. A bond need not be required in case of legacies in trust accepted by a town or school district, and legally established, which will be under the supervision of the equity courts of another state. *Webster v. Wiggin* (R. I.) 510

3. An act or resolution of the general assembly of another state accepting a legacy given to the state, and agreeing to its conditions, is a sufficient assurance to executors to justify payment of the legacy. *Id.*

4. Executors who have qualified cannot assume duties imposed upon them by the will as trustees for the management of the estate until the court has approved their accounts as executors, and ordered a distribution of the estate, and authorized a transfer of the estate in their hands as executors to themselves as trustees. *Re Higgin's Estate* (Mont.) 116

5. Authority from the probate court is necessary—at least in jurisdictions where executors have the right of possession of real estate—to release from his executorial trust one who has assumed the duties of executor under a will which also gives the entire estate to him in trust for certain purposes. *Id.*

6. Executors cannot relieve themselves from the statutory duty to file an inventory of the estate and publish notice to creditors, by showing that the entire estate was given to them absolutely as trustees and filing their *ex parte* affidavits that there are no debts, but they are subject to the orders of the court requiring such duties to be performed. *Id.*

7. Persons who are named in a will as executors, who petition the court for a probate of the will, and are duly appointed as executors, stand before the court in that capacity, subject to all orders properly directed to them as such, until they are duly discharged therefrom according to law. *Id.*

8. The administrator of the last surviving partner stands in the shoes of his intestate as a trustee of the legal representatives of the partner first deceased. *Galbraith v. Tracy* (Ill.) 129

9. The purchase of partnership real estate, or of a certificate of sale thereof by a master in chancery, made by an administrator of the last surviving partner, at half its actual value, when he should have redeemed the lands for the estate, will make him chargeable as a trustee for the estates of the partners. *Id.*

NOTES AND BRIEFS.

See also **SET OFF**.

Executors; distinguished from trustees under a will; control of, by probate court. 117
28 L. R. A.

Deceased partner's share in real estate.

99, 105

Rights of, as against surviving partner in real estate. 136

EXHIBIT. See **TRIAL**, 3.

EXTORTION.

The offense of attempting to commit the crime of extortion may be committed by threats which do not actually inspire fear in the intended victim, even if the latter is in fact acting as a decoy of the police. *People v. Gardner* (N. Y.) 699

EXTRADITION.

1. The constructive presence of a murderer in the state where his victim is struck by a bullet fired across the state boundary is not sufficient to make him a fugitive from that state in the state from which the shot was fired, under a statute providing for the arrest of fugitives and their surrender pursuant to the act of congress relating to interstate extradition. *State v. Hall* (N. C.) 59

2. The departure of a purchaser of goods to his home in another state after making criminally false representations, in reliance on which the goods were subsequently delivered to a common carrier and shipped to him, is, within the meaning of the law, a flight from justice for which he may be surrendered on a requisition. *Re Sultan* (N. C.) 294

3. The motive and purpose of an extradition proceeding, which may be considered by the governor as a ground for refusing or revoking the issuance of his warrant for the fugitive, cannot be inquired into in a habeas corpus proceeding. *Id.*

4. The act of a governor in issuing a warrant of removal on requisition for a fugitive is not conclusive on the courts of the fact that he had the necessary papers duly authenticated before him. *Ex parte Hart* (C. C. App. 4th C.) 801

5. Affidavits filed with the governor of a state and sent by him with a demand for the surrender of a fugitive to the governor of another state cannot be considered, if they are not certified to be authentic and are not recited in or used to obtain the warrants for extradition. *Id.*

6. The verification of an information will not be regarded as such an affidavit as is required by U. S. Rev. Stat. § 5278, for the surrender of a fugitive, when it is verified by a prosecuting attorney who swears that he believes the contents thereof to be true, but not that they are true. *Id.*

7. An information cannot be regarded as a substitute for an indictment within the meaning of U. S. Rev. Stat. § 5278, providing for the surrender of a fugitive from justice from another state. *Id.*

NOTES AND BRIEFS.

Extradition; fugitives; place of crime. 294

Who are fugitives subject to:—must have been in demanding state; no constructive pres-

ence; setting crime in motion; the purpose of the flight. 289

What papers necessary to obtain surrender of fugitive from another state:—in general; requirements of state statutes; the requisition; the indictment; the affidavit; sufficiency of a complaint or information; the authentication; necessity of warrant; the criminal charge; proof of flight; right to look behind papers or make other requirements; effect of governor's representationa. 801

FIREWORKS.

1. Authority to expend public money for pyrotechnic display, and conduct it under the auspices of the city officers, is not included in the general power to pass ordinances. *Love v. Raleigh* (N. C.) 192

2. A city is not liable for the acts of its servants in the management of fireworks which its officers are managing without lawful authority. *Id.*

FISHERIES. See **COMMERCE**, 8; **STATUTES**, 10; **TAXES**, 6.

FORFEITURE. See **CONSTITUTIONAL LAW**, 9; **MUNICIPAL CORPORATIONS**, 1, 2; **TRIAL**, 1.

FORGERY.

A written request to pay a certain amount to the order of a person named therein, "and charge to him at my office," is not the subject of forgery, as it could do no possible damage if acted upon as genuine. *State v. Evans* (Mont.) 127

NOTES AND BRIEFS.

Forgery; what subject to. 127

FRAUD. See also **COURTS**, 4; **DAMAGES**, 6-8.

1. One who merely answers the inquiries of a stranger, or courteously volunteers information in a matter which does not concern him, cannot be held liable to an action for fraud on account of misstatements, if he did not intentionally mislead, but answered honestly to the best of his ability. *Nash v. Minnesota Title Ins. & T. Co.* (Mass.) 753

2. Liability for making statements known to be false in the sense in which it is supposed they will be generally understood cannot be avoided on the ground that they are made without any purpose to do injury or cause loss to anybody who might rely upon them. *Id.*

3. The liability of a third person for fraud in inducing a contract is not defeated by the rescission or attempted rescission of the contract, so long as no satisfaction for the injury is obtained from the other contracting party by restoration, recovery of consideration, or otherwise. *Id.*

NOTES AND BRIEFS.

Fraud; by innocent but mistaken answers or volunteered information. 754

By partner as to real estate. 104
28 L. R. A.

Liability of corporation officers for company's fraud. 421

FUGITIVES. See **EXTRADITION**, **NOTES AND BRIEFS**.

GARBAGE. See **CONSTITUTIONAL LAW**, 15.

GARNISHMENT.

Property in the hands of a common carrier in transit to a place outside of the state is not subject to garnishment, although it is yet within the state at the time of the service of the garnishee summons. *Steehot v. Koch* (Minn.) 600

NOTES AND BRIEFS.

Garnishment; liability of carriers to garnishment:—(I.) as to debts and ordinary bailments: (a) application of ordinary garnishment laws; (b) test of garnishability; (II.) as to property held for transportation: (a) while in actual transit; (b) before and after actual transit. 600

GRAND JURY. See also **CONTEMPT**, 2, 8; **CRIMINAL LAW**, 1.

1. The grand jury guaranteed by Nev. Const. art. 1, § 8, is a common-law grand jury; and a statute providing that ten persons shall constitute a grand jury, of whom eight may find an indictment, is unconstitutional. *State v. Hartley* (Nev.) 33

2. Two separate lists of grand and petit jurors following one heading and certified to by only one certificate is a compliance with Minn. Gen. Stat. 1894, § 673, requiring the county commissioners to make out separate lists of grand and petit jurors, which lists shall be certified and signed by the chairman of the board. *State v. Peterson* (Minn.) 324

3. A grand jury for an adjourned term of the district court in Minnesota may legally be drawn from forty-nine names, where the number has been so reduced by the drawing of the grand jury for the regular term, which has been discharged, and the county commissioners have not met thereafter before the drawing of grand jurors for the adjourned term. *Id.*

4. A new venire of grand jurors to serve for an adjourned term of the district court may be drawn from the regular jury list selected by the county commissioners and certified and filed with the clerk of the court, under Minn. Gen. Stat. 1894, § 4850, providing that the court may direct grand jurors "to be drawn" and summoned for an adjourned term. *Id.*

5. The district court has power to discharge the grand jury impaneled at a regular general term of the district court, adjourn the term to a future day, and order a new venire of grand jurors to be drawn and summoned for such adjourned term, under Minn. Gen. Stat. 1894, § 4850, providing that the judge may direct grand jurors to be drawn and summoned for any adjourned or special term in the manner prescribed by law. *Id.*

6. The discharge of the grand jury upon

motion of the county attorney, upon the ground that two of the jurors resided in the same civil township, is not such an adjudication of the illegality of the grand jury as to defeat the indictments found by it. *State v. Russell* (Iowa) 195

7. Having more members from a civil township on the grand jury than the law permits is not merely technical error for which the supreme court cannot reverse a conviction upon an indictment found by it. *Id.*

8. An indictment found by a grand jury, two persons of which were unnecessarily from the same civil township, is void under a statute which says that not more than one person shall be drawn as a grand juror from any civil township excepting where necessary because more jurors are required than there are townships in the district, and which makes it the duty of the officer to reject all superfluous names drawn from any township. *Id.*

9. That a brother of the man whose wife is indicted for adultery was upon the grand jury which found the indictment is not, under the Iowa statutes, ground for quashing the indictment. *Id.*

10. That a person exempt from jury duty serves as a grand juror does not render the action of the jury in finding an indictment void. *Com. v. Hayden* (Mass.) 818

11. That one of the grand jurors is one of the witnesses upon whose testimony an indictment is found will not render the indictment void. *Id.*

12. A second indictment may be found, after the dismissal of an indictment on motion of the county attorney, by the same grand jury for the same offense on the evidence on which the former indictment was found, without receiving any additional evidence. *State v. Peterson* (Minn.) 824

NOTES AND BRIEFS.

Grand jury; qualifications of grand jurors:—(I.) alien; (II.) citizen; (III.) residence; (IV.) voter; (V.) freeholders and householders; (VI.) taxpayers; (VII.) locality: (1) county; (2) apportionment; (3) courts; (VIII.) exemptions: (1) age; (2) officers; (3) owner of gristmill; (IX.) bias: (1) opinion and prejudice; (2) connection with previous trial; (3) interest; (4) prosecutor; (5) relation; (6) suitor; (7) conscientious scruples; (X.) prior service; (XI.) bystanders; (XII.) disqualification for crime; (XIII.) negroes; (XIV.) women; (XV.) pleading and practice generally; (XVI.) ignorance; (XVII.) loyalty. 195

Number of grand jurors necessary to concur in finding an indictment:—(I.) effect of indorsement "true bill;" (II.) record of finding; (III.) concurrence by twelve grand jurors; (IV.) impeaching indictment by showing that twelve did not concur; (V.) concurrence by proper number of grand jurors, as to the parties, crimes, counts, and degree of crime charged; (VI.) concurrence by majority when grand jury exceeds twenty three; (VII.) provisions for concurrence by less than twelve; constitutional questions; (VIII.) statutes and constitutions. 38

Improper influence or interference with:—(I.) by charge to; (II.) by prosecuting attorneys; (III.) by deputy and assistant prosecutors; (IV.) 28 L. R. A.

by attorneys generally; (V.) by bailiff, messenger, and officer; (VI.) by clerk; (VII.) by stenographer; (VIII.) by interpreter; (IX.) by other persons present. 867

Competency of evidence before:—(I.) confessions, admissions, and refusal to testify; (a) accused; (b) accomplices and joint defendants; (II.) evidence of criminals; (III.) depositions and affidavits; (IV.) documents; (V.) minutes; (VI.) swearing of witnesses; (VII.) witnesses generally; (VIII.) prosecutor; (IX.) wife as witness; (X.) hearing witnesses in open court; (XI.) indictment on evidence partly incompetent; (XII.) physicians; (XIII.) evidence generally; (XIV.) rumor; (XV.) time. 818

Sufficiency of evidence before, to sustain indictment:—(I.) indictment on knowledge of grand jury; (II.) evidence on reindictment; (III.) no evidence; (IV.) prosecutor; (V.) amount of evidence necessary to sustain an indictment in general; (VI.) witnesses for defense. 824

GRANT. See *WATERA*, 2.

GUARANTY.

1. A mere offer to guarantee is not binding until acceptance by the person to whom it is made, and, until acceptance, is revocable. *Lachman v. Block* (La.) 255

2. Prompt notice of the acceptance of a contract of guaranty or suretyship is unnecessary, where the creditor receives an express agreement to become surety to a certain amount for the debtor, and acts upon it by extending credit on the faith of it. *Id.*

3. Fraudulent concealment of material facts which will release a guarantor must be in respect to such facts as necessarily operate as an inducement to the guarantor to bind himself, and which immediately affect his liability and bear directly on the particular transaction for which the obligation is given. *Id.*

HABEAS CORPUS. See *EXTRADITION*, 8.

HEALTH.

1. Authority to quarantine persons who refuse to be vaccinated, but who are not infected with and are not shown to have been exposed to smallpox, is not given by N. Y. Laws 1898, chap. 661, § 14, authorizing the isolation of all persons and things infected with or exposed to a contagious disease, and provision for "thorough and safe vaccination for all persons in need of the same." *Re Smith* (N. Y.) 820

2. The mere fact that a person is carrying on a general express business in a district in which many cases of smallpox have existed does not show that he has been exposed to that disease, so as to justify his detention in quarantine until he consents to be vaccinated. *Id.*

3. The consent of a municipality or its local officers or boards is not necessary to the validity of a tax to raise money which a board of health requires for the preservation of the public health, under legislative authority. *Darock v. Moore* (Mich.) 783

4. Mich. Act Feb. 27, 1895, to establish a

board of health for the city of Detroit, is not inoperative for failing to supply the means of carrying out its requirements or to provide any revenue for the board, as it provides that the board shall furnish an estimate annually to the comptroller, and his duties when estimates are thus made are provided for by the charter. *Davock v. Moore* (Mich.) 788

5. Members of a board of health of a city are not local or municipal officers within Mich. Const. art. 15, § 14, providing for the election of such officers, but the board is a state agency. *Id.*

NOTES AND BRIEFS.

Health; power of board of; right to compel vaccination. 821

HIGHWAYS. See also BICYCLES, 1; EMINENT DOMAIN, 1; PUBLIC IMPROVEMENTS, NOTES AND BRIEFS.

1. A town or city cannot give a vested right to maintain a private drain in a highway, such that a subsequent cutting off of the drain by an extension of a system of sewers will create any liability against the municipality. *Eddy v. Granger* (R. I.) 517

2. The fact that a team was running away does not necessarily prevent recovery for injuries to them from an obstruction in a highway. *Missouri P. R. Co. v. Hackett* (Kan.) 696

HOMESTEAD.

NOTES AND BRIEFS.

Partnership interest in. 105

HOMICIDE. See also TRIAL, 10.

1. One cannot rely upon self-defense in killing one whom he has assaulted in such a manner as to render him incapable of understanding the former's intention to withdraw from the conflict, although such intention is bona fide and the other attempts to kill him with a deadly weapon. *People v. Button* (Cal.) 591

2. The mere fact that a person first assaulted another whom he killed before the combat terminated does not deprive him of the right under Cal. Pen. Code, § 197, to kill the other in self-defense after endeavoring to decline any further struggle. *People v. Button* (Cal.) 591

HORSE. See BICYCLES, 2.

HOUSEKEEPER. See CONTRACTS, 5; DEFINITIONS.

HUSBAND AND WIFE. See also CONTRACTS, 5; CURTESY, 1; DOWER, 2; EVIDENCE, 20, 25.

1. The fact that the name of a wife is placed after that of her husband in naming the party of the first part to a deed in which she appears as one of the parties conveying and quitclaiming all interest in the land is not sufficient to restrict the conveyance by her to a mere waiver of dower. *Lake Erie & W.R. Co. v. Whitlam* (Ill.) 612

2. A naked trust in land conveyed to a man 28 L. R. A.

for the use and benefit of his wife is not executed by the statute of uses while the marriage exists, but the legal title remains in the trustee. *Meacham v. Bunting* (Ill.) 618

3. An amendment to a bill for divorce, setting up an entirely new and distinct cause, to which answer is made, is the beginning of a new suit for the purpose of determining the sufficiency of the residence of the plaintiff in the state to give jurisdiction. *Wood v. Wood* (Ark.) 157

4. Only valid divorces, and not void divorces, in another state, are referred to in S. C. Rev. Stat. § 2160, excepting a divorced person from the prohibition of marriage by one who has a former wife or husband. *McCreery v. Davis* (S. C.) 655

5. The marriage relation is not a res within a state in which only one of the parties resides, so as to give a court of that state jurisdiction to dissolve the marriage and bind the absent party who is a citizen of another jurisdiction, by substituted or actual notice of the proceedings, given without the jurisdiction of the court where the proceeding is pending. *Id.*

NOTES AND BRIEFS.

Wife as a witness before grand jury, see GRAND JURY.

Jurisdiction for divorce; allowance of alimony; amendment of pleading in divorce case. 157

ICE.

1. Wantonly and unnecessarily drawing water from a pond, which injures or destroys the ice privileges of the owner of the land which is flowed, will render the person who has the right of flowage liable in damages. *Eidemiller Ice Co. v. Guthrie* (Neb.) 581

2. The right to take ice from a pond in a non-navigable stream, as between the owner of the pond with the right to flowage and the owner of the land under it, belongs to the owner of the land over which the ice forms, subject to the dominant right of flowage, which must not be impaired by the taking of the ice. *Id.*

NOTES AND BRIEFS.

Ice; conflicting claims of ownership; on pond maintained by right of flowage. 583

INCOME TAX. See TAXES, 8.

INCOMPETENT PERSONS. See also EVIDENCE, 14.

The insanity of a client who telegraphed for money to be sent to his attorney gives the person sending it without knowledge that he is insane no right of action against the attorney for the money, where the latter has received it in payment for services. *Atwell v. Jenkins* (Mass.) 694

INDICTMENT. See also CRIMINAL LAW, 2, 3.

General allegations in an indictment for larceny, that the defendant withheld the money from the true owner and appropriated it to his

own use, are limited and qualified by the allegations of the specific facts upon which the general allegations are predicated, so that if these do not constitute a public offense the general allegations are ineffectual. *State v. Farrington* (Minn.) 395

NOTES AND BRIEFS.

As to evidence before grand jury, and improper influence on grand jury, see GRAND JURY.

Indictment; limitation of general allegations in, by specific allegations. 395

INFANTS.

Actual service of process upon infants is not necessary to the jurisdiction of a Federal court, in an action in the nature of a suit in rem for a judicial sale of real estate in which they have or claim to have an interest, where an appearance is entered for them and a guardian ad litem appointed, who defends in their behalf. *Sloan v. Martin* (N. Y.) 847

NOTES AND BRIEFS.

Infants; appearance for; service of process upon. 357

INJUNCTION. See also CHARITIES, 1; EQUITY, 2; MUNICIPAL CORPORATIONS, 1.

1. An injunction against the abuse of corporate privileges by conducting prize fights will not be denied because the wrongful acts constitute crimes. *Columbian Athletic Club v. State, McMahon* (Ind.) 727

2. An injury must be threatened and imminent and one which will become irreparable, in order to justify an injunction against a conspiracy to injure business or property rights. *Longshore Printing & Pub. Co. v. Howell* (Or.) 464

3. An injunction will not be granted to restrain the continuance of a strike and boycott by a printers' union because of a single act of trespass in entering the plaintiff's premises to call out his workmen, and of publications announcing the withdrawal of the union from the plaintiff's shop, with the exercise of influence causing loss to the plaintiff of city printing and of two private customers during a space of about ten months, with threats of the union to make war to the knife and fight the plaintiff to the death, since these facts do not show such an irreparable injury impending as will justify equitable relief. *Id.*

4. An injunction against drawing water from a pond to the injury of the ice privileges of the owner of the land will not be granted, because of an adequate remedy at law. *Eide-miller Ice Co. v. Guthrie* (Neb.) 581

5. The fact that a party is apprehensive that his witnesses by whom he expects to establish his defense against a note may die or move away is not sufficient ground for an injunction against the negotiation of the instrument, where the statute provides for perpetuating their testimony. *Erickson v. First Nat. Bank* (Neb.) 577

6. A tax levied on real property will not be

restrained by injunction because personal property is not assessed in the proper mode, when the legal part of the levy can be separated from the illegal part. *Levi v. Louisville* (Ky.) 430

NOTES AND BRIEFS.

Injunction; against wrongful acts. 727

Against strikes:—(I.) injunctions generally; (II.) proceedings under the interstate commerce act; (III.) receivers. 464

Against negotiation of note:—generally; in cases where the note is void; fraud or failure of consideration; in aid of set-off; where note is held in trust; other remedies; after maturity; parties *in pari delicto*; absence of fraud; mere convenience; rights of innocent holder. 577

Against trespass or obstruction to highway. 811

INSANE PERSONS. See INCOMPETENT PERSONS.

INSOLVENCY. See also BILLS AND NOTES, 3; CONFLICT OF LAWS, 4; CORPORATIONS, 8; COSTS AND FEES.

NOTES AND BRIEFS.

Insolvency; proceedings in case of two partnerships; effect of discharge. 451

INSURANCE. See also ACTION OR SUIT, 5, 6; CONSTITUTIONAL LAW, 8, 11-13; STATUTES, 13.

1. A policy of insurance issued by an insurance agent of his own motion to himself as receiver of the property insured is invalid by reason of his occupying inconsistent positions, unless the insurance company consents to the policy. *Wildberger v. Hartford F. Ins. Co.* (Miss.) 220

2. A contract of insurance made through the mails by a corporation of another state will not sustain an action against the insured for an assessment, where the company has not obtained the right to do business in the state, and the statute prohibits insurance by unauthorized companies upon property in the state, since the contract is in contravention of the policy of the state, even if it evades the statute. *Seamans v. Temple Co.* (Mich.) 430

3. The delivery of an insurance policy knowing of the existence of other insurance upon the premises waives a condition in the policy that it shall be void if there is any other insurance thereon. *Anderson v. Manchester F. Assur. Co.* (Minn.) 609

4. An action on a policy of life insurance payable to the "legal representatives" of the insured, and which his application asked to be made to his "estate," cannot be sustained by his widow in her own right, although he had no children and the object of the insurance association stated in its by-laws was to furnish aid to the "families or assigns" of the members in case of their death. *Suls v. Mutual Reserve Fund L. Assn.* (N. Y.) 879

5. Breach of warranty that the insured has never had "headaches severe, protracted, or

frequent," is established by proving that he had frequent sick headaches for many months prior to the contract, at irregular intervals, being accompanied by vomitings and pain in the region of the chest, and lasting from six to eighteen hours, although these headaches did not indicate a vice in his constitution or have any bearing on his general health or continuance of life. *Mutual L. Ins. Co. v. Simpson* (Tex.) 765

6. Voluntary exposure to unnecessary danger within the meaning of an insurance policy is made by attempting to cross a bridge 15 feet high, upon ties from 10 to 12 inches apart, with no walk or planking of any kind or any railing, on a dark night, when a platform or walk extends the whole length of the bridge on the opposite side, with a fence railing to protect persons from falling off. *Follis v. United States Mut. Acci. Assn.* (Iowa) 78

7. Insurance on farming utensils and livestock on described premises occupied by the assured, and on hay in stacks, does not cover such property when taken temporarily, for the purpose of plowing, to a place 20 miles distant,—especially where the application, which is made part of the policy, asks for insurance on livestock "while on the premises only." *Lakings v. Phoenix Ins. Co.* (Iowa) 70

8. An insured does not waive the benefit of Tenn. Acts Gen. Assen. chap. 107, § 1, providing that stipulations in insurance policies limiting liability to less than the full amount of loss where such amount does not exceed the amount of insurance, by accepting a policy containing such a stipulation. *Dugger v. Mechanical & T. Ins. Co.* (Tenn.) 796

9. An appraisal or award on the question of the amount of loss or damage is made a condition precedent to suit upon a policy which provides that the loss shall not become due and payable until sixty days after an award by appraisers, when an appraisal is required. *Chapman v. Rockford Ins. Co.* (Wis.) 405

10. Refusal to go on with an arbitration or procure the appointment of an umpire, so that there cannot be an agreement upon an appraisal as to the amount of an insurance loss, absolves the other party. *Id.*

11. Insisting on the selection of an umpire from a distant city in another state, and arbitrarily refusing to agree on any one residing in the vicinity of the property insured, is such conduct on the part of an appraiser selected by an insurance company as to constitute an abandonment of the right to an arbitration which the company has demanded. *Id.*

12. Arbitration as to the amount of a loss having failed in consequence of the perverse conduct and want of good faith of an insurance company represented by an adjuster and an appraiser, the insured is not bound to enter into a new one or name another appraiser, even if the company is willing to name a new appraiser on its part. *Id.*

13. An action at law will lie on a mutual insurance policy which promises to pay a definite amount, although payment is conditioned upon the same being realized from assessment, 28 L. R. A.

as this is simply a method of securing the fund. *Follis v. United States Mut. Acci. Assn.* (Iowa) 78

14. The right of a foreign insurance company by subrogation to enforce a claim for negligently destroying property is not affected by the fact that it was not legally bound to pay the loss, or by the invalidity of a formal assignment to it of the right to damages. *St. Louis, A. & T. R. Co. v. Fire Assn.* (Ark.) 68

15. An agreement to issue a policy of reinsurance in the usual form and for the usual premium, made after the property was destroyed, of which fact both parties were ignorant, will not become operative by relating back to the beginning of the original insurance, but will be deemed to commence at the date of the contract. *Union Ins. Co. v. American F. Ins. Co.* (Cal.) 692

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Insurance; by unauthorized foreign company. 83, 430

Construction of policy in respect to place. 70

After destruction of property. 603

On life; warranties in application for; falsity of answers of applicant. 765

On life; right of action for, by widow; effect of pending action in other state. 379

INTEREST. See also MORTGAGE.

1. For a reasonable time taken by a receiver of an insolvent bank to reject or accept a claim, which in this case was twenty days, no interest should be allowed on a dividend upon the claim. *Chemical Nat. Bank v. Armstrong* (C. C. App. 6th C.) 231

2. The refusal of a creditor of a national bank to accept dividends under an offer by the receiver of the bank of a certain amount, made without prejudice to creditors' claims, will prevent claiming interest on the amount of the dividend thus offered; but interest may be collected on the excess of the dividend to which the creditor was entitled above the amount offered. *Id.*

3. Interest cannot be allowed on dividends from an insolvent national bank between the time when they are declared and the subsequent presentation of claims, although the creditor's delay in proving claims was due to an erroneous belief that collateral held by the creditor was applicable to these claims. *Id.*

4. The effect of an offer to pay dividends upon a part of a claim against an insolvent bank, in preventing the running of interest in case the offer is rejected, will be destroyed by an absolute denial of liability, in a subsequent suit to compel the allowance of the entire claim. *Id.*

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Interest; liability of cotenant for. 853

Remission of, for purpose of jurisdiction. 235

INTOXICATING LIQUORS. See also CONSTITUTIONAL LAW, 4; PARDON; STATUTES, 11, 12.

The sale of beer shipped from Illinois to Iowa is an Iowa contract, where the agreement fixing the terms of sale is forwarded from Illinois to Des Moines and there signed, making in effect a continuing offer to sell on terms stated, which offer is accepted by letter or telegram. *Gippe Brewing Co. v. De France* (Iowa) 886

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Intoxicating liquor; delegating to people the power to legislate as to. 207

JUDGMENT. See also APPEAL AND ERROR, 1; COURTS, 1, 2; HUSBAND AND WIFE, 5; INFANTS; JUSTICE OF THE PEACE, 2.

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Judgment; what entry or record is necessary to complete a judgment or order:—(I.) necessity of entry or record generally: (a) in actions at law; (b) in actions in equity; (II.) how made and what constitutes: (a) the making up of the record; (b) signatures of the judgment or record; (c) entry in wrong book; (III.) for the purpose of terminating the power of the court to change; (IV.) as between the parties; (V.) for the purpose of appeal: (a) in courts of chancery; (b) in federal courts; (c) under state statutes; (d) orders for judgment; (e) orders made out of court; (VI.) for the purpose of being effective as a lien; (VII.) for the purpose of enforcement: (a) by execution; (b) by action; (VIII.) for the purpose of putting the statute of limitations in motion; (IX.) for the purpose of vesting title; (X.) for the purpose of evidence; (XI.) to prevent collateral attack; (XII.) to constitute a bar to another action; (XIII.) judgments of justices of the peace: (a) upon submission; (b) upon verdict. 621

JUDICIAL NOTICE. See EVIDENCE, 1-5.

JUDICIAL SALE. See also INFANTS.

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Judicial sale; purchase by partner at. 104
On execution against partnership real estate. 161

JURY. See NEW TRIAL.

JUSTICE OF THE PEACE. See also COURTS, 8; CRIMINAL LAW, 1.

1. A formal judgment is necessary to accomplish a dismissal of an appeal from justice's court; and until the entry of such a judgment the action is still pending in the district court. *Re Weber* (N. D.) 621

2. An order of the district court dismissing an action appealed to it, for want of jurisdiction under the Nebraska statutes, is equivalent to an order for the entry of a formal judgment embracing a dismissal, with costs, and should direct an entry of such a judgment in terms. *Id.*

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Justice of the peace; entry or record of judgments of, see JUDGMENT.

KINDERGARTEN. See EVIDENCE, 1; SCHOOLS, 1-3.

LABOR ORGANIZATIONS. See CONSPIRACY, 2-5.

LAKE. See BOUNDARIES.

LANDLORD AND TENANT. See RECEIVERS, 2, NOTES AND BRIEFS.

LIBEL AND SLANDER. See also PLEADING, 4; TRIAL, 4.

1. A publication in respect to an academy where dancing was practiced at receptions and a dancing school taught, by pastors of churches, to the effect that they "regarded the institution under such administration as harmful to the moral and religious interests" of the community, and that they urged members of their churches and friends of good morals to absent themselves from and discountenance all receptions and other gatherings at the academy as long as dancing was allowed in the building.—is sufficient to sustain an action for libel. *St. James Military Academy v. Gaiser* (Mo.) 667

2. The interchange of opprobrious epithets and mutual vituperation and abuse will justify a verdict for defendant in an action for slander, although slanderous words are proved. *Golberg v. Dobbertins* (La.) 721

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Libel or slander by expressing opinions or comments without misstating facts:—(I.) rules and principles; (II.) illustrative cases: (a) in general; (b) criticism of writings; (c) art criticism; (d) as to officers and candidates; (e) as to clergymen; (f) as to other public or professional men. 667

Liability of officers of a corporation for its libelous publications. 427

Mutual vituperation or defamation as affecting remedy for libel or slander:—(I.) libel; (II.) slander; (III.) time and connection of charges: (a) in libel cases; (b) in slander cases. 721

LICENSE. See also EASEMENTS; STATUTES, 10; TAXES, 2, 6; TRESPASS.

1. A provision giving an option to pay the sum of \$2 in discharge of all obligation for taxes on sales of oysters, which is merely in lieu of the tax imposed on such sales to be paid weekly, does not—at least as to one who does not avail himself of the privilege—make the tax a license instead of a property tax. *Com. v. Brown* (Va.) 110

2. Municipal authority to license and regulate a business, such as the sale of milk, as a sanitary measure, must be exercised as a means of regulation only, and not as a means of producing revenue. *Littlefield v. Suits* (Neb.) 588

3. A license for carrying on business un-

der a police regulation should not be disproportionate to the cost of issuing the license and regulating the business. *Littlefield v. State* (Neb.) 588

4. The fact that licenses are not applied directly to relieve burdens imposed by the business taxed for the license does not affect the validity of the license, if the amount is not disproportionate to the cost of issuing the license and regulating the business. *Id.*

5. A sale of fresh meat to a hotel keeper within a district within which a license was required was made where a dealer outside of such district on a telephonic message to bring some meat of a certain description brought the meat in his wagon and delivered it in that district, since the title did not pass and the goods were not ascertained until they were received by the purchaser. *State v. Wernwag* (N. C.) 297

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License; from public; limitation of charge for. 589, 813

Trespass against licensee in possession after revocation of license. 519

LIFE TENANTS. See ADVERSE POSSESSION, 1.

LIEN.

NOTES AND BRIEFS.

Equitable lien of partners on real property. 102

LIMITATION OF ACTIONS.

1. An amendment to a statute of limitations against the state, reducing the limitation period, will not apply to cases in which time had already begun to run under the old statute, but as to such cases the required period will remain the same as before the amendment. *Heyward v. Farmers' Min. Co.* (S. C.) 42

2. The running of the statute of limitations against a cause of action for removal of coal from a stratum beneath the surface of land by wrongfully extending a mine under lands of other owners begins only from the time of actual discovery of the trespass, or the time when discovery was reasonably possible,—at least to the extent of recovering compensation which would be allowable on a bill for an account in equity in a state where equity is administered through common-law forms of action. *Lewey v. H. C. Frick Coke Co.* (Pa.) 288

3. The cause of action for contribution between joint obligors on a written contract is not founded upon the written contract, so as to be within the four years' limitation under Tex. Rev. Stat. art. 3203, but is within the two years' provision applicable to contracts not in writing. *Faires v. Cockerill* (Tex.) 528

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Limitation of actions; as to accounting by cotenant. 859

As to right of partners in real property. 105

MASTER AND SERVANT. See also CONSTITUTIONAL LAW, 10; CONTRACTS, 5; FIREWORKS, 2.

1. Giving to an employé checks for merchandise in advance of payday on his own vol. 28 L. R. A.

untary application does not violate Ky. Stat. § 1350, providing that wage earners "shall be paid for their labor in lawful money," provided reasonable periods are fixed for making payment, although it is otherwise if the periods fixed, even with the consent of the employé, are unreasonable so that his necessities may force him to apply for and accept pay in checks. *Avent Beattyville Coal Co. v. Com.* (Ky.) 273

2. The relation of master and servant does not exist between a railroad company and surgeons employed by it to render services to injured employés, so as to render the company liable for the mistakes or malpractice of such surgeons. *Quinn v. Kansas City, M. & B. R. Co.* (Tenn.) 552

3. Selecting surgeons skilled and competent in their profession, and placing them in attendance upon an employé injured in his service, discharges every duty which the master owes in regard to the curing of such injury; and he is not liable for the mistakes which they may subsequently commit. *Id.*

4. The duty of a railroad company to provide medical or surgical attendance for an injured employé, in the absence of contract, can arise only in a case of strict necessity and urgent exigency, and expires with the emergency. *Ohio & M. R. Co. v. Early* (Ind.) 546

5. The conscious and deliberate choice of an injured employé while in possession of his mental faculties, of the time when, place where, and person by whom he will be treated, relieves the master of any liability for failure to provide other treatment. *Id.*

6. Liability of a railroad company for failure to provide for an injured brakeman is not shown where the best medical treatment that could be obtained at the little town where he was injured was procured, and he was removed as soon as possible, with his intelligent and conscious consent, without any objection of the physicians who had attended him thus far, to another town where a place was provided for him and competent surgeons were awaiting him, but he insisted on being taken, still further, to the town where he lived, but died soon after reaching the place, from loss of blood on the way. *Id.*

7. A railroad company is not liable for an injury to a brakeman in the service of another railroad company, caused by the negligence of his fellow servant on a train owned and operated by his employer, merely because the injury was received while the train was running on the road of the former. *Baltimore & O. & C. R. Co. v. Paul* (Ind.) 216

8. Placing an inexperienced and ignorant employé at work at a machine which has a saw defectively and insecurely fastened to the shaft, which is known to the employer but not to the employé, without giving any instructions in respect to the danger,—renders the employer liable for resulting injuries to the employé. *Greenberg v. Whitcomb Lumber Co.* (Wis.) 439

9. An employé or laborer on a building, who either negligently or intentionally pushes a brick from the top of the completed wall, which he has no business to touch, although it is done before the workmen have left the top

of the building, is not acting within the scope of his employment so as to make the master liable for resulting injury. *Mayer v. Thompson Hutchinson Bldg. Co. (Ala.)* 438

10. A servant or agent is liable for a negligent omission or nonfeasance causing injury to a third person, where he would be liable if acting as principal. *Id.*

NOTES AND BRIEFS.

Master and servant; validity and effect of statutes regulating time of payment of wages. 844

Validity and effect of statutes requiring wages to be paid in lawful money:—(I.) constitutionality; (II.) construction and effect: (a) in general; (b) to whom statutes apply. 278

Discharge of employé for marrying. 816
Injunction against strikes. 464

Liability of an agent or servant to third persons for his own negligence or nonfeasance:—(I.) to people generally: (a) *dicta*; (b) decisions against liability; (c) liability sustained; (II.) to fellow servants; (III.) joint liability of master and servant. 438

Duty of master to furnish medical aid to servant:—(I.) servants generally; (II.) seamen; (III.) apprentices; (IV.) slaves. 546

Acts of independent contractors. 192

MAXIMS.

1. *Allegans contraria non est audiendus.* *Galbraith v. Tracy (Ill.)* 129

2. *Expressio unius est exclusio alterius.* *Meacham v. Bunting (Ill.)* 618

3. *Res ipsa loquitur.* *Giraudi v. Electric Improv. Co. (Cal.)* 596

4. *Respondeat superior.* *Quinn v. Kansas City, M. & B. R. Co. (Tenn.)* 552

5. *Salus populi suprema lex.* *Davock v. Moore (Mich.)* 788

6. *Sic utere tuo ut alienum non lædas.* *Herr v. Central Kentucky Lunatic Asylum (Ky.)* 894

7. *Verba intentioni debent inservire.* *Edgerly v. Barker (N. H.)* 828

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Liability of cotenant for. 857

MILK. See LICENSE, 2.

MINES. See EASEMENTS; LIMITATION OF ACTIONS, 2.

MISTAKE. See COMPROMISE AND SETTLEMENT.

MOB. See CARRIERS, 14.

MONOPOLY. See CONSTITUTIONAL LAW, 15.

MORTGAGE. See also EVIDENCE, 22.

A stipulation in a mortgage providing for interest on the principal note secured thereby, at the rate of 12 per cent per annum in case 28 L. R. A.

of default in payment of the principal, interest, insurance, or taxes, while the note itself provides for 7 per cent only until its maturity,—is essentially a penalty, and will not be enforced in equity. *Krutz v. Robbins (Wash.)* 676

NOTES AND BRIEFS.

Mortgage; nature of mortgagee's estate. 511

Power of partner to give, on real estate. 95

Power of surviving partner to give, on real estate. 184

MUNICIPAL CORPORATIONS. See also CONSTITUTIONAL LAW, 14, 15; EVIDENCE, 6; FIREWORKS, 2; HEALTH, 3; OFFICERS, 1, 2.

1. Forfeiture of the charter of a municipal corporation cannot be enforced or taken advantage of in any legal proceeding collaterally or incidentally,—as, by suit for an injunction against the collection of taxes,—but only in a direct way in proceedings by the state. *Hornbrook v. Elm Grove (W. Va.)* 416

2. The charter of a municipal corporation is not *ipso facto* forfeited without any proceeding to declare it so, by failure to exercise its corporate powers and privileges, or to keep highways in good repair and order, although by W. Va. Code, chap. 47, § 44, it is said that in such case it "shall thereby forfeit its charter and all the rights, powers, and privileges conferred thereby." *Id.*

3. A statute providing that each ward of a city may elect one alderman does not violate Tex. Const. art. 6, § 3, providing that all qualified electors in a city "shall have the right to vote for mayor and the other elective officers," as this does not necessarily mean that every election officer must be elected by the voters of the entire city. *State, Guerguin, v. McAllister (Tex.)* 528

4. A municipality is only an instrumentality of the state in respect to a public duty imposed upon it by the legislature, and no right of local self-government is involved in the discharge of such duty. *Davock v. Moore (Mich.)* 788

5. A city has no vested right in moneys obtained from liquor taxes, but they are absolutely under the control of the legislature. *Id.*

6. The invalidity of municipal bonds because the term is shorter than that prescribed by statute does not affect the liability of the municipality upon the debt secured by such bonds; but the holder can fall back upon the original transaction, and recover. *People's Bank v. Barnes County Dist. School No. 52 (N. D.)* 642

7. A municipality is not answerable for the torts of a servant except where the wrong complained of is an act done in the course of his lawful employment, or an omission of a duty devolving upon him as incident to such service. *Love v. Raleigh (N. C.)* 192

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See also ELECTION DISTRICTS.

Municipal corporations; forfeiture of charter. 416

Liability for acts of representatives. 192

NAVIGABLE WATERS. See **WATERS**, 1.

NEGLIGENCE. See also **CORPORATIONS**, 8; **CUSTOM**, 2; **ELECTRICAL USES AND APPLIANCES**, 1-3; **EVIDENCE**, 7-13; **MASTER AND SERVANT**, 7-10; **PROXIMATE CAUSE**; **TRIAL**, 6, 7, 11-18.

1. Negligence of a parent contributing to the death of his infant child will defeat a recovery by him as administrator of the child, when he is the sole beneficiary of the action. *Bamberger v. Citizens' Street R. Co.* (Tenn.) 486

2. Failure of a railroad company to sound signals at a crossing, which results in an injury, is not conclusive proof of negligence, although the jury may infer negligence from that fact. *Chicago, B. & Q. R. Co. v. Metcalf* (Neb.) 824

NOTES AND BRIEFS.

Negligence; duty as to trespassers. 182

May wrongdoer take advantage of general statutory imposition of damages for negligent injuries. 749

Liability of officers of a corporation for its negligence. 427

Liability of agent or servant to third persons for his own negligence or nonfeasance. 483

Province of jury as to capacity of child for. 486

NEGROES.

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As grand jurors. 204

NEW TRIAL.

Failure of an accused to challenge a juror whom he knows to be disqualified is a waiver of objection, and estops him from setting up the disqualification as ground for a new trial. *State v. Hartley* (Nev.) 88

NOMINATIONS. See **VOTERS AND ELECTIONS**, 1-4.

NOTARY. See also **OFFICERS**, 8.

NOTES AND BRIEFS.

Notary; as public officer; use of pass by. 384

NUISANCES. See also **CHARITIES**, 1; **CORPORATIONS**, 5.

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Nuisance; of riotous and disorderly throngs. 727

OFFICERS. See also **HEALTH**, 5.

1. The provision against establishing additional executive or administrative departments, in Ind. Rev. Stat. 1894, § 3819, is not violated by the creation of a board of examiners to ascertain the fitness of applicants for office in city departments, which it is made the duty of the mayor and heads of departments under 28 L. R. A.

§ 3816 to provide for by rules and regulations prescribing a systematic method. *Newcomb v. Indianapolis* (Ind.) 733

2. The creation of a board of examiners is a proper means for the exercise of the duty imposed upon the mayor and heads of departments of a city by Ind. Rev. Stat. 1894, § 3816, requiring them to make rules and regulations for prescribing a systematic method of ascertaining the fitness of applicants for appointment and promotion in city departments without regard to political opinions or services. *Id.*

8. A constitutional provision prohibiting a public officer from receiving any free pass or free transportation applies to a notary public who is appointed by the governor and takes an official oath, and whose term of office, powers, and duties are fixed by law. *People v. Rathbone* (N. Y.) 384

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Officers; prohibiting use of pass by; who are. 384

ORDINANCE. See **EVIDENCE**, 6.

OYSTERS. See **COMMERCE**, 8; **STATUTES**, 7-10; **TAXES**, 8-6.

PARDON.

The exercise of the pardoning power is not infringed by a statute which authorizes the suspension of certain penalties of a prohibitory liquor law, in any city or town, upon certain conditions including the consent of a specified portion of the electors. *State, Witter, v. Forkner* (Iowa) 206

PARENT AND CHILD. See **NEGLIGENCE**, 1.

PARTITION.

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Of partnership real estate. 108

PARTNERSHIP. See also **DEEDS**, 1; **ESTOPPEL**, 3, 4; **EXECUTORS AND ADMINISTRATORS**, 8, 9; **TRUSTS**.

1. Whether land standing in the individual name of one member of a partnership concerns belongs to him or to the firm will be governed by the intention of the partners as indicated by all the circumstances attending the transaction, which may be shown by parol in the absence of written evidence. *Goldthwaite v. Janney* (Ala.) 161

2. In equity the surviving partner is treated as a trustee of the representatives of the deceased partner. *Galbraith v. Tracy* (Ill.) 120

3. In equity the real estate of the partnership is regarded as standing on the same footing with personal property, no matter in whom the legal title may be vested. *Id.*

4. Whatever of the real estate of the partnership remains after partnership debts are discharged is held in common by the heirs subject to dower, or goes to the devisees. *Id.*

5. A partner in whose name the real estate

which was the subject-matter of the partnership had been taken on a purchase by his partner is not entitled to reimbursement for any part of the money negligently paid by him to procure a supposed outstanding title, when in fact the title was perfect, where he bought it without consulting his partner, who knew the facts, because he was misled by an incorrect abstract obtained by him on making a sale without the knowledge or consent of his copartner. *Yorks v. Tozer* (Minn.) 86

6. A statute establishing a plan for administering partnership assets, passed after a surviving partner has taken possession of partnership real estate, all of which is needed to reimburse him for advances made to pay debts of the firm, will not control in equity in determining the validity of the title of his grantee, although he does not convey the property until after the passage of the statute. *Dyer v. Morse* (Wash.) 89

7. The common-law right of a surviving partner to take possession of real estate to pay debts is not, in the absence of exclusive words in the statute, taken away by a statute establishing a procedure for the winding up of partnerships dissolved by the death of one of the partners, where machinery provided for by the statute can only be set in motion by the representatives of the deceased partner; and his acts in so doing will be valid until some action is taken by such representatives. *Id.*

8. No relief will be given in equity to the representative of a deceased partner, who neglects to take any steps to set in motion a statute for the winding up of the partnership affairs until after the surviving partner has necessarily disposed of the partnership real estate in winding up the partnership affairs and paying debts according to the course of the common law. *Id.*

NOTES AND BRIEFS.

Partnership; rights of partners *inter se* in partnership real estate:—(I.) general rule as to partners' interest; (II.) power of partner over partnership real estate: (a) in general; (b) to contract and purchase; (c) to transfer or convey firm property; (d) to convey his interest; (e) to mortgage: (1) in general; (2) for firm benefit; (3) to secure private debt; (f) to create liens, make assignments, etc.; (g) to make and renew lease; (h) to give note; (i) to sue; (j) of continuing partner; (III.) how conveyed by partnership; (IV.) purchase by partner of firm property; (V.) purchase of deceased partner's interest; (VI.) sale by partner of his interest to his copartners; (VII.) effect of conveyance by partner; (VIII.) liability of the firm for partner's acts; (IX.) the question of ratification; (X.) partner's right to reimbursements; (XI.) equitable lien of partners; (XII.) partition of partnership real estate; (XIII.) position of partner advancing purchase money; (XIV.) position of partner purchasing at sheriff's sale; (XV.) position of new partner; (XVI.) fraud by partner; (XVII.) estoppel of partner; (XVIII.) statute of limitations; (XIX.) tender of purchase money by partner; (XX.) dormant partner; (XXI.) deceased partner's share; (XXII.) homestead rights; (XXIII.) in partnership formed for the purchase and sale of

land; (XXIV.) when partnership in lands continues after the death of a partner; (XXV.) the question of dissolution; (XXVI.) winding up of firm; (XXVII.) division by partners prior to dissolution; (XXVIII.) in Louisiana. 86

The position of surviving partners in partnership real estate:—(I.) the position of surviving partner: (a) at law; (b) in equity; (c) how affected by state statute; (d) as creditor; (e) lien of surviving partner; (II.) powers of the surviving partner: (a) of disposition; (b) to mortgage; (c) to remove incumbrances; (d) in property mortgaged to the firm; (e) to continue the business; (f) to bring ejectment; (III.) with respect to leasehold property; (IV.) effect of conveyance by; (V.) as between the survivor and personal representatives of a deceased partner; (VI.) injunction against survivor. 129

The rights and position of creditors, purchasers, and other third parties in partnership real estate:—(I.) rights of creditors of the firm: (a) in general; (b) the nature of the creditors' rights; (II.) preference of firm over individual creditors; (III.) the position of the individual creditors of a partner: (a) in general; (b) where property held prior to partnership; (IV.) the position of mortgagees; (V.) the position of judgment creditors; (VI.) the position of purchasers: (a) from the firm; (b) from partner holding the legal title; (c) of partner's interest; (d) of deceased partner's share; (e) under execution against firm; (f) under execution against partner; (g) the liability to see to the application of purchase money; (VII.) the question of notice. 161

PASS. See CONTRACTS, 2; OFFICERS, 8, NOTES AND BRIEFS.

PATENTS. See also TRADEMARK, 1, 2, NOTES AND BRIEFS.

Patents; liability of officers of a corporation for its infringement. 428

PAYMENT. See MASTER AND SERVANT, NOTES AND BRIEFS.

PENALTY. See also MORTGAGE.

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Penalty; in contract. 676

PERPETUITIES.

1. A provision for a charitable gift contingent on an accumulation which may not take place within the time permitted by the rule against perpetuities is not within that rule, if the fund in the mean time is devoted to charity. *Webster v. Wiggan* (R. I.) 510

2. A gift to testator's grandchildren when the youngest arrives at the age of forty years, when the law prohibits the suspension of alienation longer than the infancy of such children, may be sustained by modifying the provision so as to make the gift take effect on his reaching twenty-one instead of forty. *Edgerly v. Barker* (N. H.) 828

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Perpetuities; rules as to, in case of charity. 511

PHYSICIANS AND SURGEONS.

See also MASTER AND SERVANT, 2, 3.

NOTES AND BRIEFS.

Physicians; as witnesses before grand jury, see GRAND JURY.

PICTURES. See BAILMENT, 2-4; CONTRACTS, 3.**PLAT.** See DEDICATION, 2.**PLEADING.** See also HUSBAND AND WIFE, 3.1. The facts constituting an estoppel *in pais* must be pleaded. *Erickson v. First Nat. Bank* (Neb.) 5772. Ratification of an altered note must be pleaded in order to be relied on in an action on such note. *Id.*3. An amended complaint alleging that the contract in the complaint for the sale of merchandise was only intended as an agreement as to the price, and that no sales were made until orders were sent and accepted, states merely conclusions of law. *Gipps Brewing Co. v. De France* (Iowa) 3864. The sufficiency of pleadings in a libel case is a question for the court, although the jury are the judges of the law as well as of the facts in such cases. *St. James's Military Academy v. Gaiser* (Mo.) 6675. A plea alleging the defense of readiness to pay at the time and place designated in a note must not only allege such fact, but also that the defendant has ever since been ready with the money then and there to pay the note, with *proferri in curia* of the money. *Greeley v. Whitehead* (Fla.) 2866. A plea of readiness to pay a note at the time and place at which it was payable, and that the note was not presented, is rendered bad by an allegation that interest was paid on the note after maturity. *Id.*7. Denial of an allegation in a complaint that plaintiff is seised in fee and is in possession of land upon which defendant is committing a trespass is sufficient to raise the question of title to the land. *Heyward v. Farmers' Min. Co.* (S. C.) 42**NOTES AND BRIEFS.**

Pleading; amendment of, to give jurisdiction. 157

POLYGAMY. See BIGAMY.**PONDS.** See INJUNCTION, 4.**PRESUMPTIONS.** See EVIDENCE, 6-15.**PRINCIPAL AND AGENT.** See also MASTER AND SERVANT, 10.**NOTES AND BRIEFS.**Liability of agent to third person for negligence or nonfeasance. 433
28 L. R. A.**PRINCIPAL AND SURETY.** See also CONTRIBUTION.1. An agreement to become surety for another jointly and severally with him for a certain sum constitutes a contract of suretyship. *Lachman v. Block* (La.) 2552. Failure of the creditor to disclose the debtor's previous embezzlement is not such a fraudulent concealment as will discharge a surety of existing and future obligations of a limited amount. *Id.*3. A surety company which indemnifies one of the sureties upon an official bond, and is compelled to pay a judgment against all of them upon such bond, has no right of contribution against his cosureties, and can acquire none from the surety indemnified, as he holds the indemnity in trust for them as well as himself. *Gibson v. Sheehan* (D. C. App.) 400**NOTES AND BRIEFS.**

Rights of surety company as cosurety; contribution. 400

PRIZE FIGHT. See also INJUNCTION, 1; RECEIVERS, 1.**NOTES AND BRIEFS.**

Prize fight; prohibition of. 737

PROXIMATE CAUSE.Failure to construct a scaffold is not the proximate cause of injury caused by a brick intentionally or heedlessly pushed from the top of a wall after its completion, although before the workmen had left the top of the building. *Mayer v. Thompson-Hutchison Bldg. Co.* (Ala.) 483**PUBLIC IMPROVEMENTS.**1. Railroad property cannot be sold for street assessments. *Detroit, G. H. & M. R. Co. v. Grand Rapids* (Mich.) 7932. No benefit to railroad tracks and the necessary right of way, which will sustain an assessment for benefits, will accrue from street improvements. *Chicago, M. & St. P. R. Co. v. Milwaukee* (Wis.) 249; *Detroit, G. H. & M. R. Co. v. Grand Rapids* (Mich.) 7933. The exception in a statutory provision exempting railroad property from taxation, "except that the same shall be subject to special assessment for local improvements," has no operation or force except to exclude such assessments from the exemption and leave them subject to the law as it stood before the statute. *Chicago, M. & St. P. R. Co. v. Milwaukee* (Wis.) 2494. Tracks and necessary right of way of a railway company are not subject to assessment and sale for benefits by local improvements, in the absence of an express statutory provision. *Id.*5. The fact that abutting land of a railroad company not in use for railway purposes will probably be required for such use in the near future will not exclude it from assessments for street improvements. *Id.*

6. The power to require grading for side-

walks is not included in the statutory power to require lot owners to build and maintain sidewalks. *Little Rock v. Fitzgerald* (Ark.) 496

NOTES AND BRIEFS.

Public improvements; assessments on railroad property for. 793

Liability of railroad right of way to assessments for local improvements:—the English cases; property not contiguous; property not benefited; property generally; right of way. 249

Charging expense of grading for sidewalk upon abutting owner. 496

PUBLIC LANDS. See also **WATERS**, 2.

PUBLIC MONEY.

A statute giving a bounty for killing coyotes is not a violation of the constitutional provision against gifts of public money. *Ingram v. Colgan* (Cal.) 187

PUBLIC PRINTING. See **CONTRACTS**, 7.

QUARANTINE. See **HEALTH**, 1, 2, **NOTES AND BRIEFS.**

QUO WARRANTO.

1. The trial of the title of a public officer by information in the nature of quo warranto as a substitute for the writ of quo warranto, under authority of Mass. Pub. Stat. chap. 150, § 3, authorizing the issue of such writs by the supreme judicial court, is exclusively a civil proceeding. *Attorney General v. Sullivan* (Mass.) 455

2. The right to a jury trial is not given by implication on an information in the nature of quo warranto to try title to a public office, entertained as a substitute for a writ of quo warranto authorized by Mass. Pub. Stat. chap. 150, § 8. *Id.*

3. A public office, such as that of the president of the common council of a city, is not property, and a trial on an information in the nature of a writ of quo warranto is not a suit between two or more persons, within the meaning of the declaration of rights in Mass. Const. art. 15, giving the right to a jury trial in controversies concerning property and in suits between two or more persons. *Id.*

NOTES AND BRIEFS.

Quo warranto; nature of proceeding; right to jury. 455

RAILROADS. See also **DEDICATION**, 1; **EVIDENCE**, 3, 4; **MASTER AND SERVANT**, 7; **NEGLIGENCE**, 2; **PUBLIC IMPROVEMENTS**, 1-5; **RECEIVERS**, 3, 4; **TRESPASS**.

1. A licensee passing through a railroad yard is guilty of contributory negligence which will prevent recovery for injury from being run over by an engine which passes him on one track, switches on to the track on which he is walking, and reverses its direction, where he does not look to the rear, but walks on from 20 to 30 yards before he is overtaken, *Kansas* 28 L. R. A.

City, Ft. S. & M. R. Co. v. Cook (C. C. App. 6th C.) 181

2. One who crosses on a railroad ferryboat in violation of the rules of the company against the carrying of passengers upon such boat, and, after concluding his visit, again enters the company's yard and the boat, remains a trespasser in proceeding through the yard to reach a public ferryboat after he is ordered off the railroad boat, although the employes of the company direct him as to the way through the yard to the ferry landing, where if he were carried back on the railroad boat he would have to pass through another yard, and there is no other way to the ferry than through the yard. *Id.*

3. Failure to maintain a gate at a crossing, as required by ordinance, may make a railroad company liable for injuries sustained in consequence thereof by a runaway team. *Missouri P. R. Co. v. Hackett* (Kan.) 696

4. Roads in fact used by the public, though not dedicated as public highways, are within the provision of Neb. Comp. Stat. chap. 16, § 104, requiring the bell or steam whistle of a locomotive to be sounded at least 80 rods from the crossing of a road or street. *Chicago, B. & Q. R. Co. v. Metcalf* (Neb.) 824

5. One whose team is standing by a car on a side track near a railroad depot, for the purpose of unloading the car, is within the protection of a statute requiring signals by trains at the crossing. *Id.*

NOTES AND BRIEFS.

See also **PUBLIC IMPROVEMENTS**.

Railroads; negligence in case of injury at crossing. 589

Negligence at crossings; at what crossings signals required. 824

Striking runaway team at crossing; absence of gates. 697

Negligence as to person in railroad yard; duty as to trespassers. 182

REAL PROPERTY. See **PARTNERSHIP**, **NOTES AND BRIEFS.**

RECEIVERS. See also **INSURANCE**, 1.

1. A receiver of the property of a corporation which has forfeited its franchise by unlawfully conducting prize fights may be appointed to hold the property subject to the order of the court, when necessary to aid an injunction against the further unlawful use of the property. *Columbian Athletic Club v. State, McMahan* (Ind.) 727

2. A receiver of an insolvent corporation by taking possession of its leasehold estate becomes liable only for a reasonable rent while he retains possession, and does not become liable on the covenants of the lease as an assignee of the term. *Bell v. American Protective League* (Mass.) 452

3. An order directing possession of a railroad to be delivered by a receiver to a purchaser, subject to the payment of such claims against the receiver as may be established before the court which appointed him, within a

reasonable time, does not make the purchaser liable for any claims that are not thus established in that court. *Houston & T. C. R. Co. v. Crawford* (Tex.) 761

4. Earnings of a railroad while operated by a receiver after sale and conveyance are subject to an equitable lien for an indebtedness of the railroad company; and a diversion thereof by the receiver to betterments upon the property will make the new owner liable after the receiver's discharge for the amount of such earnings to prior creditors of the railroad company whose claims have not been paid by the receiver. *Id.*

5. Failure to present to a federal court which appointed a receiver of a railroad company, a claim against him, does not preclude an action in a state court after his discharge, to enforce a liability of a purchaser of the railroad for a debt against the old company. *Id.*

NOTES AND BRIEFS.

Receivers; injunction against strike by employees of. 464

To aid injunction against corporation. 727

Allowance of attorney's fees to. 277

Liability of, for rent. 453

Right of purchaser of property in hands of; effect of claims against. 768

RECORD.

NOTES AND BRIEFS.

Of judgments, see JUDGMENT.

REMAINDERMAN. See ADVERSE POSSESSION, 1.

RESUME. For résumé of contents of book, see 865

REVIEW.

1. The sufficiency of alimony cannot be considered on a bill of review, as the remedy, if the allowance is inadequate, is by appeal. *Wood v. Wood* (Ark.) 157

2. Leave of court need not be obtained to file a bill of review for errors of law apparent on the face of the decree. *Id.*

NOTES AND BRIEFS.

Review; bills of; leave of court. 157

SALE. See also INTOXICATING LIQUORS; LICENSE, 5.

The words "fireproof safe," in an order by a purchaser, do not imply a warranty of the quality of the safe, or that it will protect its contents from fire for any definite period or under any given circumstances. *Diebold Safe & L. Co. v. Huston* (Kan.) 53

NOTES AND BRIEFS.

Sale; implied warranty on. 54

SCHOOLS. See also CHARITIES, 5; EVIDENCE, 1.

1. A fund for the support of primary and grammar schools may be lawfully used to pay salaries of teachers in a kindergarten which has 28 L. R. A.

been duly adopted as part of the public primary schools, although when the money was raised by tax the kindergarten had no existence in those schools. *Sinnott v. Colombet* (Cal.) 594

2. Kindergarten classes may be instructed in separate buildings, and no studies except those of the kindergarten system taught in such classes, under Cal. Pol. Code, § 1666, providing that other studies may be authorized by the board of education, but not to the neglect or exclusion of studies named in § 1665, as § 1663, only requires those branches of study "in the several grades in which each may be required." *Id.*

3. A certificate to teach in a kindergarten is sufficient under Cal. Pol. Code, § 1771, as a certificate to teach a branch of education required by a city board of education, where such board has adopted the kindergarten as part of the public-school system; and no other certificate need be obtained in such case. *Id.*

4. A school township organized under Dak. Laws 1883, chap. 44, becomes immediately liable for the debts of a district, the schoolhouse and furniture of which become the property of such township, without regard to a settlement, under §§ 136-138, of the equities between the several districts included in such township. *Coler v. Dwight School Trp.* (N. D.) 649

SEAMEN. See SHIPPING, NOTES AND BRIEFS.

SET-OFF.

A bank cannot set off against a check by a depositor his unmatured debt to the bank, although he was insolvent and had made an assignment for creditors when the check was given, and this was known to all parties. *Merchants' Nat. Bank v. Robinson* (Ky.) 760

NOTES AND BRIEFS.

Set-off; against check by insolvent. 760

Against share of distributee in estate. 521

SHIPPING.

NOTES AND BRIEFS.

Duty to furnish medical aid to seamen. 546

SIDEWALKS. See PUBLIC IMPROVEMENTS, 6.

SIGNATURE. See ACKNOWLEDGMENT.

SLAVES.

NOTES AND BRIEFS.

Slaves; duty to furnish medical aid to. 546

SPECIFIC PERFORMANCE.

Specific performance of a contract for land cannot be enforced by the vendor when the land is subject to an inchoate dower right of his wife. *McCreery v. Davis* (S. C.) 553

STATE.

NOTES AND BRIEFS.

As a litigant; estoppel of. 49

STATUTES. See also **COURTS**, 4.

1. A statute granting a right or imposing a duty also confers by implication every proper power for the exercise of the one or the performance of the other. *Newcomb v. Indianapolis* (Ind.) 783

2. An election law imported from a monarchy to a republic should not be subjected strictly to the rule that the importation of the statute imports also its construction. *Stackpole v. Hallahan* (Mont.) 502

3. An amendment to a bill, which is germane to it, is not within the restriction of Mich. Const. art 4, § 28, as to the introduction of bills after the first fifty days of a session of the legislature. *Davock v. Moore* (Mich.) 788

4. The title of an amendatory statute need not express the subject of its provisions, if the title of the original statute amended is sufficient to embrace the matters covered. *Com. v. Brown* (Va.) 110

5. The title of a statute amending, re-enacting, repealing, or adding to any part of the Code, sufficiently states the object by adopting and expressing the number and subject of the chapter of the Code affected thereby. *Id.*

6. The object of a tax being sufficiently stated in the statute which creates it, the title of a subsequent amendatory statute merely continuing the tax need not repeat the object of the tax. *Id.*

7. The amount of a tax on oysters is sufficiently stated within the meaning of Va. Const. art. 10, § 16, by a provision that it shall equal the amount of taxes levied on any other species of property. *Id.*

8. The object of an oyster tax being expressly stated "to obtain revenue," it complies with the constitutional provision that the object must be stated, although Va. Code, chap. 97, § 2185, provides that the taxes shall be paid "into the public treasury to the credit of the oyster fund," since this oyster fund is merely an account, and not the object of the tax. *Id.*

9. An act to amend and re-enact certain sections of the Code of Virginia and repeal others in relation to oysters, and to add independent sections thereto, all of which have an actual connection with the general subject of oysters, does not embrace more than one subject. *Id.*

10. A license tax on the business of an oyster packer may be properly included in the provisions of a statute on the general subject of the protection and preservation of oysters. *State v. Applegarth* (Md.) 812

11. The title of an act, which says that it is to tax traffic in intoxicating liquors and regulate and control the same, fairly expresses the purpose of the act, and is not insufficient because the law may be in effect a license law without being so named. *State, Witter, v. Forkner* (Iowa) 206

12. A statute permitting certain penalties of a prohibitory liquor law to be suspended in any city or town, upon filing the written consent of the city council and of the majority of the voters in cities of 5,000 or more, but requiring

the consent of 65 per cent of the voters of the smaller cities and towns, is not a local or special law, nor does it violate a constitutional provision for uniformity of operation, or furnish a diversity of laws in different parts of the state. *Id.*

13. The court will not construe as retrospective Tenn. Acts Gen. Assem. 1893, chap. 107, § 1, making void stipulations limiting liability on insurance policies to less than the full amount of loss if that does not exceed the amount of insurance. *Dugger v. Mechanics' & T. Ins. Co.* (Tenn.) 796

14. The repeal of Cal. Civ. Code, § 489, if conceded, does not extend to § 490 merely because the latter expresses the effect of a railroad ticket which shall be given "on being tendered the fare therefor fixed, as provided in the preceding clause." *Robinson v. Southern P. Co.* (Cal.) 773

NOTES AND BRIEFS.

Statutes; ambiguity. 784

Implication of means for ends aimed at. 783

Defining terms in; repeal by implication. 727

STREET RAILWAYS. See **EVIDENCE**, 12.**STRIKES.** See **INJUNCTION**, 3, **NOTES AND BRIEFS**.**SUBROGATION.** See **ACTION OR SUIT**, 6; **CONTRIBUTION**; **INSURANCE**, 14.**SURETY COMPANIES.** See **PRINCIPAL AND SURETY**, 3.**TAXES.** See also **CONSTITUTIONAL LAW**, 16; **COURTS**, 5, 6; **INJUNCTION**, 6; **LICENSEE**, 1; **MUNICIPAL CORPORATIONS**, 1; **STATUTES**, 6-11.

1. The requirement of equality and uniformity in taxation is satisfied by such regulations as will secure an equal rate and just valuation, without reference to the method of valuation; and in order to be uniform a tax need not be imposed and assessed upon all property by the same agency or officers. *Com. v. Brown* (Va.) 110

2. The constitutional requirement that taxes shall be uniform upon all property subject to taxation, and shall be assessed at its fair cash value (Ky. Const. §§ 171, 172), is violated by a municipal tax which applies the *ad valorem* system to real property and a license tax to personal property, although it is also provided (§§ 174, 181) that taxation based on licenses or franchises may be provided for. *Levi v. Louisville* (Ky.) 480

3. A tax on sales of oysters, expressly authorized by Va. Const. art. 10, § 2, is not an income tax within § 4, which exempts incomes under \$600. *Com. v. Brown* (Va.) 110

4. A tax on sales of oysters, to be assessed and paid weekly, while other property is assessed and taxes paid thereon once a year, does not for that reason violate the principle of equality and uniformity. *Id.*

5. A provision for a fine on a tong man who fails to make a weekly return of sales of oysters for taxation does not add to or increase the tax so as to affect its equality and uniformity. *Com. v. Brown* (Va.) 110

6. A license tax on the business or occupation of those engaged in packing or canning oysters is not a tax on property within the constitutional provisions as to equality and uniformity, although regulated by the amount of business done, with a provision for the privilege of paying a maximum fixed amount instead. *State v. Applegarth* (Md.) 812

7. The last clause of § 1 of Ill. Const. art. 9, providing for the taxation of corporations and other persons specified, "in such manner" as the general assembly shall direct, does not limit the effect of the first clause, which requires every person and corporation to be taxed in proportion to the value of his, her, or its property, but only authorizes a difference of method of assessments. *People's Loan & H. Assn. v. Keith* (Ill.) 65

8. A statute providing that stock and notes of a homestead loan association shall not be subject to taxation violates Ill. Const. art. 9, § 1, which declares that the general assembly shall provide needful revenue by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property. *Id.*

9. Taxing homestead loan associations on their obligations held against borrowers does not constitute double taxation by reason of a tax on the real estate mortgaged to the association by such borrowers. *Id.*

10. A tax on the privilege of receiving property by inheritance or will or otherwise, at the death of the former owner, is not a tax on the property or on the right of alienation. *State v. Alston* (Tenn.) 178

11. A discrimination between direct descendants and collateral kindred and strangers does not make a collateral-inheritance tax unconstitutional. *Id.*

12. Exempting every estate under \$250 in value, but not exempting that sum in larger estates, from a succession tax, does not make the tax unconstitutional. *Id.*

NOTES AND BRIEFS.

Taxes; constitutionality of exemption. 65

Uniformity of; on occupations. 818

Uniformity of; different rules for realty and personalty; power of court as to. 480

TELEGRAPHS. See ACTION OR SUIT, 7; DAMAGES, 9.

TELEPHONES. See EMINENT DOMAIN, 3.

TENDER.

NOTES AND BRIEFS.

Of purchase money by partner. 86

TOLLS. See also BICYCLES, NOTES AND BRIEFS; CONSTITUTIONAL LAW, 9; TURNPIKE COMPANIES.

A turnpike company authorized to collect 26 L. R. A.

from sulkies a toll of 6 cents for every 5 miles may impose a toll of 1 cent per mile upon bicycles, which under the Pennsylvania statute are entitled to the same rates and subject to the same restrictions as prescribed by law in the case of persons using carriages drawn by horses. *Geiger v. Perkiomen & R. Turnp. Road* (Pa.) 458

TOWNS. See ACTION OR SUIT, 1.

TRADEMARK.

1. The right to protection of a trademark, under Mass. Pub. Stat. chap. 76, § 1, does not change the rule that the name of a patented article becomes open to general use on the expiration of the patent. *Dover Stamping Co. v. Fellows* (Mass.) 448

2. The exclusive right to the use of a name given by a patentee merely to describe his patented article ceases with the expiration of the patent,—at least if there is no special and distinguishing use which shows that the word was not used merely as the name of the thing. *Id.*

3. The manufacture of articles similar in construction and general appearance to those made by another which were formerly covered by a patent, and the use of the same name which had been given to the patented articles, does not necessarily make a case of deception or unfair competition. *Id.*

NOTES AND BRIEFS.

Trademark; liability of officers of a corporation for its infringement. 426

TRADE UNIONS. See CONSPIRACY, 5.

TRESPASS.

A spur track built under parol agreement by a railroad company over land of individuals at the joint expense and for the joint benefit of all the parties gives the railroad company such possession of the land covered that an action of trespass will not lie against it in favor of a land owner who has revoked his permission. *Scarvell v. Grand Rapids & L. R. Co.* (Mich.) 519

NOTES AND BRIEFS.

Trespass; liability of officers of a corporation for its trespasses. 423

Possession of licensee to defeat trespass after revocation of license. 519

TRIAL. See also QUO WARRANTO, 2, 3.

1. The constitutional right of trial by jury is denied by a statute attempting to authorize a court without a jury to declare a turnpike road abandoned and its franchise forfeited because the road has been out of repair for six months. *Salt Creek Valley Turnp. Co. v. Parks* (Ohio) 769

2. Requiring a defendant in a criminal case to stand up or sit down in the presence of the jury at any particular time is within the discretion of the trial judge, involving no constitutional right. *People v. Gardner* (N. Y.) 699

3. It is proper to mark as an exhibit a writ-

ing which is competent evidence when it can only be used for its legitimate purpose. *Curtis v. Bradley* (Conn.) 148

Questions for jury.

4. The justification, on the ground that dancing is immoral, of the published opinion that an academy where dancing is practiced is harmful to moral and religious interests, is a question for the jury under the constitutional provision making them judges of the law as well as of the facts in such cases. *St. James Military Academy v. Gaiser* (Mo.) 667

5. The intention of the parties to a purchase of grain for future delivery, in respect to the delivery, where there is a claim that the intent was to make an option contract to be settled by payment of differences, is a question for determination by the jury on consideration of the evidence. *Pope v. Hanks* (Ill.) 568

6. The question of the negligence of a person who drove across a side track before discovering an approaching engine, which was wholly or partly concealed, and was then taken upon the track while trying to turn her horse, which was frightened by the engine,—is for the jury. *Gulf, C. & S. F. R. Co. v. Shieder* (Tex.) 538

7. Want of ordinary care of an employé in a hotel in going out on a metallic roof in a dark night, with his employer, to secure signs which seemed to be endangered during a heavy rain, and coming in contact with electric-light wires which he knew were above the roof, but which he may not have known to be dangerous, is a question for the jury. *Giraudé v. Electric Improv. Co.* (Cal.) 596

Instructions.

8. The jury may be instructed that in considering the weight and effect to be given to the evidence of an accused person the situation may be considered, and the consequences of the result to the witness, with the inducements and temptations that are involved. *State v. Hartley* (Nev.) 83

9. Instructions that the interest of witnesses for an accused person, growing out of their relationship with him, or otherwise, may be considered in passing upon the testimony, is not erroneous, where the question of the credibility of the witnesses in general was fairly presented to the jury. *People v. De France* (Mich.) 139

10. An instruction that certain facts enumerated will not constitute a defense for homicide is not misleading because the facts enumerated are not all that were relied on by the defense. *State v. Hartley* (Nev.) 83

11. An instruction that certain concurring facts constitute negligence, which assumes nothing as facts, but presents a hypothetical case raised by the evidence, and applies the law thereto, is not an invasion of the province of the jury. *Bamberger v. Citizens' Street R. Co.* (Tenn.) 486

12. An instruction that it was the duty of a person to do certain things, which is equivalent to declaring as a matter of law that failure to do so would have been negligence, is correctly refused. *Gulf, C. & S. F. R. Co. v. Shieder* (Tex.) 538

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13. Instructions as to the negligence of a motorman in failing to stop his car promptly enough to avoid an accident are not erroneous because of an assumption that it was his duty to endeavor to stop, when there are no facts in the case showing that an increase of speed might have been a proper means to avoid the accident. *Bamberger v. Citizens' Street R. Co.* (Tenn.) 486

Verdict.

14. A general verdict for plaintiff in an action for negligent injuries, under a complaint based on the theory that a brakeman was employed by defendant, is overthrown by special answers to interrogatories to the effect that plaintiff was not in defendant's employ, but in the employ of another railroad company which owned, controlled, and operated the train which injured him. *Baltimore & O. & C. R. Co. v. Paul* (Ind.) 216

NOTES AND BRIEFS.

Constitutional right to jury; in case of forfeiture of franchise. 769

Questions as to negligence. 486

Direction of verdict for negligence. 538

TROVER.

NOTES AND BRIEFS.

Liability of officers of a corporation for conversion by it. 422

TRUSTS. See also ADVERSE POSSESSION, 2; APPEAL AND ERROR, 2; CHARITIES, 3, 4; EXECUTORS AND ADMINISTRATORS, 4-6; HUSBAND AND WIFE, 2.

That a member of a partnership concern, who is also a trustee for a third person, commits a breach of trust by loaning the trust fund to the partnership, in which the copartners participate, will not create a lien for the amount in favor of the *cestui que trust*, either on the firm assets or on real estate of the partnership which stands in the individual name of the trustee. *Goldthwaite v. Janney* (Ala.) 161

TURNPIKES. See also CONSTITUTIONAL LAW, 9; TOLLS; TRIAL, 1.

A turnpike company authorized to collect tolls from any of designated carriages "or other carriage of burthen or pleasure," based upon the number of horses and wheels, may collect tolls from bicycles, although the amount of toll to be charged cannot be computed by the method designated for other vehicles. *Geiger v. Perkiomen & R. Turnp. Road* (Pa.) 453

VACCINATION. See HEALTH, 1, 2, NOTES AND BRIEFS.

VENUE. See COURTS; NOTES AND BRIEFS.

VIEW. See APPEAL AND ERROR, 3.

VOTERS AND ELECTIONS. See also MUNICIPAL CORPORATIONS, 3.

1. By the use of the word "delegate," in

Minn. Gen. Laws 1898, chap. 4, §§ 81, 83, 84, the legislature did not intend to prohibit political parties from holding mass conventions for the nomination of candidates for office, or intend to require the members of such conventions to be elected as delegates to such conventions at primaries or caucuses. *Manson v. McIntosh* (Minn.) 605

2. The failure of a certificate of nomination to specify, as required by statute, the business address of the candidate and the chairman and secretary of the committee who make the certificate, is not material where it states the names, address, and business of each, and the business address of each is in fact the same as the address given for him in the certificate. *Stackpole v. Hallahan* (Mont.) 502

3. All the provisions of the Australian ballot law are not mandatory to the extent of invalidating an election if some detail as to the nominating certificate is omitted, although they may be mandatory in a direct proceeding to enforce them. *Id.*

4. An election in which the voters have fully, fairly, and honestly expressed their will, is not invalid under the Montana Australian Ballot Law of March 13, 1889, because the certificate of nomination of the successful candidate, who was selected to fill a vacancy, did not show that fact or the fact that the committee nominating him had power to fill the vacancy, or because no declination of the person previously nominated was filed, where the officer with whom the certificates were filed had never been notified of any previous nomination, and the committee in fact had full power to fill the vacancy. *Id.*

5. The provision of Kan. Sess. Laws 1898, chap. 78, § 25, that a ballot shall not be counted if the voter fails to mark it as required by statute, is mandatory, and prevents the counting of a ballot not marked with a cross upon the designated square or space. *Taylor v. Bleakley* (Kan.) 683

6. The legislature, within the terms of the constitution, may adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary to prevent intimidation, fraud, bribery, or other corrupt practices, provided that the voting be by ballot and that the person casting the vote do so in absolute secrecy. *Id.*

NOTES AND BRIEFS.

Legislative power to regulate elections; marking ballots. 685

Mandatory provisions of ballot law. 504

WAGES. See CONSTITUTIONAL LAW, 10; MASTER AND SERVANT, 1, NOTES AND BRIEFS.

WARRANTY. See EVIDENCE, 21.

WATERS. See also ACTION OR SUIT, 8-10; APPEAL AND ERROR, 12; BOUNDARIES; DAMS; EASEMENTS; EMINENT DOMAIN, 8; EVIDENCE, 15; ICE, 1; INJUNCTION, 4.

1. The test of the navigability of a stream is its navigable capacity, and not that its sur-
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roundings—such as the business done upon it, its connection with other streams, or the place where it flows—be such that it may be useful for the purpose of commerce. *Hayward v. Farmers' Min. Co.* (S. C.) 42

2. A grant by the state of land in the usual way, through the land office, which covers land under navigable water, will not estop the state or its subsequent grantee from setting up title to such land. *Id.*

3. Lands included in a Spanish grant and owned by private persons are not affected by the Florida grant of submerged lands, made by the act of 1856. *Arlins v. Shaw* (Fla.) 391

4. Land below high-water mark does not necessarily pass to the grantee of the upland as an incident and appurtenance of the latter. *Id.*

NOTES AND BRIEFS.

Waters; navigability; disposal of land under water. 46, 391

WILLS. See also CONFLICT OF LAWS, 5; EVIDENCE, 28; EXECUTORS AND ADMINISTRATORS, 2.

1. A will made by a married woman is not revoked by her subsequent marriage after becoming a widow, under Cal. Civ. Code, § 1300, making subsequent marriage operate to revoke "a will executed by an unmarried woman." *Re Comassi's Estate* (Cal.) 414

2. The adoption of a stranger in blood is not equivalent to having issue of a marriage within the meaning of Cal. Civ. Code, § 1298, respecting the effect of issue to make a revocation of a will. *Id.*

3. The legal construction of a will is according to the common understanding of the language, unless a different meaning is proved. *Edgerly v. Barker* (N. H.) 328

4. In the construction of a will the important question always is to ascertain the intention of the testator. *Whitcomb v. Rodman* (Ill.) 149

5. A testator will be presumed to have intended to dispose of his whole estate unless the presumption is rebutted by the provisions of the will or evidence to the contrary. *Id.*

6. In a will by which a testator owning 180 acres of land evidently intended to devise the whole, in terms giving parcels amounting altogether to 180 acres, a devise of parcels described as certain quarters of designated quarter-sections which the testator does not own except as to a portion of one of such quarters devised by another clause to the devisee of such quarter,—will be construed to cover two quarters of quarter-sections owned by the testator lying adjacent to those described and which will otherwise be undisposed of, where, by eliminating the numbers of the quarter-section and the quarters thereof, sufficient is left in the devise to designate such parcels with the aid of extrinsic evidence. *Id.*

7. In construing wills the principle of lineal representation is accepted as an implied basis of distribution, except so far as a purpose to set it aside is clearly expressed. *Edgerly v. Barker* (N. H.) 328

8. A will giving to the children of tes-

tator's son and daughter his whole estate when the youngest arrives at a certain age entitles the descendants of any children who are then deceased to take their parent's share. *Id.*

9. Specific portions of a legacy to a town or school district, being given for designated purposes, may be severally accepted or rejected. *Webster v. Wiggin* (R. I.) 510

10. Real property acquired by a testator after the date of his will, including that acquired by foreclosure of mortgages which he held before such date, does not pass by his will in which there are no express terms referring to after acquired property. *Id.*

WITNESSES. See also CONSTITUTIONAL LAW, 5, 6; CONTEMPT, 1; CRIMINAL LAW, 1.

1. To attack the credibility of a witness who has testified that he gave at a certain date a note to a person whose whereabouts on that day are in question, and paid the note on a cer-
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tain day several months after, testimony is admissible that on the latter date such person was at another distant place. *People v. De France* (Mich.) 189

2. One with whom a person is alleged to have been unlawfully intermarried while having a living wife is competent to testify to the fact of the marriage which is alleged to be unlawful. *Com. v. Hayden* (Mass.) 818

NOTES AND BRIEFS.

Swearing before grand jury, see GRAND JURY.

Witnesses; indorsement of names on information; examination of. 140

WOMEN.

NOTES AND BRIEFS.

As grand jurors. 204

WRIT. See INFANTS, NOTES AND BRIEFS.

L. R. A. CASES AS AUTHORITIES

SHOWING WHERE THE CASES IN THIS VOLUME HAVE BEEN AP-
PLIED, DEVELOPED, STRENGTHENED, LIMITED, OR IN ANY
WAY AFFECTED BY LATER DECISIONS THAT HAVE
CITED THESE CASES AS PRECEDENTS, WITH
HOLDINGS OF CITING CASES; ALSO
REFERENCES TO LATER AN-
NOTATIONS CITING
CASES OR NOTES

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L. R. A. CASES AS AUTHORITIES.

CASES IN 28 L. R. A.

28 L. R. A. 33, *STATE v. HARTLEY*, 22 Nev. 342, 40 Pac. 372.

Number of grand jurors.

Cited in footnotes to *State v. Vincent*, 52 L. R. A. 83, which holds indictment found by less than twenty-three grand jurors demurrable; *State v. Caldwell*, 41 L. R. A. 718, which holds changes in number of grand jurors and in number necessary to agree on verdict by petit jury not *ex post facto* law.

Failure to exhaust peremptory challenges.

Cited in *People v. Durrant*, 116 Cal. 197, 48 Pac. 75, holding overruling of challenge for cause unavailable if peremptory challenges not all exhausted when jury completed.

View of premises.

Cited in *State v. Mortensen*, 26 Utah, 346, 73 Pac. 562, holding that ordering view of premises is not taking testimony, but is to enable jurors to more accurately understand evidence; *People v. Mathews*, 139 Cal. 529, 73 Pac. 416, holding that defendant, upon whose motion view of premises is ordered, who voluntarily absents himself, cannot complain after verdict of his absence, as ground for new trial.

28 L. R. A. 42, *HEYWARD v. FARMERS' MIN. CO.* 42 S. C. 138, 46 Am. St. Rep. 702, 19 S. E. 963, 20 S. E. 64.

Necessary parties to action.

Cited in *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 43 S. C. 165, 20 S. E. 1002, holding state not indispensable party to action in tort for unlawful use of plaintiff's land, which defendant claims right to use under contract with state.

Mode of trying issues.

Cited in *Alston v. Limehouse*, 61 S. C. 5, 39 S. E. 192, holding that issue of title in action to enjoin trespass on land, plaintiff's title to which defendant denies, should be tried by jury without framing issues.

What is sealed instrument.

Cited in *Cook v. Cooper*, 59 S. C. 563, 38 S. E. 218, holding deed with word "seal" written below signature, without scroll or other symbol, sealed instrument.

Shortening limitation period.

Cited in footnote to *Osborne v. Lindstrom*, 46 L. R. A. 715, which holds
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invalid, statute shortening period of limitation without leaving reasonable time to sue.

What waters are navigable.

Cited in *New England Trout & Salmon Club v. Mather*, 68 Vt. 347, 33 L. R. A. 572, 35 Atl. 323, holding "boatable waters" confined to those which are of common passage as highways for business or pleasure.

Cited in note (42 L. R. A. 320, 321) on what waters are navigable.

Disapproved in *Chisolm v. Caines*, 67 Fed. 294, holding test of navigability means, or capability of becoming means open to public of passing between two places where they have right to be.

State's power to grant land.

Cited in *Nathans v. Steinmeyer*, 57 S. C. 390, 35 S. E. 733, stating that parties admitted that state could grant marsh lands.

Estoppel of state.

Cited in *Carolina Nat. Bank v. State*, 60 S. C. 476, 85 Am. St. Rep. 865, 38 S. E. 629, holding state not estopped to deny power of superintendent of penitentiary to indorse note, proceeds of which were placed to credit of state.

28 L. R. A. 53, *DIEBOLD SAFE & LOCK CO. v. HUSTON*, 55 Kan. 104, 39 Pac. 1035.

Oral evidence of prior or contemporaneous agreement.

Approved in *Gett v. Binkert*, 55 Kan. 620, 40 Pac. 925, holding evidence of parol contemporaneous agreement that note payable one day after date should be due only after sale of certain lots inadmissible; *Thisler v. Mackey*, 65 Kan. 466, 70 Pac. 334, holding oral evidence of contemporaneous agreement to surrender note without payment, on rescission of contract, inadmissible; *Commercial Union Assur. Co. v. Norwood*, 57 Kan. 615, 47 Pac. 529, holding parol evidence of prior oral agreement for greater amount of concurrent insurance than that stated in policy inadmissible; *Ehrsam v. Brown*, 64 Kan. 470, 67 Pac. 867, holding parol evidence inadmissible to show warranty of personal property sold by written contract.

28 L. R. A. 57, *EMERY v. BURBANK*, 163 Mass. 326, 47 Am. St. Rep. 456, 39 N. E. 1026.

Conflict of laws.

Approved in *Heaton v. Eldridge*, 56 Ohio St. 99, 36 L. R. A. 820, 60 Am. St. Rep. 737, 46 N. E. 638, holding law of forum, that no action shall be brought on unwritten contract not to be performed within year, applicable; *Western Massachusetts Mut. F. Ins. Co. v. Hilton*, 42 App. Div. 60, 58 N. Y. Supp. 996, holding validity of fire insurance contract determined by law of place of performance; *Seely v. Manhattan L. Ins. Co.* 72 N. H. 56, 55 Atl. 425, holding affidavit not admissible to show due mailing of notice, when not admissible according to laws of evidence of state where action brought.

Distinguished in *Johnson v. Mutual L. Ins. Co.* 180 Mass. 408, 63 L. R. A. 843, 62 N. E. 733, holding requirement of Massachusetts statute that application must be attached to policy, to form part thereof, inapplicable to policy of New York corporation to one living in New Hampshire, but domiciled in Massachusetts; *Finney v. Guy*, 106 Wis. 277, 49 L. R. A. 495, 82 N. W. 595, refusing to

follow construction of statute of other state creating stockholders' liability, by courts of that state, if unjust to own citizens.

Cited in note (64 L. R. A. 120) on conflict of laws as to statute of frauds.

28 L. R. A. 59, *STATE v. HALL*, 114 N. C. 909, 41 Am. St. Rep. 822, 19 S. E. 602.

Crimes committed in two jurisdictions.

Cited in *State v. Buchanan*, 130 N. C. 662, 41 S. E. 107, denying jurisdiction over theft of property stolen in other state and brought into state; *State v. Caldwell*, 115 N. C. 800, 20 S. E. 523, upholding act giving jurisdiction in county where death takes place, of one mortally injured outside of state; *State v. Patterson*, 134 N. C. 617, 47 S. E. 808, upholding trial in county of actual delivery of liquor, unlawfully sold.

Cited in footnotes to *Coleman v. State*, 64 L. R. A. 807, which holds commencement in either county of prosecution for death in one county from fatal blow struck in another, bar to subsequent prosecution in the other county; *Graham v. People*, 47 L. R. A. 731, which requires institution of prosecution for obtaining money by confidence game in county where offense consummated.

Cited in note (28 L. R. A. 59) on locality of crime committed by shooting or striking across state boundary.

— Extradition.

Cited in *Re Sultan*, 115 N. C. 60, 28 L. R. A. 296, 44 Am. St. Rep. 423, 20 S. E. 375, holding resident of one state who, while in another, procures by false representations shipment of goods to his residence, whither he returns, extraditable as fugitive from justice; *State v. Hall*, 115 N. C. 820, 28 L. R. A. 291, 44 Am. St. Rep. 501, 20 S. E. 729, holding that constructive presence of murderer in state where victim struck by bullet fired across state boundary does not make him extraditable to that state as fugitive from justice.

Time when crime committed.

Cited in note (34 L. R. A. 851, 852) on time when homicide is deemed to be committed.

28 L. R. A. 65, *PEOPLE'S LOAN & HOMESTEAD ASSO. v. KEITH*, 153 Ill. 609, 39 N. E. 1072.

Exemption of corporation from taxation.

Followed without special discussion in *Ex parte People's Loan & Homestead Asso.* 153 Ill. 656, 39 N. E. 1077.

Approved in *Re St. Louis Loan & Invest. Co.* 194 Ill. 613, 62 N. E. 810, holding void, statute exempting from taxation loan association stock while loaned and pledged as security to association; *Atlanta Nat. Bldg. & L. Asso. v. Stewart*, 109 Ga. 102, 35 S. E. 73, holding void, act providing that tax shall be levied on shares of members of loan association, which shall be in lieu of all other taxes against it; *State ex rel. Cornell v. Poynter*, 59 Neb. 431, 81 N. W. 431, holding void, act exempting property of insurance companies from taxation, or releasing or commuting taxes on such companies; *Raymond v. Hartford F. Ins. Co.* 196 Ill. 343, 63 N. E. 745, holding void, act levying 2 per cent tax on gross amount received by foreign insurance companies, as exemption from local tax, except as to land; *Re Wilmerton*, 206 Ill. 18, 68 N. E. 1050, denying right of board of

review to assess stock for years during which assessment had been omitted under provision of void statute.

Cited in note (60 L. R. A. 340, 352, 365) on constitutional equality in United States in relation to corporate taxation.

Distinguished in *Deniston v. Terry*, 141 Ind. 681, 41 N. E. 143, holding paid-up stock of loan association taxable against holder.

Double taxation.

Cited in *Adams v. Kuykendall*, 83 Miss. 585, 35 So. 830, upholding assessment of vendor's lien notes representing purchase price of real estate subject to taxation; *Albany Mut. Bldg. Asso. v. Laramie*, 10 Wyo. 74, 65 Pac. 1011, holding mortgages of building and loan association, taxable assets.

Limited in *Illinois Nat. Bank v. Kinsella*, 201 Ill. 45, 66 N. E. 338, upholding assessment of tangible property of banking institution to bank, and shares of stock to shareholders.

What constitutes loan by loan association.

Cited in *Borrowers' & I. Bldg. Asso. v. Eklund*, 190 Ill. 262, 52 L. R. A. 639, 60 N. E. 521, holding transaction by which note and mortgage given to loan association by member, loan, not sale of stock to association.

28 L. R. A. 70, *LAKINGS v. PHENIX INS. CO.* 94 Iowa, 476, 62 N. W. 783.

Location of property as affecting insurance thereon.

Approved in *L'Anse v. Fire Asso.* 119 Mich. 430, 43 L. R. A. 840, footnote p. 838, 75 Am. St. Rep. 410, 78 N. W. 465, holding that insurance on fire engine, etc., while in enginehouse, does not cover property while being used in extinguishing fire.

Cited in footnotes to *British America Assur. Co. v. Miller*, 39 L. R. A. 545, which holds that insurance on personal property while contained in certain building does not cover property while in other place, where family temporarily staying in accordance with known habit; *Ohio Farmer's Ins. Co. v. Burget*, 55 L. R. A. 825, which authorizes recovery for insured chattels destroyed at place to which removed with insurer's consent, notwithstanding previous removal without consent.

28 L. R. A. 72, *MENTZER v. WESTERN U. TELEG. CO.* 93 Iowa, 752, 57 Am. St. Rep. 294, 62 N. W. 1.

Measure of damages.

Approved in *Hendershot v. Western U. Teleg. Co.* 106 Iowa, 538, 68 Am. St. Rep. 313, 76 N. W. 828, holding telegram announcing "Bravo is sick," and directing sender to bring veterinary surgeon at once, sufficient notice of damages that might result from delay; *McPeck v. Western U. Teleg. Co.* 107 Iowa, 362, 43 L. R. A. 218, 78 N. W. 63, holding loss of reward offered for capture may be included in damages for delay in delivering telegram advising sendee of fugitive's whereabouts; *Free v. Western U. Teleg. Co.* 122 Fed. 312, holding right of plaintiff to prevent removal from state court to Federal court not controllable by fact that different rule of damages prevails in latter court.

— Fright or mental anguish.

Approved in *Watson v. Dilts*, 116 Iowa, 253, 57 L. R. A. 561, 93 Am. St. Rep. 239, 89 N. W. 1068, sustaining right to recover for nervous prostration of

woman, due to fright caused by one stealthily entering her home at night; *Cowan v. Western U. Teleg. Co.* 122 Iowa, 381, 64 L. R. A. 548, footnote p. 546, 101 Am. St. Rep. 268, 98 N. W. 281, holding that mental anguish and suffering will sustain action for breach of contract to promptly deliver telegram; *Hurlburt v. Western U. Teleg. Co.* 123 Iowa, 297, 98 N. W. 794, holding that mental anguish alone will sustain recovery for failure to promptly deliver telegram resulting in preventing recipient's attendance at funeral; *Mack v. South Bound R. Co.* 52 S. C. 337, 40 L. R. A. 685, 68 Am. St. Rep. 913, 29 S. E. 905, authorizing recovery for injuries occasioned by fright caused by negligence of railroad, though no physical injury sustained except that caused by fright; *Cashion v. Western U. Teleg. Co.* 123 N. C. 273, 31 S. E. 493, and *Western U. Teleg. Co. v. Van Cleave*, 107 Ky. 468, 92 Am. St. Rep. 306, 54 S. W. 827, sustaining right to recover for mental anguish from delay in delivering telegram; *Hickey v. Welch*, 91 Mo. App. 11, authorizing recovery for mental anguish resulting from forcible trespass on one's premises, though no physical injury sustained; *Graham v. Western U. Teleg. Co.* 109 La. 1075, 34 So. 91 sustaining recovery for mental pain alone, in action for failure to promptly deliver telegram; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 79, 54 L. R. A. 851, 60 N. E. 1080 (dissenting opinion), majority holding action not supported by mental anguish from failure to promptly deliver telegram.

Cited in footnotes to *Western U. Teleg. Co. v. Crocker*, 59 L. R. A. 398, which sustains recovery for mental anguish from failure to promptly deliver telegram announcing serious illness of grandchild; *Cowan v. Western U. Teleg. Co.* 64 L. R. A. 546, which holds that mental anguish will sustain action for breach of contract to promptly transmit telegram; *Morton v. Western U. Teleg. Co.* 32 L. R. A. 735, which denies sendee's right to recover for mental suffering alone, from failure to deliver telegram; *Simmons v. Western U. Teleg. Co.* 57 L. R. A. 607, which sustains statute rendering telegraph companies liable for mental anguish from delay in delivering messages.

Distinguished in *Brumfield v. Western U. Teleg. Co.* 97 Iowa, 695, 66 N. W. 898, denying right to any damages for delay in delivering telegram, where no negligence shown; *Tisdale v. Major*, 106 Iowa, 5, 68 Am. St. Rep. 263, 75 N. W. 663, denying right to recover for mental suffering from suing out wrongful attachment; *Mahoney v. Dankwart*, 108 Iowa, 326, 79 N. W. 134, denying right to recover for fright caused by apprehension for one's mother, who had been in house somewhat shattered by blast near by, and suddenly collapsed after blast.

Disapproved in *Peay v. Western U. Teleg. Co.* 64 Ark. 543, 39 L. R. A. 466, footnote p. 463, 43 S. W. 965, denying right to damages for mental anguish without physical injury, for delay in delivering telegram.

28 L. R. A. 78, *FOLLIS v. UNITED STATES MUT. ACCI. ASSO.* 94 Iowa, 435, 58 Am. St. Rep. 408, 62 N. W. 807.

Action at law for insurance payable out of assessments.

Approved in *Byrnes v. American Mut. F. Ins. Co.* 114 Iowa, 741, 87 N. W. 699, holding absolute money judgment properly entered against mutual fire insurance company where policy contains absolute promise to pay specified amount, though by-laws provide for payment from assessments only; *Delle v. State Mut. Hail Ins. Co.* 119 Iowa, 174, 93 N. W. 96, holding judgment for full amount properly entered in action upon policy providing for full indemnity, unless losses

exceeded amount collected on assessments, in absence of showing that losses exceeded such amount.

Cited in footnote to *Thuenen v. Iowa Mut. Ben. Asso.* 37 L. R. A. 587, which sustains provision in benefit certificate for specified amount, that payment of full assessment on members shall be payment in full.

Presumption against suicide.

Cited in *Stephenson v. Bankers Life Asso.* 108 Iowa, 640, 79 N. W. 459, sustaining presumption that killing of insured was accidental, not suicidal.

Voluntary exposure to unnecessary danger.

Approved in *Travelers Ins. Co. v. Randolph*, 24 C. C. A. 314, 47 U. S. App. 260, 78 Fed. 763, holding dangers of real character, to which insured purposely and consciously exposes himself, meant by voluntary exposure to unnecessary danger; *Smith v. Aetna L. Ins. Co.* 115 Iowa, 220, 56 L. R. A. 273, 91 Am. St. Rep. 153, 88 N. W. 368, holding voluntary exposure to unnecessary danger not shown as matter of law, by fact that insured was standing on step of car when he fell; *Cornwell v. Fraternal Acci. Asso.* 6 N. D. 204, 40 L. R. A. 440, 69 N. W. 191, holding attempt to scale bank with loaded gun not voluntary exposure to unnecessary danger; *Willard v. Masonic Equitable Acci. Asso.* 169 Mass. 290, 61 Am. St. Rep. 285, 47 N. E. 1006, holding voluntary exposure to danger shown by attempting to cross track between freight cars, when train known to be ready to move; *Payne v. Fraternal Acci. Asso.* 119 Iowa, 344, 93 N. W. 361, holding it question for jury when reasonable minds might reach different conclusions as to whether death resulted from voluntary exposure to danger.

Cited in note (40 L. R. A. 432, 435) on voluntary exposure to unnecessary danger within meaning of insurance policy.

28 L. R. A. 80, *MISSOURI P. R. CO. v. NEVILS*, 60 Ark. 375, 46 Am. St. Rep. 208, 30 S. W. 425.

Liability of carrier after arrival of goods.

Cited in footnotes to *Allam v. Pennsylvania R. Co.* 39 L. R. A. 535, which denies carrier's liability for unloading goods on open platform during storm; *Seasongood v. Tennessee & O. River Transp. Co.* 49 L. R. A. 270, which holds carrier refusing to accept freight tendered liable for its theft; *Hardman v. Montana Union R. Co.* 39 L. R. A. 300, which holds carrier liable for permitting car incorrectly labeled "powder," to stand near warehouse, preventing firemen from attempting to put out fire.

Distinguished in *Kansas City, Ft. S. & M. R. Co. v. Sharp*, 64 Ark. 118, 40 S. W. 781, sustaining stipulation by initial carrier that liability of all carriers shall terminate at station of delivery, after which they shall be liable as warehousemen only.

Carrier's liability for acts of strikers, etc.

Cited in note (35 L. R. A. 624) on effect of strikes on rights and liabilities of carrier.

28 L. R. A. 83, *ST. LOUIS, A. & T. R. CO. v. FIRE ASSO.* 60 Ark. 325, 30 S. W. 350.

Subrogation of insurer.

Cited in footnotes to *Mason v. Marine Ins. Co.* 54 L. R. A. 700, which holds

insurer receiving abandonment of vessel injured by collision entitled to recover for loss of prospective earnings recovered; *New Hampshire F. Ins. Co. v. National L. Ins. Co.* 57 L. R. A. 692, which denies right of insurer, subrogated to mortgagee's claims against mortgagor, to insist on charging mortgagee, retaining more than its share from other policy, with amount paid to mortgagor; *United States Casualty Co. v. Bagley*, 55 L. R. A. 616, which holds landlord liable to insurer of tenant subrogated to his rights, for loss from defective condition of automatic fire apparatus.

Self-executing provisions of Constitution.

Followed in *Sherwood v. Wilkins*, 65 Ark. 315, 45 S. W. 988, holding constitutional provision against foreign corporation doing business in state without performing specified conditions not self-executing.

Cited in footnotes to *Anderson v. Whatcom County*, 33 L. R. A. 137, which holds constitutional provision for justices of peace receiving salary instead of fees, self-executing; *Illinois C. R. Co. v. Ihlenberg*, 34 L. R. A. 393, which holds constitutional provision that employee's knowledge of defect shall be no defense to action for injury, self-executing; *Criswell v. Montana C. R. Co.* 33 L. R. A. 554, which holds act imposing liability on domestic railroad companies for fellow servant's negligence abrogated by adopting Constitution against special privileges to foreign corporations; *State v. Kyle*, 56 L. R. A. 115, which holds self-operating, constitutional amendment for criminal prosecution by indictment or information only.

Foreign corporations.

Cited in *Keating Implement & Mach. Co. v. Favorite Carriage Co.* 12 Tex. Civ. App. 668, 35 S. W. 417, holding statute requiring foreign corporation to file articles of incorporation inapplicable to corporation not undertaking to do business in state.

28 L. R. A. 86, *YORKS v. TOZER*, 59 Minn. 78, 50 Am. St. Rep. 395, 60 N. W. 846.

Rights in partnership real estate.

Cited in footnote to *Darrow v. Calkins*, 48 L. R. A. 299, which holds intent to change grantor's interest from land to surplus shown by partner's conveyance of undivided half interest in lands to copartner for partnership uses.

Cited in notes (28 L. R. A. 129) on position of surviving partners in partnership real estate; (28 L. R. A. 170) on rights and position of creditors, purchasers, and other third parties in partnership real estate; (27 L. R. A. 449) as to when real estate will be considered partnership property.

Accounting between partners.

Cited in footnote to *Miller v. Freeman*, 51 L. R. A. 504, which sustains accounting between partners without dissolution of firm, where settlement at end of each season contemplated by partnership articles.

28 L. R. A. 89, *DYER v. MORSE*, 10 Wash. 492, 39 Pac. 138.

Rights in partnership real estate.

Cited in *Hannegan v. Roth*, 12 Wash. 699, 44 Pac. 256 (dissenting opinion), to point that survivors are entitled to possession and control of partnership property till administrator appointed.

Cited in notes (27 L. R. A. 449) as to when real estate will be considered partnership property; (28 L. R. A. 129, 132) on position of surviving partners in partnership real estate.

Right of action against surviving partners.

Cited as changed by statute in *Brigham Hopkins Co. v. Gross*, 20 Wash. 218, 54 Pac. 1127, holding action at law not maintainable against survivors pending settlement of partnership estate.

28 L. R. A. 110, *COM. v. BROWN*, 91 Va. 762, 21 S. E. 357.

Uniformity in taxation.

Cited in footnote to *Levi v. Louisville*, 28 L. R. A. 480, which holds void for lack of uniformity, ad valorem tax on realty and license tax on personalty.

Validity of license tax.

Cited in footnote to *State v. Applegarth*, 28 L. R. A. 812, which sustains, license tax on privilege of packing oysters.

Time and manner of objecting that statute is unconstitutional.

Cited in *Adkins v. Richmond*, 98 Va. 92, 47 L. R. A. 584, 81 Am. St. Rep. 702, 34 S. E. 967, holding that unconstitutionality of act may be raised by general demurrer, or even raised first on appeal.

Stating object for which license tax imposed.

Cited in *Morgan v. Com.* 98 Va. 816, 35 S. E. 448, holding object for which license tax imposed sufficiently stated by provision that it should be accounted for in general oyster fund, but should not be considered part thereof or used to defray expenses of oyster commission.

Title of act.

Cited in *Prison Asso. v. Ashby*, 93 Va. 670, 25 S. E. 893, holding title sufficient if things authorized by statute may fairly be regarded as in furtherance of object expressed in title; *Roby v. Sheppard*, 42 W. Va. 289, 26 S. E. 278, holding title of amendatory act sufficient if title of amended act covers amendment; *Laramie County v. Stone*, 7 Wyo. 291, 51 Pac. 605, holding provision for expressing subject-matter in title not applicable to acts in amendment of general statutes consolidated into a Code; *State v. Courtney*, 27 Mont. 385, 71 Pac. 308, holding title of amendatory act sufficient which cites number of section and chapter of Code amended; *State v. Anaconda Copper Min. Co.* 23 Mont. 501, 59 Pac. 854, holding requirement of iron-bonneted safety cage for vertical shafts of mines more than 300 feet deep, within title "to have the cages in all mines cased in;" *Bosang v. Iron Belt Bldg. & L. Asso.* 96 Va. 123, 30 S. E. 440, holding provision validating previous transactions between loan association and its members within title to provide new charter for it; *Lacey v. Palmer*, 93 Va. 164, 31 L. R. A. 824, 57 Am. St. Rep. 795, 24 S. E. 930, holding pool selling only form of betting punishable under statute prohibiting bets of all kinds, but entitled "An Act to Prevent Pool Selling and so forth;" *Trehv v. Marye*, 100 Va. 43, 40 S. E. 126, holding title of amendatory statute "to regulate salary" of public officer sufficient to embrace services to be rendered, including provision imposing duties formerly performed by another, and taking away latter's salary; *McNeeley v. South Penn Oil Co.* 52 W. Va. 642, 62 L. R. A. 576, 44 S. E. 508, holding act fixing three

years' limitation for suits to recover land leased for oil or minerals void because of failure to express object of act in title.

Plurality of subject of statute.

Cited in *Ingles v. Straus*, 91 Va. 217, 21 S. E. 490, holding only one object embraced in statute for special elections as to removal of courthouse, selection of site, and sale of old site; *Cook v. Marshall County*, 119 Iowa, 401, 93 N. W. 372, holding that title, "An Act to Revise, Amend, and Codify the Statutes in Relation to Crimes and Their Punishment," properly embraces provision taxing persons dealing in cigarettes.

Cited in note (55 L. R. A. 842, 846, 851) on power of legislature to enact a Code or compilation of laws, or amend many or undesignated sections thereof by a single statute.

Mode of collecting taxes or rents.

Cited in *Thomas v. Rowe*, 2 Va. Dec. 119, 22 S. E. 157, sustaining power of inspector to collect back rents for leased oyster grounds, and, in doing so, to pursue all remedies given county treasurer for collecting taxes.

28 L. R. A. 116, *Re HIGGINS*, 15 Mont. 474, 39 Pac. 506.

Jurisdiction over decedents' estates.

Cited in *Burns v. Smith*, 21 Mont. 266, 69 Am. St. Rep. 653, 53 Pac. 742, sustaining jurisdiction of district court, as court of equity, to try action to enforce agreement by decedent to devise share in his property; *State ex rel. Bartlett v. Second Judicial District Court*, 18 Mont. 484, 46 Pac. 259, denying jurisdiction of district court, as court of probate, to order special administrator to pay claim in advance of general administration; *State ex rel. Shields v. Second Judicial District Court*, 24 Mont. 13, 60 Pac. 489, holding verified petition by authorized person, and notice to all parties interested, necessary to obtain order to lease decedent's lands; *State ex rel. Kelly v. Second Judicial Dist. Court*, 25 Mont. 38, 63 Pac. 717, denying power of district court to compel administratrix to amend final account by inserting allowance to counsel, whose employment was matter of private agreement between them.

Obtaining discharge as executor.

Approved in *Joy v. Elton*, 9 N. D. 446, 83 N. W. 875, and *Re Sanborn*, 109 Mich. 196, 67 N. W. 128, holding executor required to show some act done to change character of his holding to that of trustee, and proper placing of fund, to entitle him to discharge as executor.

Appealable orders.

Distinguished in *Tuohy's Estate*, 23 Mont. 307, 58 Pac. 722, holding order directing executor to execute lease of certain realty not final for purposes of appeal.

Power of executors and administrators.

Cited in *Kohn v. McKinnon*, 90 Fed. 626, denying power of administrators to maintain ejectment for land claimed to be decedent's.

28 L. R. A. 127, *STATE v. EVANS*, 15 Mont. 539, 48 Am. St. Rep. 701, 39 Pac. 850.

What are subjects of forgery.

Approved in *Territory v. Delana*, 3 Okla. 584, 41 Pac. 618, holding certificate

by clerk of district court, stating that a juror is entitled to certain amount as fees, not subject of forgery, as such certificate is unauthorized.

Cited in footnotes to *Gordon v. Com.* 57 L. R. A. 744, which holds irregular check subject of forgery as to its effect as receipt, after it has been paid; *Hickson v. State*, 54 L. R. A. 327, which holds instrument requesting addressee to let bearer have "single rig," which signer promises to return, subject of forgery; *White v. Wagar*, 50 L. R. A. 60, which holds labels and trade-marks not subject of forgery.

Distinguished in *State v. Patch*, 21 Mont. 536, 55 Pac. 108, holding indictment for forging indorsement on certificate of deposit, which sets out certificate according to tenure, sufficient without alleging extrinsic facts.

28 L. R. A. 129, *GALBRAITH v. TRACY*, 153 Ill. 54, 46 Am. St. Rep. 867, 38 N. E. 937.

Transactions between parties in fiduciary relationship.

Approved in *Douthart v. Logan*, 190 Ill. 256, 60 N. E. 507, sustaining right of executor of deceased partner to such portion of profits as intestate's capital, wrongfully used, bears to entire capital; *Tennant v. Dunlop*, 97 Va. 242, 33 S. E. 620, holding that purchase by surviving partner from personal representative of deceased partner will be closely scrutinized, and allowed only when reasonable, fair, and just; *Ehrngren v. Gronlund*, 19 Utah, 421, 57 Pac. 268, holding agreement by minor with executor on latter's advice, permitting him while in failing circumstances, of which former has no knowledge, to retain legacy at specified rate of interest, void; *Hannah v. People*, 198 Ill. 89, 64 N. E. 776, denying right of public warehouseman to mix his own grain with that stored, and issue and buy warehouse receipts representing his own grain; *Hodgin v. People's Nat. Bank*, 125 N. C. 509, 34 S. E. 709, denying right of bank to apply deposits by surviving partner to payment of firm debt, without survivor's consent.

Rights in partnership real estate.

Approved in *Barnett v. Barnett*, 86 Ill. App. 629, holding that interest of partner in firm real estate, specifically found by decree and subject to no right of accounting or firm debts, may be reached by such partner or his creditors.

Cited in footnotes to *Steinberg v. Larkin*, 37 L. R. A. 195, which sustains agreement for surviving partner retaining partnership real estate, so as to vest title in him without formal conveyance of deceased partner's interest; *Darrow v. Calkins*, 48 L. R. A. 299, which holds intent to change grantor's interest from land to surplus shown by partner's conveyance of undivided half interest in lands to copartner for partnership uses.

Cited in notes. (28 L. R. A. 86) on rights of partners *inter se* in partnership real estate; (28 L. R. A. 170) on rights and position of creditors, purchasers, and other third parties in partnership real estate; (27 L. R. A. 449, 451, 491) as to when real estate will be considered partnership property; (27 L. R. A. 340, 350) on position of tenants in dower and by the curtesy, and of heirs and personal representatives of deceased partner in partnership real estate.

Imposing conditions to relief in equity.

Approved in *Carpenter v. Plagge*, 192 Ill. 97, 61 N. E. 530, holding mortgagor not entitled to aid of equity to redeem, without repayment of advances made by mortgagee after default, under oral agreement that mortgage should secure same.

28 L. R. A. 139, *PEOPLE v. DE FRANCE*, 104 Mich. 563, 62 N. W. 709.

Attack on credibility of witnesses.

Cited in *Barry v. People*, 29 Colo. 398, 68 Pac. 274, holding that credit of witness may be attacked by proof of independent facts inconsistent with his testimony.

28 L. R. A. 143, *CURTIS v. BRADLEY*, 65 Conn. 99, 48 Am. St. Rep. 177, 31 Atl. 591.

Questions considered on appeal.

Cited in *Enfield v. Ellington*, 67 Conn. 464, 34 Atl. 818, and *Thresher v. Dyer*, 69 Conn. 408, 37 Atl. 979, denying jurisdiction to retry questions of fact on appeal.

Admissibility of memoranda and other writings.

Approved in *State v. Brady*, 100 Iowa, 202, 36 L. R. A. 696, footnote p. 693, 62 Am. St. Rep. 560, 69 N. W. 290, holding memoranda made at ticket office at time of sale of tickets admissible; *Callihan v. Washington Water Power Co.* 27 Wash. 166, 56 L. R. A. 777, 91 Am. St. Rep. 829, 67 Pac. 697, holding street car conductor's trip report as to fares taken admissible to corroborate his evidence that he received no transfers on trip; *Bloomington Min. Co. v. Brooklyn Hygienic Ice Co.* 58 App. Div. 71, 68 N. Y. Supp. 699, upholding right of bookkeeper who testifies to having correctly entered certain item in her book, to read such entry.

Cited in *Palmer v. Hartford Dredging Co.* 73 Conn. 188, 47 Atl. 125, holding writing made by witness from which he has refreshed his memory inadmissible to corroborate his testimony; *Alabama & V. R. Co. v. Coleman*, 78 Miss. 186, 28 So. 828, holding memoranda admissible to refresh memory, only when made by witness himself, or by one under his direction, so that he knows or knew of truth of entry; *New Haven Trust Co. v. Doherty*, 74 Conn. 352, 50 Atl. 890, holding memorandum of details essential to full proof of transactions in issue, proved to have been correctly made at time of transactions in question, admissible.

Distinguished in *Gurley v. MacLennan*, 17 App. D. C. 179, holding memorandum of order for purchase of stock by broker, made when order given, inadmissible, where person making has distinct independent recollection of transaction; *Norwalk ex rel. Fawcett v. Ireland*, 68 Conn. 12, 35 Atl. 804, holding memorandum made by constable at time of attaching goods, partly from his own inspection and partly from information by assistants, inadmissible.

Conclusiveness of judgment.

Distinguished in *Fuller v. Metropolitan L. Ins. Co.* 68 Conn. 66, 57 Am. St. Rep. 84, 35 Atl. 766, holding adjudication in action for breach of contract not *res judicata* in subsequent action for breach by one of parties of different contract by him with third person, assigned to other party to former action.

28 L. R. A. 149, *WHITCOMB v. RODMAN*, 156 Ill. 116, 47 Am. St. Rep. 181, 40 N. E. 553.

Construing will according to testator's intention.

Approved in *Harrison v. Weatherby*, 180 Ill. 439, 54 N. E. 237, holding testator's intention an important question to determine in construing will; *Powell v. McDowell*, 194 Ill. 397, 82 N. E. 879, and *Rose v. Hale*, 185 Ill. 382, 76 Am. St. Rep. 40, 56 N. E. 1073, requiring testator's intent, if clearly shown by will, to prevail, though some words must be rejected; *King v. King*, 168 Ill. 282, 48 N.

E. 582, requiring adoption of construction of will, if possible, by which entire estate disposed of.

Rejection of false description in will.

Approved in *Huffman v. Young*, 170 Ill. 297, 49 N. E. 570, authorizing striking out of false words of description of devised premises, if enough remains to identify land intended; *Stewart v. Stewart*, 96 Iowa, 627, 65 N. W. 976, holding that south half of southeast quarter section passes under will devising south half of northeast quarter by one owning no land in latter quarter; *Vestal v. Garrett*, 197 Ill. 405, 64 N. E. 345, authorizing rejection, as meaningless, of words "southwest three fourths of the south half" in devise of "undivided southwest three fourths of the south half of the southwest quarter and the west half of the southeast quarter of" a specified section; *Portland Trust Co. v. Beatie*, 32 Or. 310, 52 Pac. 89, holding that entire unplatted tract of 160 acres in northeast portion of land claim passes under devise of all that part of land claim not laid off into lots and blocks, lying in the northeasterly portion of the claim and containing "85 acres more or less;" *Pate v. Bushong*, 161 Ind. 544, 63 L. R. A. 598, footnote p. 593, 100 Am. St. Rep. 287, 69 N. E. 291, sustaining devise of real estate falsely described, when what remains after rejecting false description reasonably corresponds with real estate indicated by extrinsic evidence.

Admissibility of extrinsic evidence.

Cited in *Flynn v. Holman*, 119 Iowa, 737, 94 N. W. 447, holding extrinsic evidence admissible to show that property described by section and range, without naming state and county, was certain property which testator owned.

Presumption of intent to dispose of whole estate.

Cited in *Primm v. Primm*, 111 Ill. App. 246, sustaining presumption that testatrix intended to dispose of whole estate.

Distinguished in *Williams v. Williams*, 189 Ill. 508, 59 N. E. 966, holding that devise of "northeast 40 acres" of specified section does not pass one tract in northwest quarter and two in southwest quarter of such section, aggregating 41 acres.

28 L. R. A. 153, *STATE ex rel. KINSWORTHY v. MARTIN*, 60 Ark. 343, 30 S. W. 421.

Legislative regulation of jurisdiction of justices of peace.

Cited in footnote to *Love v. Liddle*, 62 L. R. A. 482, which denies power to regulate jurisdiction of justices of peace by classification of cities in which they reside.

28 L. R. A. 157, *WOOD v. WOOD*, 59 Ark. 441, 43 Am. St. Rep. 42, 27 S. W. 641.

Jurisdiction of divorce suit.

Cited in footnotes to *Atherton v. Atherton*, 40 L. R. A. 291, which holds matrimonial domicile of wife leaving husband for cruelty may be changed by removal to other state; *Kempson v. Kempson*, 58 L. R. A. 484, which sustains jurisdiction in state where parties married and wife resides, of suit by her to enjoin fraudulent divorce suit by husband in other state.

Effect of divorce on dower or curtesy.

Cited in footnotes to *Land v. Shipp*, 50 L. R. A. 560, which holds wife's right of dower not affected by release made directly to husband in deed of separation;

Beaty v. Richardson, 46 L. R. A. 517, which denies forfeiture of right of dower of woman living in adultery after husband's abandonment for other woman; **Doyle v. Rolwing**, 55 L. R. A. 332, which holds right of curtesy defeated by divorce for wife's fault.

Running of limitations.

Cited in **Buck v. Davis**, 64 Ark. 348, 42 S. W. 534, holding that limitations continue to run against defendant in equity who makes no affirmative assertion of title, to the property in suit, until she procures herself to be made a party plaintiff.

28 L. R. A. 161, **GOLDTHWAITE v. JANNEY**, 102 Ala. 431, 48 Am. St. Rep. 56, 15 So. 560.

Rights in partnership real estate.

Approved in **Adams v. Church**, 42 Or. 274, 59 L. R. A. 784, footnote p. 782, 95 Am. St. Rep. 740, 70 Pac. 1037, holding timber-culture claims exempt from debts of owner or firm of which he is member, notwithstanding decree requiring him to convey to firm according to agreement; **Rockefeller v. Dellinger**, 22 Mont. 424, 74 Am. St. Rep. 613, 56 Pac. 822, holding actual use of land for partnership purposes not absolutely essential to make land conveyed to partners individually, partnership property.

Cited in notes (27 L. R. A. 449) as to when real estate will be considered partnership property; (28 L. R. A. 86) on rights of partners *inter se* in partnership real estate; (28 L. R. A. 129) on position of surviving partners in partnership real estate; (28 L. R. A. 161) on rights and position of creditors, purchasers, and other third parties in partnership real estate; (27 L. R. A. 340) on position of tenants in dower and by the curtesy, and of heirs and personal representatives of deceased partner, in partnership real estate.

Following trust funds.

Cited in footnotes to **Central Stock & Grain Exchange v. Bendinger**, 56 L. R. A. 875, which holds broker liable to refund to principal, money illegally taken from agent as margin on gambling transaction.

28 L. R. A. 176, **SHACKT v. ILLINOIS C. R. CO.** 94 Tenn. 658, 30 S. W. 742.

Misrepresenting value of goods shipped.

Cited in **Pacific Exp. Co. v. Pitman**, 30 Tex. Civ. App. 628, 71 S. W. 312, holding express company not liable beyond \$50 for loss of articles, when shipper, for purpose of obtaining lower rates, fraudulently concealed from express company their greater value.

Cited in footnote to **United States Exp. Co. v. Koerner**, 33 L. R. A. 600, which denies right of express company to additional compensation because value of package carried exceeded amount represented.

Limitation of liability.

Cited in **Western U. Teleg. Co. v. Beals**, 56 Neb. 418, 71 Am. St. Rep. 692, 76 N. W. 903, holding telegraph company liable for all damages from failure to correctly transmit and deliver telegram, notwithstanding agreement on blanks to contrary.

28 L. R. A. 178, *STATE v. ALSTON*, 94 Tenn. 674, 30 S. W. 750.

Equal protection and uniformity of taxation.

Cited in *State ex rel. Astor v. Schlitz Brewing Co.* 104 Tenn. 732, 78 Am. St. Rep. 941, 59 S. W. 1033, upholding class legislation based on natural and reasonable classification; *Debardelaben v. State*, 99 Tenn. 652, 42 S. W. 684, sustaining act prohibiting betting on horse race, except by persons on grounds; *Knorrville & O. R. Co. v. Harris*, 99 Tenn. 706, 53 L. R. A. 929, 43 S. W. 115, sustaining classification of railroads by imposing privilege tax on those not paying ad valorem taxes; *Sutton v. State*, 96 Tenn. 709, 33 L. R. A. 592, 36 S. W. 697, holding void, statute prohibiting stock running at large, in counties with population between 30,000 and 34,000, those having 55,000 or over, and counties adjoining county with population of 35,100 and over.

— In succession tax.

Approved in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 287, 42 L. ed. 1040, 18 Sup. Ct. Rep. 594, sustaining right to make exemptions, and discriminate between relatives and strangers in succession tax law; *Bailey v. Drane*, 96 Tenn. 18, 33 S. W. 573, upholding statute exempting husband, wife, parents, children, and lineal descendants from succession tax; *Re Wilmerding*, 117 Cal. 284, 49 Pac. 181, sustaining act imposing collateral inheritance tax on estates exceeding \$500 in value; *Black v. State*, 113 Wis. 223, 90 Am. St. Rep. 853, 89 N. W. 522, sustaining succession tax law exempting estates under \$10,000 in value from tax; *State v. Clark*, 30 Wash. 446, 71 Pac. 20; *Dixon v. Ricketts*, 26 Utah, 218, 72 Pac. 947; *Re Inheritance Tax*, 23 Colo. 493, 48 Pac. 535,—holding inheritance tax not a tax on property within constitutional provision as to uniformity, etc.

Cited in footnotes to *Drew v. Tift*, 47 L. R. A. 525, which requires uniformity and equal application in exemption from inheritance tax; *State ex rel. Garth v. Switzler*, 40 L. R. A. 280, which holds succession tax at different rates on legacies of different amounts invalid; *Billings v. People*, 59 L. R. A. 807, which sustains transfer tax on lineal descendants to whom life estate is given with remainder to lineal descendants, but exempting lineal descendants taking fee; *State ex rel. Gelsthorpe v. Furnell*, 39 L. R. A. 170, which sustains exemption from succession tax of estate of less than \$7,500; *State ex rel. Schwartz v. Ferris*, 30 L. R. A. 218, which holds void for lack of uniformity, exemption of estates less than \$20,000 in value.

What subject to succession tax.

Cited in *Eidman v. Martinez*, 184 U. S. 591, 46 L. ed. 704, 22 Sup. Ct. Rep. 515, holding American securities passing partly under will executed abroad by nonresident alien, and partly under intestate laws of Spain, not subject to inheritance tax imposed by war revenue act.

Nature of succession tax.

Approved in *Black v. State*, 113 Wis. 223, 90 Am. St. Rep. 853, 89 N. W. 522, and *Gelsthorpe v. Furnell*, 20 Mont. 306, 39 L. R. A. 174, 51 Pac. 267, holding right to receive property, and not property itself, taxed by succession tax; *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 492, 84 N. W. 1101, holding succession tax a tax on privilege of inheritance, not one on property; *Knowlton v. Moore*, 178 U. S. 55, 44 L. ed. 975, 20 Sup. Ct. Rep. 747, 9 Pa. Dist. R. 308, holding taxes on legacies and distributive shares of personalty, imposed by war rev-

venue act, one on their transmission, instead of on state's right to regulate devolution of property on death.

Due process in succession tax.

Cited in *Ferry v. Campbell*, 110 Iowa, 295, 50 L. R. A. 95, footnote p. 92, 81 N. W. 604, holding succession tax void for want of notice of proceedings to fix amount of tax.

28 L. R. A. 181, *KANSAS CITY, FT. S. & M. R. CO. v. WOK*, 13 C. C. A. 364, 31 U. S. App. 277, 66 Fed. 115.

Liability for injury to person on railroad track.

Distinguished in *Baltimore & O. R. Co. v. Anderson*, 29 C. C. A. 238, 56 U. S. App. 137, 85 Fed. 416, holding railroad company bound to keep lookout for travelers on track at highway crossing.

— To trespassers.

Cited in *St. Louis & S. F. R. Co. v. Bennett*, 16 C. C. A. 302, 32 U. S. App. 621, 69 Fed. 527, holding no duty owed by railroad company to keep lookout for trespassers on track; *Gulf, C. & S. F. R. Co. v. Bolton*, 2 Ind. Terr. 472, 51 S. W. 1085, holding no duty owed to intending passenger going to sleep on track, except not wantonly and unnecessarily to inflict injury after discovering him; *Felton v. Aubrey*, 20 C. C. A. 441, 43 U. S. App. 278, 74 Fed. 355, holding company not required, as to trespassers on track in sparsely settled part of city constituting switch yard, to give notice of movement of trains; *Baltimore & O. R. Co. v. Hellenthal*, 31 C. C. A. 417, 60 U. S. App. 156, 88 Fed. 120, holding railroad company liable for injury to child trespassing on track, if, after becoming aware of its danger, injury might have been prevented by reasonable care; *Farley v. Cincinnati, H. & D. R. Co.* 47 C. C. A. 159, 108 Fed. 17, holding existence of custom of mail clerks to enter car at place other than station, known to carrier or so general as to make it chargeable with notice, necessary to render carrier liable for injury to clerk so entering car.

Contributory negligence on track.

Cited in *Louisville & N. R. Co. v. McClish*, 53 C. C. A. 65, 115 Fed. 273, holding use of railway track as footpath in accordance with general custom, made at risk of one so using it, where no question of license or public crossing involved; *Spaven v. Lake Shore & M. S. R. Co.* 130 Mich. 587, 90 N. W. 325, denying liability of railway company to one guilty of contributory negligence in walking upon track with back towards incoming train, when there was ample space beside track.

Distinguished in *Illinois C. R. Co. v. Jones*, 37 C. C. A. 115, 95 Fed. 370, holding ten-year-old boy not guilty of contributory negligence *per se*, in driving across track without stopping, looking, or listening, where view was obstructed, bell of backing engine could not have been heard, and flagman ordinarily present was absent.

Direction of verdict.

Cited in *Detroit Crude-Oil Co. v. Grable*, 36 C. C. A. 103, 94 Fed. 82, requiring direction of verdict for defendant where trial judge held upon the evidence that plaintiff could not recover.

28 L. R. A. 187, *INGRAM v. COLGAN*, 106 Cal. 113, 46 Am. St. Rep. 221, 38 Pac. 315, 39 Pac. 437.

Prohibited gifts of public money.

Cited in footnotes to *Conlin v. San Francisco*, 33 L. R. A. 752, which denies legislative right to direct use of city money to pay claim based on merely moral obligation; Opinion of Justices, 49 L. R. A. 564, which holds legislative right to appropriate money for widow, heirs, etc., of deceased officer dependent on whether public good will be served; *Re Sanford*, 45 L. R. A. 788, which holds void, statute exempting certain persons from liability for inheritance tax, where liability has already accrued.

28 L. R. A. 192, *LOVE v. RALEIGH*, 116 N. C. 296, 21 S. E. 503.

Municipal liability.

Cited in footnote to *Bartlett v. Clarksburg*, 43 L. R. A. 295, which denies liability of town for injuries from fireworks, etc., fired on streets with consent of town authorities.

Powers of municipality.

Approved in *South Pasadena v. Los Angeles Terminal R. Co.* 109 Cal. 320, 41 Pac. 1093, denying power of city to pass ordinance regulating rates on street railway connecting such city with another.

28 L. R. A. 195, *STATE v. RUSSELL*, 90 Iowa, 569, 58 N. W. 915.

Disqualification of, or influence on, grand jurors.

Approved in *State v. Baughman*, 111 Iowa, 73, 82 N. W. 452, holding previous expression by grand juror of unqualified opinion of defendant's guilt not ground for setting aside indictment.

Cited in *State v. Boyd*, 56 S. C. 384, 34 S. E. 661, suggesting that relationship of grand juror to prosecutor is not ground for plea in abatement or quashing indictment.

Cited in notes (28 L. R. A. 199) on qualification of grand jurors; (28 L. R. A. 372) on improper influence or interference with grand jury.

Effect of divorce on right to prosecute for adultery.

Cited in *State v. Smith*, 108 Iowa, 444, 79 N. W. 115, sustaining right of husband on remarriage with wife after divorce, to institute complaint against third person for adultery committed with wife before divorce.

Qualification of women for office.

Cited in footnote to Opinion of Justices, 32 L. R. A. 350, which denies right to authorize appointment of women as notaries.

28 L. R. A. 206, *STATE ex rel. WITTER v. FORKNER*, 94 Iowa, 1, 62 N. W. 772.

Title of act.

Approved in *Rex Lumber Co. v. Reed*, 107 Iowa, 114, 77 N. W. 572, requiring subject of act to be expressed in title by use of general terms only; *State v. Schlenker*, 112 Iowa, 651, 51 L. R. A. 351, 84 Am. St. Rep. 360, 84 N. W. 693, holding title of original act, embodied in Iowa Code, § 4990, relating to penalty for selling adulterated milk, sufficient; *Des Moines v. Keller*, 116 Iowa, 649, 57 L. R. A. 243, 93 Am. St. Rep. 268, 88 N. W. 827, holding requirement for lamps

on bicycles on streets after dark within title "An Ordinance to Regulate Bicycles;" *Guaranty Sav. & L. Asso. v. Ascherman*, 108 Iowa, 153, 78 N. W. 823, holding contracts between association and its members within title "An Act to Amend § 1898 of the Code Relating to Building and Loan Associations."

Delegation of power.

Approved in *State v. Gerhardt*, 145 Ind. 472, 33 L. R. A. 325, 44 N. E. 469, sustaining act allowing majority of voters of township or ward, by remonstrance, to prevent granting of liquor license; *State ex rel. White v. Barker*, 116 Iowa, 105, 57 L. R. A. 250, 93 Am. St. Rep. 222, 89 N. W. 204, denying power of legislature to vest management of city water supply system in persons for whose election it provides.

Special legislation.

Cited in *Robert J. Boyd Paving & Contracting Co. v. Ward*, 28 C. C. A. 672, 55 U. S. App. 730, 85 Fed. 32, holding void, act authorizing cities accepting provisions of such act, to construct sewers, and charge cost on property benefited.

Cited in footnote to *Adams v. Beloit*, 47 L. R. A. 441, which sustains option giving specially chartered cities power to adopt provisions of general law.

Pardoning power.

Cited in footnote to *Territory v. Richardson*, 49 L. R. A. 440, which holds invalid, statutory limitations on pardoning power of governor.

Cited in note (34 L. R. A. 255) on legislative power to grant pardons or amnesty.

28 L. R. A. 216, *BALTIMORE & O. & C. R. CO. v. PAUL*, 143 Ind. 23, 40 N. E. 519.

Liability for injury to servant of another.

Approved in *Baltimore & O. & C. R. Co. v. Leathers*, 12 Ind. App. 567, 40 N. E. 1094 (dissenting opinion), on question of liability of railroad company for injury to employer of other company operating train on road of former company; *Chicago & G. T. R. Co. v. Hart*, 209 Ill. 425, 66 L. R. A. 91, 70 N. E. 654 (dissenting opinion), majority holding lessors not relieved from liability for injuries to lessee's employees from defective rolling stock, although resulting from latter's negligence, in absence of statute.

Cited in notes (37 L. R. A. 84) on which of two or more persons is master of another who is conceded to be servant of one of them; (44 L. R. A. 754) on liability of lessor of railroad for injuries caused by negligence of another company using road under lease, license, or other contract.

28 L. R. A. 220, *WILDBERGER v. HARTFORD F. INS. CO.* 72 Miss. 338, 48 Am. St. Rep. 558, 17 So. 282.

Insurance by agent of his own property.

Cited in footnote to *Zimmermann v. Dwelling-House Ins. Co.* 33 L. R. A. 698, which holds company not bound until approval of policy written by agent on own property.

28 L. R. A. 221, *HUNTON v. LUCE*, 60 Ark. 146, 46 Am. St. Rep. 165, 29 S. W. 151.

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28 L. R. A. 231, *CHEMICAL NAT. BANK v. ARMSTRONG*, 8 C. C. A. 155, 16 U. S. App. 465, 59 Fed. 372, 13 C. C. A. 47, 31 U. S. App. 75, 65 Fed. 573.

Powers of corporate officers.

Later appeal in *Aldrich v. Chemical Nat. Bank*, 176 U. S. 623, 44 L. ed. 613, 20 Sup. Ct. Rep. 498, Affirming 27 C. C. A. 602, 54 U. S. App. 462, 83 Fed. 556. Which Affirms 76 Fed. 339, holding national bank liable for money obtained by its vice president as loan from other bank, and used in its business, though loan not negotiated by its direction.

Approved in *Glidden & J. Varnish Co. v. Interstate Nat. Bank*, 16 C. C. A. 543, 32 U. S. App. 654, 69 Fed. 922, holding general manager of corporation empowered to borrow money to pay debts or purchase goods, and give corporate note for same; *First Nat. Bank v. Stone*, 106 Mich. 370, 64 N. W. 487, holding bona fide holder of note containing indorsement of bank entitled to protection, though bank officials negotiating transfer sought to defraud holder or stockholders of bank; *First Nat. Bank v. Michigan City Bank*, 8 N. D. 612, 80 N. W. 766, holding cashier of state bank unauthorized to borrow money unless authority specially given by directors.

Distinguished in *City Nat. Bank v. Chemical Nat. Bank*, 26 C. C. A. 197, 52 U. S. App. 209, 80 Fed. 861, holding national bank liable on notes executed by it through cashier having almost entire management, for amount not so great as to excite suspicion; *Wilson v. Pauly*, 18 C. C. A. 480, 37 U. S. App. 642, 72 Fed. 135, holding agency of president adopted and unauthorized acts ratified by bank suing on notes procured by him.

Amount of dividend on secured claims against insolvent.

Reaffirmed on later appeal in *Aldrich v. Chemical Nat. Bank*, 176 U. S. 639, 44 L. ed. 619, 20 Sup. Ct. Rep. 498, Affirming 27 C. C. A. 602, 54 U. S. App. 462, 83 Fed. 556. Which Affirms 76 Fed. 339, holding that collections from collateral securities made by creditor of insolvent bank after its insolvency is declared need not be deducted from amount on which dividends computed.

Approved in *London & S. F. Bank v. Willamette Steam-Mill Lumbering & Mfg. Co.* 80 Fed. 227, and *Doe v. Northwestern Coal & Transp. Co.* 78 Fed. 72, holding secured creditor of corporation not required to exhaust security before participating in general assets; *Merrill v. First Nat. Bank*, 21 C. C. A. 285, 41 U. S. App. 529, 75 Fed. 151, holding creditor of insolvent bank entitled to prove whole amount of claims against it, regardless of collateral security; *Williams v. Overholt*, 46 W. Va. 340, 33 S. E. 226, holding secured creditors entitled to dividend on full amount of claim, regardless of collateral; *Levy v. Metropolitan Nat. Bank*, 57 Ill. App. 149, holding claim of secured creditor allowable for amount owing at time of assignment, without reference to collateral; *Sullivan v. Erle*, 8 Colo. App. 13, 44 Pac. 948, holding secured creditor entitled to dividend on full amount of claim, although collateral sold by him after claim allowed; *Merrill v. National Bank*, 173 U. S. 136, 43 L. ed. 642, 19 Sup. Ct. Rep. 360, holding secured creditor entitled to dividends on full amount of claim, regardless of any sums received from collateral; after transfer of assets from debtor in insolvency; *Merrill v. National Bank*, 173 U. S. 136, 43 L. ed. 642, 19 Sup. Ct. Rep. 360, holding that secured creditor of insolvent bank may receive dividends on full amount of claim as proved, notwithstanding collections subsequently made from collaterals; *Central Trust Co. v. Richmond, N. I. & B. R. Co.* 41 L. R. A. 464, 15 C. C. A. 283, 31 U. S. App. 675, 68 Fed. 99, holding that subcontractors having common security will take *pro rata* on full amount of their claims without deduction for payments by principal contractor on account of his personal liability; *Re Hayes*, 37 Misc. 284, 75 N. Y.

Supp. 312, holding exchange of creditor of suspended member of New York stock exchange entitled to prove for entire amount of original claim, although dividends received out of sale of debtor's membership; *Pace v. Pace*, 95 Va. 798, 44 L. R. A. 462, 30 S. E. 361, holding surety paying obligation entitled to receive dividends against cosurety's insolvent estate on entire debt, till reimbursed for half of amount paid; *Chemical Nat. Bank v. World's Columbian Exposition*, 170 Ill. 91, 48 N. E. 331, Affirming 67 Ill. App. 178, holding acceptance from comptroller of currency of undisputed part of claim against insolvent bank not estopped against suing for balance.

Distinguished in *Erle v. Lane*, 22 Colo. 276, 44 Pac. 591, and *State Nat. Bank v. Esterly*, 69 Ohio St. 35, 68 N. E. 582, holding creditor who has realized on collaterals entitled to dividends on balance of claim only; *Marbury v. Kentucky Union Land Co.* 10 C. C. A. 412, 22 U. S. App. 267, 62 Fed. 353, holding Federal court required to follow state court's construction of state statute as to mode of distribution of fraudulent grantor's assets as to secured creditors; *New York Security & T. Co. v. Lombard Invest. Co.* 73 Fed. 545, authorizing allowance, in settling affairs of insolvent corporation, of claims maturing after appointment of receiver, but before order of distribution made; *Mercantile Nat. Bank v. Macfarlane*, 71 Minn. 501, 70 Am. St. Rep. 352, 74 N. W. 287, requiring dividend to be computed in favor of holder of notes indorsed by insolvent on balance remaining after deducting payments by principal debtor.

Disapproved in *Citizens' Bank v. State*, 8 Kan. App. 469, 54 Pac. 510, holding secured creditor of insolvent bank entitled to dividends only on deficiency remaining after exhausting collateral; *Jamison v. Adler-Goldman Commission Co.* 59 Ark. 553, 28 S. W. 35, requiring deduction of amounts realized on collateral securities, in ascertaining amounts due from insolvent decedent's estate; *Levy v. Chicago Nat. Bank*, 158 Ill. 96, 30 L. R. A. 382, footnote p. 380, 42 N. E. 129, requiring deduction of amount realized on collateral to time of making proofs before participating in dividends.

Interest on claims of different priorities against insolvent.

Approved in *Jourolmon v. Ewing*, 29 C. C. A. 44, 56 U. S. App. 149, 85 Fed. 105, requiring allowance of interest to date of decree where fund in court is subject to lien claims of different priorities; *Central Trust Co. v. Condon*, 14 C. C. A. 328, 31 U. S. App. 387, 67 Fed. 98, requiring allowance of interest on superior lien to time of satisfaction, in distributing proceeds of common security between liens of different priorities.

Distinguished in *Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.* 34 L. R. A. 632, 15 C. C. A. 299, 31 U. S. App. 704, 68 Fed. 116, authorizing inclusion of interest on overdue claims of subcontractors in amount of their liens, though property owner insolvent and funds applicable to inferior liens will be diminished.

What constitutes loan.

Cited in *Nebraska v. First Nat. Bank*, 88 Fed. 949, holding transaction by which state treasurer places state funds in bank subject to check, bank giving security and agreeing to pay interest on daily balances, deposit, not loan.

28 L. R. A. 242, *Re CLARK*, 65 Conn. 17, 31 Atl. 522.

What is judicial power.

Cited in *Norwalk Street R. Co's Appeal*, 69 Conn. 591, 39 L. R. A. 799, 37 Atl.

1080, holding approval and adoption of plan for street railway not within scope of judicial power.

Right to trial by jury.

Approved in *People ex rel. Akin v. Kipley*, 171 Ill. 70, 41 L. R. A. 784, 49 N. E. 229, holding trial of charges for removal of officers not within provision for trial by jury.

Summary punishment for contempt.

Cited in *Goodman v. People*, 90 Ill. App. 540, holding refusal of witness to affirm or be sworn not indictable, but summarily punishable as contempt, when done in course of judicial proceeding.

Determining constitutionality of statutes.

Approved in *State v. Travelers Ins. Co.* 73 Conn. 260, 57 L. R. A. 483, 47 Atl. 299; *Swanson v. Ottumwa*, 118 Iowa, 189, 59 L. R. A. 630, 91 N. W. 1048; *State v. Conlon*, 65 Conn. 484, 31 L. R. A. 57, 48 Am. St. Rep. 227, 33 Atl. 519,—holding that court will look at essence as well as form in determining whether law invades constitutional right.

28 L. R. A. 249, *CHICAGO, M. & ST. P. R. CO. v. MILWAUKEE*, 89 Wis. 506, 62 N. W. 417.

Taxes, assessments, and mechanic' liens on corporate property — Taxes.

Approved in *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 564, 63 N. W. 746, holding franchises and all other property of street railway company assessable as entirety as personalty at place of principal office; *Monroe Waterworks Co. v. Monroe*, 110 Wis. 20, 85 N. W. 685, holding unenforceable, agreement by city to pay water company sum equal to all assessments on portions of plant in street, as taxes must be assessed as lump sum on all corporate property; *Chicago & N. W. R. Co. v. Forest County*, 95 Wis. 89, 70 N. W. 77, holding tools, fuel, etc., used by railroad company in operating road not subject to distress for taxes in absence of special statutory authority.

Cited in footnote to *United R. & Electric Co. v. Baltimore*, 52 L. R. A. 772, which holds railroad right of way and tracks not within provision as to increasing rate of tax on "landed property."

— Local improvement assessments.

Approved in *Boston v. Boston & A. R. Co.* 170 Mass. 100, 49 N. E. 95, holding railroad right of way not exceeding 5 rods in width exempt from street improvement assessment.

Cited in *River Forest v. Chicago & N. W. R. Co.* 197 Ill. 348, 64 N. E. 364, holding that railroad right of way is not ordinarily benefited by local improvement; *Kansas City, P. & G. R. Co. v. Waterworks Improv. Dist. No. 1*, 68 Ark. 381, 59 S. W. 248, holding right of way and depot grounds of railroad company assessable for local improvements benefiting same; *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 312, 51 L. R. A. 769, footnote p. 763, 83 N. W. 1074, holding railroad right of way adjacent to, but occupying no portion of, street not subject to street paving assessment.

Cited in footnotes to *Detroit, G. H. & M. R. Co. v. Grand Rapids*, 28 L. R. A. 793, which denies right to assess railroad right of way for opening and paving street across it; *Philadelphia use of McCann v. Philadelphia & R. R. Co.* 34 L.

R. A. 564, which holds exemption of roadbed does not extend to strip 1,500 feet wide, used as coal and ore terminal; *Storrie v. Houston City Street R. Co.* 44 L. R. A. 716, which holds street railway company required to pave between rails and 6 inches each side; *Lake Shore & M. S. R. Co. v. Grand Rapids*, 29 L. R. A. 195, which holds sale of railroad property at terminus invalid as mode of collecting assessments; *Cincinnati, L. & N. R. Co. v. Cincinnati*, 49 L. R. A. 566, which denies right to assess entire cost of land taken for highway on remaining land of same owner.

Cited in notes (35 L. R. A. 40) on liability to local assessments for benefits, of property exempt from general taxation; (28 L. R. A. 252) on liability of railroad right of way to assessment for local improvements.

Disapproved in effect in *Indianapolis & V. R. Co. v. Capitol Paving & Constr. Co.* 24 Ind. 116, 54 N. E. 1076, holding railroad right of way bordering on street subject to assessment for street improvement; *Pittsburgh, C. C. & St. L. R. Co. v. Hays*, 17 Ind. App. 264, 44 N. E. 375, holding railroad right of way assessable for highway improvement.

— Mechanic's liens.

Cited in *Pittsburg Testing Laboratory v. Milwaukee Electric R. & Light Co.* 110 Wis. 643, 84 Am. St. Rep. 948, 86 N. W. 592, holding mechanic's lien enforceable against structures and property of railroad not essential to maintenance; *National Foundry & Pipe Works v. Oconto Water Co.* 68 Fed. 1009, holding that Federal court will not recede from position that mechanic's lien exists against property of water company, because state court has subsequently changed its construction of state statute in regard thereto.

28 L. R. A. 255, *LACHMAN v. BLOCK*, 47 La. Ann. 505, 17 So. 153.

Release of guarantor or surety.

Cited in footnotes to *Fidelity Mut. Life Asso. v. Dewey*. 54 L. R. A. 945, which holds sureties on bond of employee released by continuing him in employ without weekly reports as required by contract; *Connecticut General L. Ins. Co. v. Chase*, 53 L. R. A. 510, which holds concealment of prior shortage of agent, fraud releasing sureties on his bond.

Notice of acceptance of guaranty.

Cited in *Peoples' Bank v. Lemarie*, 106 La. 431, 31 So. 138, holding that notice of acceptance of guaranty may be waived by form of guaranty or implied from its terms.

Cited in footnote to *German Sav. Bank v. Drake Roofing Co.* 51 L. R. A. 758, which holds notice of acceptance necessary to bind guarantor.

Documentary evidence.

Cited in *Vredenburg v. Baton Rouge Sugar Co.* 52 La. Ann. 1672, 28 So. 122, holding answer in other suit admissible, but not conclusive against one not a party to such suit.

28 L. R. A. 273, *AVENT-BEATTYVILLE COAL CO. v. COM.* 96 Ky. 218, 28 S. W. 502.

Restrictions on right to contract.

Approved in *Harbison v. Knoxville Iron Co.* 103 Tenn. 446, 56 L. R. A. 322,

footnote p. 316, 76 Am. St. Rep. 682, 53 S. W. 955, sustaining act requiring redemption, on demand, of store orders, etc., given for wages.

Cited in footnotes to *Dixon v. Poe*, 60 L. R. A. 308, which holds void, act requiring redemption in money of checks issued in payment of wages; *State v. Haun*, 47 L. R. A. 369, which holds void, statute prohibiting payment, in other than lawful money, of wages of corporate employees; *St. Louis, I. M. & S. R. Co. v. Paul*, 37 L. R. A. 504, which sustains statute requiring railroad company to pay discharged employees all wages earned at contract rate without deduction for paying before time agreed on; *Harding v. People*, 32 L. R. A. 445, which holds invalid, act requiring weighing of coal hoisted from mines whose product is shipped by rail or water; *State v. Julow*, 29 L. R. A. 257, which holds unlawful, requirement, as condition of employment, that employee shall not belong to labor union; *Stimson Mill Co. v. Braun*, 57 L. R. A. 726, which holds void, statute depriving owner of protection from claims of subcontractors, where contract provides for payment with something other than money; *Third Nat. Bank v. Divine Grocery Co.* 34 L. R. A. 445, which denies right to prevent transfer of property in payment of debt while solvent; *Luman v. Hitchins Bros. Co.* 46 L. R. A. 393, which holds void, statute prohibiting officer of railroad and mining corporations only, being interested in mercantile business.

Cited in notes (28 L. R. A. 274) on validity and effect of statutes requiring wages to be paid in lawful money; (28 L. R. A. 344) on validity and effect of statutes regulating time of payment of wages; (32 L. R. A. 855) on police power to protect health of employees.

28 L. R. A. 277, *PERRY MASON SHOE CO. v. SYKES*, 72 Miss. 390, 17 So. 171.

Position of assignee for creditors.

Cited in *Weems v. Love Mfg. Co.* 74 Miss. 846, 21 So. 915, holding that general assignee who has given bond occupies dual relation as assignee and receiver.

Compensation of attorneys from insolvent estate.

Cited in *Tishomingo Sav. Inst. v. Allen*, 76 Miss. 131, 23 So. 305, requiring deduction of sums advanced by preferred creditors, from reasonable value of services of attorney employed by assignee for creditors, whose right to any compensation depends on sustaining of assignment; *Randolph v. Scruggs*, 190 U. S. 538, 47 L. ed. 1170, 23 Sup. Ct. Rep. 310, holding claim for professional services rendered assignee before adjudication of bankruptcy of assignor, in resisting such adjudication, not allowable as preferred claim.

28 L. R. A. 283, *LEWEY v. H. C. FRICK COKE CO.* 166 Pa. 536, 45 Am. St. Rep. 684, 31 Atl. 261.

Running of limitation.

Approved in *Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co.* 167 Pa. 152, 31 Atl. 484, holding running of limitations against action for value of water taken for other purposes than agreed not prevented by its being taken without water company's knowledge or consent; *Robins's Estate*, 16 Pa. Co. Ct. 379, holding creditors not barred from compelling legatees receiving voluntary payments from executors to contribute to payment of debts by lapse of five years from confirmation of executor's accounts; *Gotshall v. J. Langdon & Co.* 16 Pa. Super. Ct. 164, holding that limitation does not run against owner in favor of trespasser

taking coal from his land until actual discovery of trespass, or time when discovery reasonably possible; *Delaware & H. Canal Co. v. Hughes*, 183 Pa. 70, 38 L. R. A. 827, footnote p. 826, 41 W. N. C. 225, 63 Am. St. Rep. 743, 38 Atl. 568, holding title to coal under surface not obtained by adverse possession of surface; *Com. v. Folz*, 23 Pa. Super. Ct. 566, holding that statute runs from date of payment of money by title company to attorney to satisfy mortgage, which he does not do, in action by company against attorney, for its recovery.

Distinguished in *Noonan v. Pardee*, 200 Pa. 484, 55 L. R. A. 412, footnote p. 410, 86 Am. St. Rep. 722, 50 Atl. 255, holding that limitation begins to run as to damage by subsidence of surface over mine from time of removal of support; *Noonan v. Pardee*, 11 Kulp, 6, holding right of action against mine operator for failure to furnish sufficient support to surface owner barred after six years from removal of coal, leaving insufficient support.

28 L. R. A. 286, *GREELEY v. WHITEHEAD*, 35 Fla. 523, 48 Am. St. Rep. 258, 17 So. 643.

28 L. R. A. 289, *STATE v. HALL*, 115 N. C. 811, 44 Am. St. Rep. 501, 20 S. E. 729.

Extradition of fugitives from justice.

Cited in footnote to *State ex rel. McNichols v. Justus*, 55 L. R. A. 325, which holds requisition for extradition "by the acting governor" made by chief magistrate.

Who are fugitives from justice.

Cited in *Hyatt v. New York*, 188 U. S. 718, 47 L. ed. 664, 23 Sup. Ct. Rep. 456, holding one conclusively showing absence from state at time acts complained of were committed therein not fugitive from justice within meaning of extradition statute.

Cited in footnotes to *Ex parte Tod*, 47 L. R. A. 566, which holds person coming into state at another's request not fugitive from justice; *Drinkall v. Spiegel*, 36 L. R. A. 486, which holds prisoner in reformatory violating parole permitting going into one state, by going into another, a fugitive from justice; *Re Sultan*, 28 L. R. A. 294, which holds departure of purchaser to own home in other state after making criminally false representations, flight from justice.

Cited in note (28 L. R. A. 289) on who are fugitives subject to extradition.

Annotation to 28 L. R. A. 289, referred to particularly in *People ex rel. Corkran v. Hyatt*, 172 N. Y. 197, 60 L. R. A. 781, footnote p. 774, 92 Am. St. Rep. 706, 64 N. E. 825, holding one not corporeally present in state when crime committed not fugitive from justice in other state.

28 L. R. A. 294, *Re SULTAN*, 115 N. C. 57, 44 Am. St. Rep. 433, 20 S. E. 375.

Who are fugitives from justice.

Approved in *State v. Hall*, 115 N. C. 817, 28 L. R. A. 292, 44 Am. St. Rep. 501, 20 S. E. 729, holding constructive presence in state, of one shooting fatal bullet across boundary line from other state, insufficient to make him fugitive from justice.

Cited in footnotes to *Ex parte Tod*, 47 L. R. A. 566, which holds person coming into state at another's request not fugitive from justice; *People ex rel. Cork-*

ran v. Hyatt, 60 L. R. A. 774, which holds one not corporeally present in state when crime committed not fugitive from justice in other state; *State ex rel. McNichols v. Justus*, 55 L. R. A. 325, which holds requisition for extradition "by the acting governor" made by chief magistrate.

Questions considered on habeas corpus.

Approved in *Barranger v. Baum*, 103 Ga. 474, 68 Am. St. Rep. 113, 30 S. E. 524, denying right to inquire into motives or purposes of prosecution on habeas corpus for liberation of one sought to be extradited.

Cited in footnote to *State ex rel. McNichols v. Justus*, 55 L. R. A. 325, which holds that inquiry on habeas corpus as to validity of arrest of fugitive cannot extend back of warrant.

Jurisdiction of crime partly consummated in two places.

Cited in *State v. Patterson*, 134 N. C. 617, 47 S. E. 808, holding indictment in county where actual delivery of liquor, unlawfully sold, is made, not in violation of constitutional provision giving accused right of trial in district where crime was committed.

28 L. R. A. 297, *STATE v. WERNWAG*, 116 N. C. 1061, 47 Am. St. Rep. 873, 21 S. E. 683.

When title passes for purpose of license tax.

Approved in *Sims v. Norfolk & W. R. Co.* 130 N. C. 557, 41 S. E. 673, holding seller of sewing machines shipped into state to be delivered to consignees on payment of purchase price, subject to license tax.

28 L. R. A. 298, *STATE ex rel. EAVES v. RICKARDS*, 16 Mont. 145, 50 Am. St. Rep. 476, 40 Pac. 210.

Awarding public contract to lowest bidder.

Approved in *State ex rel. State Pub. Co. v. Smith*, 21 Mont. 48, 52 Pac. 641, holding acceptance of bid for exact supplies advertised for, proper in preference to slightly lower bid including any additional supplies of same kinds at specified prices for different kinds, some of which are higher than those of former bid; *Inge v. Board of Public Works* 135 Ala. 198, 93 Am. St. Rep. 20, 33 So. 678, holding that determination of lowest responsible bidder requires exercise of discretion and bona fide judgment of officer whose duty it is.

Cited in footnote to *Mulnix v. Mutual Ben. L. Ins. Co.* 33 L. R. A. 827, which denies legislative right to authorize secretary of state to purchase in open market instead of from lowest bidder.

Contract by municipality with officer.

Cited in footnote to *Sylvester v. Webb*, 52 L. R. A. 518, which sustains contract to erect school building by member of building committee and selectman of town.

When mandamus lies.

Approved in *State ex rel. Foerstel v. Higgins*, 76 Mo. App. 328, holding discretion of election commissioners in giving notice of primary elections not controllable by mandamus if faithfully and honestly exercised; *State ex rel. State Pub. Co. v. Smith*, 23 Mont. 49, 57 Pac. 449, denying power to control by mandamus governor's decision refusing to approve award of state printing contract by state board.

Cited in *People ex rel. Sherrill v. Guggenheimer*, 28 Misc. 744, 59 N. Y. Supp. 913, authorizing issuance of mandamus to compel city council to perform duty imposed by law; *State ex rel. Robert Mitchell Furniture Co. v. Toole*, 26 Mont. 32, 55 L. R. A. 648, 91 Am. St. Rep. 386, 66 Pac. 496, declaring that erroneous failure of state furnishing board to award contract to lowest responsible bidder not sufficient to justify issuance of writ of mandamus.

28 L. R. A. 304, *BYRNE v. SCHUYLER ELECTRIC MFG. CO.* 65 Conn. 336, 31 Atl. 833.

Transfer of corporate property.

Approved in *Summers v. Glenwood Gold & Silver Min. Co.* 15 S. D. 24, 86 N. W. 749, holding void, deed of entire corporate property executed without authority from stockholders by directors at meeting at branch office, of which no notice was given to corporation of which majority of such directors were also directors; *Morris v. Elyton Land Co.* 125 Ala. 277, 28 So. 513, holding that transfer of entire corporate property to other corporation for stock of latter, without unanimous consent of stockholders, will be set aside at suit of nonassenting stockholder; *Parsons v. Tacoma Smelting & Ref. Co.* 25 Wash. 505, 65 Pac. 765, holding lease of corporate property authorized by majority vote of stockholders voidable at suit of nonconsenting stockholder, unless authorized by articles of incorporation.

Cited in footnote to *McCutcheon v. Merz Capsule Co.* 31 L. R. A. 415, which holds sale of entire corporate plant for stock of new company *ultra vires*.

Consolidation of corporations.

Cited in note (52 L. R. A. 381) on right of corporations to consolidate.

28 L. R. A. 310, *CATER v. NORTHWESTERN TELEPH. EXCH. CO.* 60 Minn. 539, 51 Am. St. Rep. 543, 63 N. W. 111.

Additional servitudes.

Approved in *Ryan v. Preston*, 59 App. Div. 99, 69 N. Y. Supp. 100, holding bicycle sidepaths on highway not additional burden; *Castle v. Bell Teleph. Co.* 49 App. Div. 440, 63 N. Y. Supp. 482, holding conduit in street for telephone wires previously maintained on poles not additional burden; *Magee v. Overshiner*, 150 Ind. 131, 40 L. R. A. 372, 65 Am. St. Rep. 358, 49 N. E. 951, holding reasonable use of streets for equipment of telephone system, including poles and wires, not additional burden; *Northwestern Teleph. Exch. Co. v. Minneapolis*, 81 Minn. 152, 53 L. R. A. 186, 86 N. W. 69, holding telephone companies empowered to erect poles and wires in streets of city; *Bronson v. Albion Teleph. Co. (Neb.)* 60 L. R. A. 428, footnote p. 426, 93 N. W. 201, holding poles and wires permanently and exclusively occupying portion of street, additional burden.

Cited in footnotes to *Palmer v. Larchmont Electric Co.* 43 L. R. A. 672, which holds electric light poles not additional burden on fee in country highway; *Coburn v. New Teleph. Co.* 52 L. R. A. 672, which holds occupation of sidewalk with trench and pipes for conduit for telephone wires not additional burden.

Disapproved in *Donovan v. Allert*, 11 N. D. 297, 58 L. R. A. 780, footnote p. 775, 95 Am. St. Rep. 720, 91 N. W. 441, and *Krueger v. Wisconsin Teleph. Co.* 106 Wis. 107, 50 L. R. A. 304, footnote p. 298, 81 N. W. 1041, holding telephone poles and wires an additional burden.

How rights in street lost.

Cited in footnote to *French v. Robb*, 57 L. R. A. 956, which holds right to maintain, as against owner of soil, poles and wires rightfully placed in street to light it, not lost by wrongfully using for private lighting.

Who may exercise power of eminent domain.

Cited in *Northwestern Teleph. Exch. Co. v. Chicago, M. & St. P. R. Co.* 76 Minn. 345, 79 N. W. 315, holding telephone company entitled to exercise power of eminent domain equally with telegraph companies in establishing its line.

28 L. R. A. 318, *COM. v. HAYDEN*, 163 Mass. 453, 47 Am. St. Rep. 468, 40 N. E. 846.

Matters before grand jury.

Approved in *State v. Brewster*, 70 Vt. 350, 42 L. R. A. 448, 40 Atl. 1037, holding that presence of stenographer of state's attorney in grand jury room during taking and transcribing of testimony will not abate indictment in absence of prejudice.

(Cited in notes (28 L. R. A. 318) on competency of evidence before grand jury; (28 L. R. A. 324) on sufficiency of evidence before grand jury to sustain indictment.

Wife as witness against husband.

Cited in footnote to *People v. Curiale*, 59 L. R. A. 538, which denies wife's competency to testify to offenses committed by husband on her before marriage.

Evidence of marriage.

Approved in *Lowery v. People*, 172 Ill. 470, 64 Am. St. Rep. 50, 50 N. E. 165, holding that former marriage of defendant charged with bigamy may be established by his admissions.

Absence of criminal intent.

Approved in *Com. v. Murphy*, 165 Mass. 70, 30 L. R. A. 735, 52 Am. St. Rep. 496, 42 N. E. 504, holding ignorance that girl is under sixteen years of age no defense against punishment for criminal intercourse with her; *Russell v. State*, 66 Ark. 188, 74 Am. St. Rep. 78, 49 S. W. 821, holding honest and reasonable belief in divorce from first wife, no defense to prosecution for bigamy, though admissible in mitigation of punishment; *State v. Goulden*, 134 N. C. 747, 47 S. E. 450, holding neither belief that first wife is dead, nor ignorance that she is alive, defense to bigamy.

28 L. R. A. 324, *STATE v. PETERSON*, 61 Minn. 73, 63 N. W. 171.

Evidence before grand jury.

Cited in *United States v. Kimball*, 117 Fed. 161, holding evidence given by persons in investigation before grand jury to ascertain whether crime has been committed, not used elsewhere, because grand jury subsequently indict them.

Cited in notes (28 L. R. A. 323) on competency of evidence before grand jury; (28 L. R. A. 325) on sufficiency of evidence before grand jury to sustain indictment.

28 L. R. A. 328, *EDGERLY v. BARKER*, 66 N. H. 434, 31 Atl. 900.

Construction of will.

Approved in *Emery v. Haven*, 67 N. H. 504, 35 Atl. 940, holding that competent evidence on the question is considered to determine testator's intention, rather than arbitrary rules of construction; *Stratton v. Stratton*, 68 N. H. 585, 44 Atl. 609, holding that testator's intention is to be determined by court as a question of fact, instead of by applying arbitrary rules of law; *Page v. Eldredge Public Library*, 69 N. H. 576, 45 Atl. 411, holding that testator's intention is to be gathered from language of will as a whole, read in light of all surrounding circumstances; *Bray v. Miles*, 23 Ind. App. 481, 55 N. E. 510 (dissenting opinion), majority holding adopted child of deceased daughter of testator entitled to mother's share under will providing that in case of death of any of testator's children the share of deceased should go to her "children;" *Brown v. Berry*, 71 N. H. 244, 52 Atl. 870, upholding general intent as to education of grandchildren so as to allow payment therefor out of general fund, when specific fund pointed out is insufficient.

— Of statute.

Approved in *Opinion of Justices*, 66 N. H. 651, 33 Atl. 1076, requiring meaning of statute to be ascertained by due consideration of legal proof.

Perpetuities.

Cited in *Rolfe & R. Asylum v. Lefebvre*, 69 N. H. 243, 45 Atl. 1087, holding void, devise over to specified persons on failure of trustees of charitable trust to faithfully comply with its terms and conditions; *Troutman v. De Boissiere Odd Fellows' Orphans' Home*, 66 Kan. 27, 71 Pac. 286, holding conveyance to trustees and successors in perpetual trust to provide school for children of deceased members of secret society in violation of rule prohibiting perpetuities.

28 L. R. A. 344, *Re HOUSE BILL NO. 1230*, 163 Mass. 589, 40 N. E. 713.

Equal protection and restrictions on right to contract.

Approved in *Harbison v. Knoxville Iron Co.* 103 Tenn. 446, 56 L. R. A. 322, 76 Am. St. Rep. 682, 53 S. W. 955, sustaining act requiring redemption on demand, of store orders, etc., given for wages; *Com. v. Beatty*, 15 Pa. Super. Ct. 19, sustaining act limiting number of hours a day woman may be employed at specified kinds of work; *Re Morgan*, 26 Colo. 418, 47 L. R. A. 55, 77 Am. St. Rep. 269, 58 Pac. 1071, holding void, act against working more than eight hours a day in mines or smelters; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 542, 58 L. R. A. 754, 91 Am. St. Rep. 934, 90 N. W. 1098, holding void, act prohibiting discharge of employee because he belongs to labor organization; *Com. v. Danziger*, 176 Mass. 291, 57 N. E. 461, sustaining act requiring license as pawnbrokers by persons carrying on business of loaning money on mortgage, or pledge of wearing apparel, jewelry, etc.; *Considine v. Metropolitan L. Ins. Co.* 165 Mass. 466, 43 N. E. 201, upholding power of legislature to prescribe form of insurance policy, and to require attachment thereto of copies of all papers referred to therein; *Arkle v. Board of Comrs.* 41 W. Va. 481, 23 S. E. 804, holding act authorizing county court to hear charges against justice of peace, and remove him from office, void as conferring judicial powers not authorized by Constitution.

Cited in footnotes to *Harding v. People*, 32 L. R. A. 445, which holds invalid, act requiring weighing of coal hoisted from mines whose product is shipped by

rail or water; *St. Louis, I. M. & S. R. Co. v. Paul*, 37 L. R. A. 504, which sustains statute requiring railroad company to pay discharged employees all wages earned at contract rate without deduction for paying before time agreed on; *State v. Julow*, 29 L. R. A. 257, which holds unlawful, requirement, as condition of employment, that employee shall not belong to labor union; *Johnson v. Good-year Min. Co.* 47 L. R. A. 338, which holds void, statute giving wages superior lien on all corporate property unless paid monthly; *Third Nat. Bank v. Divine Grocery Co.* 34 L. R. A. 445, which denies right to prevent transfer of property in payment of debt while solvent.

Cited in notes (32 L. R. A. 854) on police power to protect health of employees; (28 L. R. A. 274) on validity and effect of statutes requiring wages to be paid in lawful money; (28 L. R. A. 344) on validity and effect of statutes regulating time of payment of wages.

Disapproved in *Republic Iron & Steel Co. v. State*, 160 Ind. 390, 62 L. R. A. 144, footnote p. 136, 66 N. E. 1005, holding statute requiring weekly payment of wages, notwithstanding private contracts to contrary, unconstitutional.

Restrictions on personal liberty.

Cited in *Com. v. Pear*, 183 Mass. 248, 66 N. E. 719, upholding statute authorizing board of health of town to require vaccination of all citizens.

28 L. R. A. 347, *SLOANE v. MARTIN*, 145 N. Y. 524, 45 Am. St. Rep. 630, 40 N. E. 217.

28 L. R. A. 361, *O'BRIEN v. GRANT*, 146 N. Y. 163, 40 N. E. 871.

Clearing-house business.

Cited in footnote to *Voltz v. National Bank*, 30 L. R. A. 155, which sustains right of bank guaranteeing payment of checks of other bank to enable it to clear such checks, to recover against drawers of certified check paid according to guaranty.

Unlawful preference by insolvent bank.

Cited in footnotes to *O'Brien v. East River Bridge Co.* 48 L. R. A. 122, Reversing 36 App. Div. 31, 55 N. Y. Supp. 206, which upholds right of director of insolvent bank to notify corporation of which he is president, and which has a deposit in such bank, of its imminent insolvency; *James Clark Co. v. Colton*, 49 L. R. A. 698, which holds void; payment by insolvent bank of check of company in which bank president is chief stockholder, and of note on which directors are indorsers.

Binding effect of by-laws on member of association.

Approved in *Haebler v. New York Produce Exchange*, 149 N. Y. 427, 44 N. E. 87, holding member of produce exchange bound by its charter and by-laws as to suspension from membership, to which he assented on becoming member.

28 L. R. A. 367, *CLAIR v. STATE*, 40 Neb. 534, 59 N. W. 118.

Interference with grand jury.

Followed without discussion in *Cobb v. State*, 40 Neb. 545, 57 N. W. 122.

Approved in *State v. Will*, 97 Iowa, 61, 65 N. W. 1010, sustaining right of court to direct grand jury to investigate matter as to violations of liquor law, but not to tell them that there is abundant evidence to warrant them in return-

ing indictments; *Blau v. State*, 82 Miss. 519, 34 So. 153, sustaining quashing of indictment returned by grand jury in accordance with expressed charge of court that evidence was sufficient upon which to find indictment, and referring particularly to annotation in 28 L. R. A. 367.

Cited in footnote to *State v. Brewster*, 42 L. R. A. 444, which holds indictment not avoided by presence of stenographer of state's attorney in grand jury room during taking of testimony.

Cited in note (28 L. R. A. 368) on improper influence on, or interference with, grand jury.

28 L. R. A. 375, *BAIRD v. BAIRD*, 145 N. Y. 659, 40 N. E. 222.

Parol evidence concerning writings.

Approved in *Parmerter v. Colrick*, 20 Misc. 205, 45 N. Y. Supp. 748, holding oral evidence admissible as to purposes and conditions of delivery of instrument for payment of money, if attempted enforcement would violate agreement or constitute fraud; *Lannon v. Lynch*, 160 N. Y. 488, 55 N. E. 5, holding parol evidence admissible in action between parties that note or security for payment of money was in fact delivered for purpose quite different from that appearing on its face; *Megowan v. Peterson*, 173 N. Y. 6, 65 N. E. 738, holding parol evidence admissible in action between parties that trustee of insolvent firm signing note, with word "trustee" after his name, was not personally liable, though representative character not shown on face of note; *Underwood v. Greenwich Ins. Co.* 161 N. Y. 425, 55 N. E. 936, holding parol evidence admissible that parties intended that binding slip, stating that it should be void on delivery of policy, should not survive rejection of policy and notice to that effect; *Snyder v. Ash*, 30 App. Div. 185, 51 N. Y. Supp. 772 (dissenting opinion), majority holding parol evidence incompetent that mortgage executed by husband and wife, covering undivided interest of both, was executed by wife merely to release inchoate right of dower in husband's interest; *Jamestown Business College Asso. v. Allen*, 172 N. Y. 302, 92 Am. St. Rep. 740, 64 N. E. 952 (dissenting opinion), majority holding parol evidence inadmissible to show condition upon which promissory note was delivered.

Criticised in *Newman v. Baker*, 10 App. D. C. 200, holding parol evidence inadmissible that parties agreed that deed delivered and accepted should not take effect unless one of parties should do certain acts within a year.

— As to consideration.

Approved in *Sparling v. Wells*, 24 App. Div. 587, 49 N. Y. Supp. 321, holding declarations of mortgagee while owner, that it was without consideration, admissible against assignee of mortgage; *Church v. Case*, 110 Mich. 625, 68 N. W. 424, holding parol evidence admissible that mortgage was executed without consideration, as mere form, without intent that it should be enforced; *Hanes v. Sackett*, 56 App. Div. 615, 67 N. Y. Supp. 843, holding parol evidence admissible that mortgagor on conveying premises agreed that grantee should receive balance not yet received from mortgagee; *Williams v. Whittell*, 69 App. Div. 346, 74 N. Y. Supp. 820, suggesting that parol evidence was admissible as to consideration for executory agreement, although in form of instrument under seal, reciting consideration of "\$1 and other valuable consideration;" *Nortrip v. Hermans*, 16 Misc. 314, 39 N. Y. Supp. 415, holding parol evidence admissible as to actual consideration for assignment of contract for purchase of land; *Hess v. Allen*, 24 Misc. 396, 53 N. Y. Supp. 413, holding oral evidence admissible, in action on contract to pay

law firm stated annual salary, alleged to be illegal in part because of agreements by attorneys to allow defendants percentage of fees from persons introduced by them, that it was represented that such fees would reduce amount to be paid to attorneys; *Mygatt v. Coe*, 147 N. Y. 466, 42 N. E. 17, holding parol evidence that husband received part of consideration expressed in deed of wife's premises in which he joined admissible on issue as to his possession of the premises; *Medical College Laboratory v. New York University*, 76 App. Div. 59, 78 N. Y. Supp. 673, holding parol evidence admissible to show conditions and consideration of conveyance, and failure thereof.

Estoppel by contract.

Approved in *Gibbins v. Campbell*, 148 N. Y. 414, 42 N. E. 1055, holding discharge of mortgage proper, where mortgagee accepts bequests in will of his father in which he asserted his ownership of same and directed its discharge; *Bennett v. Bennett*, 50 App. Div. 129, 63 N. Y. Supp. 387, holding unsealed instrument signed and acknowledged by son of testatrix after her death, reciting his release of all right, title, and interest in her estate in consideration of transfer of land by her to him, and acknowledging full satisfaction of all claims, ineffectual to release his interest; *Orth v. Orth*, 145 Ind. 210, 32 L. R. A. 308, 57 Am. St. Rep. 185, 42 N. E. 277 (dissenting opinion), majority holding parol promise to testator by sole beneficiary of will to dispose of part of property in favor of another person invalid as to realty or personalty coming within statute of frauds.

28 L. R. A. 379, *SULZ v. MUTUAL RESERVE FUND LIFE ASSO.* 145 N. Y. 563, 40 N. E. 242.

Comity.

Approved in *Re Learned*, 12 Misc. 564, 34 N. Y. Supp. 189, holding decision of foreign court as to commissions of committee of lunatic who appeared in action before such court entitled, by way of comity, to weight and respect by court appointing him.

Suits in different jurisdictions on insurance policy.

Approved in *Equitable Life Assur. Soc. v. Brown*, 187 U. S. 314, 47 L. ed. 193, 23 Sup. Ct. Rep. 123, sustaining right of suit against New York insurance company on policy payable there by one having possession of policy at domicile of insured in other state or territory; *Traflet v. Empire L. Ins. Co.* 64 N. J. L. 391, 46 Atl. 204, holding judgment against insurance company in action in New York by administratrix appointed in that state, bar to action in other state where insured died, by administrator appointed in latter state.

Distinguished in *Steele v. Connecticut General L. Ins. Co.* 31 App. Div. 393, 53 N. Y. Supp. 373, Reversing 22 Misc. 253, 49 N. Y. Supp. 647, holding that action on policy by administrator appointed in state of domicile of insured does not abate on commencement of action by ancillary administrator appointed in state where insurer incorporated and loan made, secured by assignment of policy.

Service on foreign corporation.

Approved in *Steele v. Connecticut General L. Ins. Co.* 31 App. Div. 397, 53 N. Y. Supp. 373, holding service on foreign insurance company by delivering writ to superintendent of insurance effective.

Binding effect of by-laws on member of association.

Cited in *Clark v. Mutual Reserve Fund Life Asso.* 14 App. D. C. 173, 43 L. R. A.

395, holding member of mutual insurance company conclusively presumed to know its constitution and by-laws.

Who are legal representatives, etc., of deceased.

Approved in *Leonard v. Harney*, 63 App. Div. 299, 71 N. Y. Supp. 546, holding widow of insured entitled to insurance where application provides for payment to such person as applicant directs in his will, which bequeathed policy to her, although policy itself was made payable to insured or his "legal representatives."

Who entitled to recover on policy.

Distinguished in *Grogan v. United States Industrial Ins. Co.* 90 Hun, 523, 36 N. Y. Supp. 687, holding instrument by which insured "requests and authorizes" company to pay the insurance to specified person entitles latter to maintain action on policy.

— Legal or personal representatives.

Approved in *Geoffroy v. Gilbert*, 5 App. Div. 102, 38 N. Y. Supp. 643, holding personal representative of daughter of insured entitled to policy payable to daughter or her legal representatives, where daughter dies before insured; *Beil v. Supreme Lodge, K. of H.* 80 App. Div. 614, 80 N. Y. Supp. 751, holding widow suing as individual on policy cannot waive prohibition against physician disclosing information obtained from patient, under statute authorizing waiver by "personal representatives" only; *Re Smith*, 42 Misc. 647, 87 N. Y. Supp. 725, holding that death certificate "payable to estate" passes to persons competent to take under statute of distributions, where order was established, not to increase estate of members, but to provide for proper beneficiaries.

Cited in note (30 L. R. A. 610) on who are "legal representatives" within meaning of life insurance policies.

28 L. R. A. 384, *PEOPLE v. RATHBONE*, 145 N. Y. 434, 40 N. E. 395.

Construction of Constitution.

Approved in *Re Brenner*, 35 Misc. 309, 71 N. Y. Supp. 44, holding Constitution of 1894 adopted with reference to all local offices then existing: *Rathbone v. Wirth*, 6 App. Div. 311, 40 N. Y. Supp. 535; *Re Sweeley*, 12 Misc. 182, 33 N. Y. Supp. 369; *People ex rel. McClelland v. Roberts*, 91 Hun, 111, 36 N. Y. Supp. 677, Affirming 13 Misc. 457, 34 N. Y. Supp. 641,—holding that it will be presumed that constitutional convention had existing laws in view when framing Constitution; *Smith v. St. Lawrence County*, 148 N. Y. 193, 42 N. E. 592, and *People ex rel. Balsom v. Mosher*, 163 N. Y. 36, 79 Am. St. Rep. 552, 57 N. E. 88, Affirming 45 App. Div. 74, 61 N. Y. Supp. 452, requiring effect to be given to all provisions of Constitution, if possible; *People ex rel. McClelland v. Roberts*, 91 Hun, 110, 36 N. Y. Supp. 677, Affirming 13 Misc. 455, 34 N. Y. Supp. 641, holding that intent and meaning of framers of, and people adopting, Constitution are to be gathered, if possible, from plain and ordinary meaning of words used; *Re Brenner*, 35 Misc. 315, 71 N. Y. Supp. 44, holding provision in new Constitution as to election of officers whose offices may "hereafter" be created not referable back to earlier Constitution so as to include office created before new Constitution; *State ex rel. Childs v. Sutton*, 63 Minn. 150, 30 L. R. A. 632, 56 Am. St. Rep. 459, 65 N. W. 262, denying power of court to indulge in speculation as to meaning or wisdom of plain constitutional provision; *People v. Dooley*, 69 App. Div. 545, 75 N. Y. Supp. 350 (dissenting opinion), as to lack of power to add to, or take away

from, Constitution by judicial interpretation; *People v. Wadhams*, 176 N. Y. 9, 68 N. E. 65, holding that public officer accepting privilege, accorded by pass, of riding in palace car, accepts free transportation within prohibition of constitutional provision.

Who are public officers, and their powers.

Approved in *Dempsey v. New York C. & H. R. R. Co.* 146 N. Y. 294, 40 N. E. 867, holding railroad policeman a public officer prohibited from receiving free pass for his own benefit; *Merzbach v. New York*, 163 N. Y. 22, 57 N. E. 96, sustaining right of person holding office of messenger and librarian in district attorney's office to recover for services as notary; *Re Searls*, 155 N. Y. 339, 49 N. E. 938, holding commissioner appointed to take testimony for use in other state empowered to determine in first instance pertinency and propriety of questions asked witness.

Cited in dissenting opinion in *People ex rel. MacDonald v. Leubischer*, 34 App. Div. 596, 54 N. Y. Supp. 869, Affirming 23 Misc. 497, 51 N. Y. Supp. 735, majority denying power of foreign notary appointed as commissioner to take testimony of certain witnesses for use in foreign court, to punish for contempt subpoenaed witness refusing to answer impertinent questions.

28 L. R. A. 386, *GIPPS BREWING CO. v. DE FRANCE*, 91 Iowa, 108, 51 Am. St. Rep. 329, 58 N. W. 1087.

When title passes.

Approved in *Buckingham v. Dake*, 50 C. C. A. 503, 112 Fed. 270, holding that title to personalty does not pass until delivery, under contract by which seller is to deliver at specified place and pay freight; *Julius Winkelmeyer Brewing Asso. v. Nipp*, 6 Kan. App. 736, 50 Pac. 956, holding sale of liquor made at place of delivery where freight charges are paid in first instance by purchaser, but are to be deducted from purchase price; *Cameron v. Fellows*, 109 Iowa, 538, 80 N. W. 567, holding that sale of beer takes place at customer's saloons, where agent having it in cold storage building takes orders at saloons, delivers liquor there, and collects his pay at same place.

Cited in *Wind v. Iler*, 93 Iowa, 321, 27 L. R. A. 221, 61 N. W. 1001, holding that title to liquor purchased in Nebraska, by resident of Iowa, and paid for on arrival of bills before liquor itself, passes in Nebraska although right is retained to test liquor on arrival and return that found unsatisfactory.

What is place of contract.

Cited in *Emerson Co. v. Proctor*, 97 Me. 364, 54 Atl. 849, holding that written proposal signed by one of parties in Maryland, and accepted and signed by the other in Maine, becomes Maine contract.

Cited in note (61 L. R. A. 426) on conflict of laws as to sales of intoxicating liquor.

28 L. R. A. 389, *RESSEGIEU v. SIOUX CITY*, 94 Iowa, 543, 63 N. W. 184.

Right to damages for change of street grade.

Approved in *Whaples v. Waukegan*, 95 Ill. App. 32, holding paving at other grade than that fixed by ordinance done by city at its peril; *Buser v. Cedar Rapids*, 115 Iowa, 685, 87 N. W. 404, holding owner entitled to damages on raising grade of street to height originally fixed by ordinance, although damages pre-

viously paid after raising grade to half height fixed; *Farmer v. Cedar Rapids*, 116 Iowa, 325, 89 N. W. 1105, denying recovery to abutting owner improving premises according to actual grade, when different grade has been established by ordinance, for damages from city's bringing street to established grade.

Cited in footnotes to *Searle v. Lead*, 39 L. R. A. 345, which denies right to grade street in front of premises without making compensation; *Less v. Butte*, 61 L. R. A. 601, which requires compensation for injury to abutting property by original establishment of street grade.

28 L. R. A. 391, *AXLINE v. SHAW*, 35 Fla. 305, 17 So. 411.

What passes as appurtenance.

Cited in footnote to *Forrest v. Vanderbilt*, 52 L. R. A. 473, which holds naphtha launch not appurtenance of yacht with which used as tender.

Riparian rights.

Cited in footnote to *New England Trout & Salmon Club v. Mather*, 33 L. R. A. 569, which denies right of action for mere crossing of uncultivated land to reach public waters for purpose of fishing.

Cited in note (40 L. R. A. 393) on separation of riparian rights from upland.

— Title to land under water.

Cited in footnote to *People v. Silberwood*, 32 L. R. A. 694, which holds fee of land under waters of Lake Erie in state.

Cited in note (45 L. R. A. 239) on title to land between high and low water marks.

28 L. R. A. 394, *HERR v. CENTRAL KENTUCKY LUNATIC ASYLUM*, 97 Ky. 458, 53 Am. St. Rep. 414, 30 S. W. 971.

Injunction against nuisance.

Distinguished in *Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Prison Commission*, 92 Fed. 803, sustaining right to injunction against polluting waters of stream used for supplying city, only when practically certain that substantial injury to plaintiff or detriment to public will follow; *Deaconess Home & Hospital v. Bontjes*, 104 Ill. App. 493, sustaining injunction against continuance of nuisance by charitable institution not suable at law.

Liability of public corporation.

Cited in footnote to *Hearns v. Waterbury Hospital*, 31 L. R. A. 224, which denies liability of charitable hospital for wrongful neglect of servants.

Distinguished in *Gross v. Kentucky Bd. of Managers*, 105 Ky. 850, 43 L. R. A. 706, 49 S. W. 458 (dissenting opinion), majority sustaining right to sue board of managers of World's Columbian Exposition for indebtedness due from it.

28 L. R. A. 395, *STATE v. FARRINGTON*, 59 Minn. 147, 60 N. W. 1088.

Sufficiency of indictment.

Approved in *State v. Nelson*, 79 Minn. 376, 82 N. W. 674, holding indictment charging defendant with embezzlement of money which came into his possession as assignee for creditors which money is also alleged to be property of assignor, without further allegations as to ownership, insufficient.

Cited in note (28 L. R. A. 395) on limitation of general allegations in indictment by specific allegations.

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28 L. R. A. 400, GIBSON v. SHEEHAN, 5 App. D. C. 391.

Liability of surety company indemnifying one of several sureties.

Criticized in American Surety Co. v. Boyle, 65 Ohio St. 494, 63 N. E. 73, holding surety company indemnifying one surety on replevin bond, in consideration of premium paid by principal obligor, not liable to cosureties in excess of amount of such premium.

28 L. R. A. 402, FLENNIKEN v. MARSHALL, 43 S. C. 80, 20 S. E. 788.

Construction of term "creditor."

Cited in Stewart v. Waterboro & W. R. Co. 64 S. C. 96, 41 S. E. 827, holding that term "creditor," in statute providing for consolidation of railroad companies, includes persons entitled to damages for torts.

28 L. R. A. 405, CHAPMAN v. ROCKFORD INS. CO. 89 Wis. 572, 62 N. W. 422.

Appraisal as condition precedent to action; validity of provision.

Approved in Zalesky v. Home Ins. Co 102 Iowa, 620, 71 N. W. 566, holding compliance with provisions in policy for appraisement, condition precedent to suit in absence of statute to contrary; Connecticut F. Ins. Co. v. Cohen, 97 Md. 304, 99 Am. St. Rep. 445, 55 Atl. 675, holding insured not prevented from maintaining suit upon policy by failure of appraisement, which occurred without his fault.

Cited in footnotes to Hartford F. Ins. Co. v. Hon, 60 L. R. A. 436, which holds void, agreement to settle all differences by arbitration, without suit; Mittenthal v. Mascagni, 60 L. R. A. 812, which sustains provision in contract for entertainment tour, that suits shall be brought in country of domicile.

Waiver of appraisal.

Approved in Hickerson v. German-American Ins. Co. 96 Tenn. 197, 32 L. R. A. 174, 33 S. W. 1041, holding existence of real difference arising out of honest effort between insurer and insured necessary to make provision for arbitration operative; Read v. State Ins. Co. 103 Iowa, 316, 64 Am. St. Rep. 180, 72 N. W. 665, holding unreasonable delay of appraisers to select an umpire and proceed with appraisement, waiver of provision for same; Hickerson v. German-American Ins. Co. 96 Tenn. 206, 32 L. R. A. 176, footnote p. 172, 33 S. W. 1041, holding unreasonable demand of appraiser for insurer that umpire be chosen who does not live in vicinity, waiver of arbitration; Northern Assur. Co. v. Samuels, 11 Tex. Civ. App. 422, 33 S. W. 239, holding failure of insurer to appear, by agent or otherwise, at time and place fixed for appraisement of fire loss, waiver of right of appraisement.

Cited in footnote to Grand Rapids F. Ins. Co. v. Finn, 50 L. R. A. 555, which holds appraisal of loss not required by policy, unless demand made by insurer.

28 L. R. A. 409, STATE *ex rel.* WHITE v. NEFF, 52 Ohio St. 375, 40 N. E. 720.

28 L. R. A. 414, *Re* COMASSI, 107 Cal. 1, 40 Pac. 15.

Revocation of will or abatement of legacy.

Cited in Hibberd v. Trask, 160 Ind. 504, 67 N. E. 179, holding that divorce and remarriage does not revoke will made by married woman before divorce.

Cited in footnotes to Flannigan v. Howard, 59 L. R. A. 664, which holds devises and legacies in will ratably abated by adoption of child after its execution: Glascott v. Bragg, 56 L. R. A. 258, which holds will in favor of third person re-

voked by marriage and adoption of child; *Re Kelly*, 56 L. R. A. 754, which holds woman's will not revoked by subsequent marriage; *Miles's Appeal*, 36 L. R. A. 176, which holds erasure of specific legacy from will not sufficient revocation of such legacy.

Distinguished in *Hilpire v. Claude*, 109 Iowa, 167, 46 L. R. A. 174, 77 Am. St. Rep. 524, 80 N. W. 332, holding will revoked by subsequent adoption of child.

28 L. R. A. 416, *HORNBROOK v. ELM GROVE*, 40 W. Va. 543, 21 S. E. 851.

Special acts repealing or amending municipal charters.

Approved in *Roby v. Sheppard*, 42 W. Va. 288, 26 S. E. 278, holding act amending charter of town containing population of more than 2,000, which takes from town of less than 2,000 some of its territory, not special act within prohibition against amending charters of latter kind of towns; *South Morgantown v. Morgantown*, 49 W. Va. 730, 40 S. E. 15, sustaining power of legislature to pass special act uniting territory of several municipalities into one, thus repealing charters of original ones.

Remedies for illegal annexation to municipality.

Cited in footnote to *State ex rel. Childs v. Crow Wing County*, 35 L. R. A. 745, which authorizes quo warranto to oust county from adjoining territory illegally annexed.

Collateral attack on corporate existence.

Cited in footnote to *Kuhn v. Port Townsend*, 29 L. R. A. 445, which holds mere irregularities no ground for attack on annexation of territory to city.

28 L. R. A. 421, *NUNNELLY v. SOUTHERN IRON CO.* 94 Tenn. 397, 29 S. W. 361.

Effect and validity of parol license.

Approved in *Long v. Mayberry*, 96 Tenn. 382, 36 S. W. 1040, holding that right in private way cannot be created by parol license.

Cited in note (49 L. R. A. 503, 522) on revocability of license to maintain burden on land after licensee has incurred expense in creating burden.

Right to pollute waters.

Cited in footnote to *Weston Paper Co. v. Pope*, 56 L. R. A. 899, which sustains liability for pollution of stream by discharge from strawboard works, though business skilfully conducted.

Liability of servant, agent, and corporate officer or stockholder.

Approved in *Cameron v. Kenyon-Connell Commercial Co.* 22 Mont. 320, 44 L. R. A. 511, footnote p. 508, 74 Am. St. Rep. 602, 56 Pac. 508, holding directors' liability in storage of explosives dependent on due care in managing business.

Cited in *Davenport v. Newton*, 71 Vt. 22, 42 Atl. 1087, holding director personally liable for acts of corporation, only when he does something making them his acts also.

Cited in footnote to *White v. Wilson*, 37 L. R. A. 197, which denies right of member of club, sharing in winnings of gambling, to recover on note for money loaned for use in game.

Cited in notes (28 L. R. A. 433) on liability of agent or servant to third persons for his own negligence or nonfeasance; (50 L. R. A. 645) on liability of

servants or agent for conversion, trespass, or other positive act of wrongdoing against third parties under orders of employer; (28 L. R. A. 421) on personal liability of officers of corporation for its torts or negligence.

28 L. R. A. 430, SEAMANS v. TEMPLE CO. 105 Mich. 400, 55 Am. St. Rep. 457, 63 N. W. 408.

Foreign corporations.

Approved in Buell v. Breese Mill & Grain Co. 65 Ill. App. 275, sustaining act requiring foreign insurance company to appoint attorney, etc., before doing business in state; Rough v. Breitung, 117 Mich. 56, 75 N. W. 147, holding action on contract not maintainable by foreign corporation doing business in state, without paying franchise fee required by statute; Commonwealth Mut. F. Ins. Co. v. Hayden Bros. 60 Neb. 638, 83 Am. St. Rep. 545, 83 N. W. 922, denying right of foreign insurance companies not complying with law as to doing business, to claim enforcement of contracts in courts of state; People's Mut. Ben. Soc. v. Lester, 105 Mich. 717, 63 N. W. 977, holding action to recover money collected by agent not maintainable by foreign mutual benefit society forbidden under penalty to do business in state; Cowan v. London Assur. Corp. 73 Miss. 328, 55 Am. St. Rep. 535, 19 So. 298, holding action for premiums not maintainable by corporation which has not complied with statutory requirements; Seamans v. Christian Bros. Mill Co. 66 Minn. 208, 68 N. W. 1065, denying right of foreign insurance company, whether incorporated or not, to recover premiums on contracts to insure property in state, entered into either within or without state, unless statutory requirements complied with; Indiana Millers' Mut. F. Ins. Co. v. People, 65 Ill. App. 358, holding officers of foreign insurance company not authorized to do business in state chargeable with knowledge of participation in forbidden act, in receiving application by mail from person in state for insurance on property therein and sending policy to him.

Cited in National Mut. Bldg. & L. Asso. v. Burch, 124 Mich. 67, 33 Am. St. Rep. 311, 82 N. W. 837, holding that right of foreign loan association to enforce contract without filing articles of incorporation, etc., cannot be first questioned on appeal.

Cited in footnote to People v. Gay, 30 L. R. A. 464, which sustains act prohibiting solicitation of insurance within state for nonresident without procuring certificate of authority.

Distinguished in Holder v. Aultman, M. & Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 269, holding valid, contract made elsewhere by foreign corporation which has not filed articles of incorporation, etc., although performable in state; People v. Hawkins, 106 Mich. 482, 64 N. W. 736, holding that agent *de facto* of foreign corporation may be convicted of embezzling its funds, although it has not complied with statute as to doing business in state; Root v. Sweeney, 12 S. D. 52, 80 N. W. 149, holding that foreign corporation has vested right to maintain action on contract entered into while courts held such action maintainable, notwithstanding failure to comply with statutory provisions as to filing copies of charters, etc.

State comity; conflict of laws.

Cited in Palmer v. Palmer, 26 Utah, 40, 61 L. R. A. 645, 99 Am. St. Rep. 820, 72 Pac. 3, holding contract for final separation of husband and wife not enforceable by courts of state under whose laws it is invalid.

Cited in footnotes to *Pope v. Hanke*, 28 L. R. A. 568, which holds that comity does not require execution of law against public policy; *Union Cent. L. Ins. Co. v. Pollard*, 36 L. R. A. 271, as to law governing effect of answers in application for policy and their use in evidence; *Swing v. Munson*, 58 L. R. A. 223, which holds insurance contract, valid where made, not enforceable in state where property located, whose laws directly violated.

Cited in note (63 L. R. A. 852) on conflict of laws as to contracts of insurance.

— **Stockholders' liability.**

Approved in *Finney v. Guy*, 106 Wis. 277, 49 L. R. A. 495, 82 N. W. 595, holding action to enforce liability of stockholders not maintainable in other state, where statute provides single method of enforcement by one suit in state courts against all stockholders.

Cited in note (34 L. R. A. 741) on right to enforce stockholder's liability outside of state of incorporation.

28 L. R. A. 433, *MAYER v. THOMPSON-HUTCHISON BLDG. CO.* 104 Ala. 611, 53 Am. St. Rep. 88, 16 So. 620.

Liability of servant or agent for his torts.

Approved in *Stiewel v. Borman*, 63 Ark. 38, 37 S. W. 404, holding agent having complete management of principal's business liable for failure to perform duty to protect third persons against injuries; *Luling v. Sheppard*, 112 Ala. 593, 21 So. 352, denying right to defend action of forcible entry and detainer on ground that defendant was acting as agent; *Lough v. John Davis & Co.* 30 Wash. 213, 59 L. R. A. 805, footnote p. 802, 94 Am. St. Rep. 848, 70 Pac. 491, holding agent liable for injury to tenants from failure to make necessary repairs.

Cited in footnotes to *Lawton v. Chilton*, 45 L. R. A. 616, which holds subcontractor for transporting mails liable in tort for negligent injury to postal employee; *Winston v. Illinois C. R. Co.* 55 L. R. A. 603, which authorizes joint or several action for death from negligence of agent of railroad company.

Cited in notes (28 L. R. A. 434) on liability of agent or servant to third persons for his negligence or nonfeasance; (27 L. R. A. 185) on master's civil responsibility for wrongful or negligent act of servant or agent towards one who has no claim on master by reason of contract, incipient or perfected; (28 L. R. A. 421, 427) on personal liability of officers of corporation for its torts or negligence.

Distinguished in *Kuhnert v. Angell*, 10 N. D. 61, 88 Am. St. Rep. 675, 84 N. W. 579, denying liability of agent for nonresident to lease and collect rents, for injuries by barbed wire fence across beaten trail, negligently built by subagent not negligently selected by agent.

Liability of bailor for acts of bailee or his servants.

Cited in footnote to *New Jersey Electric R. Co. v. New York, L. E. & W. R. Co.* 43 L. R. A. 849, which holds bailor not responsible to third person for negligence of bailee's servant in respect to bailment.

Personal liability of corporate officer.

Approved in *Lawlor v. French*, 14 Misc. 500, 35 N. Y. Supp. 1077, holding president and manager of theater company liable for injury to employee by kick from vicious horse used in play; *Cameron v. Kenyon-Connell Commercial Co.* 22 Mont. 320, 44 L. R. A. 511, footnote p. 508, 74 Am. St. Rep. 602, 56 Pac. 508, holding it duty of directors of corporation dealing in explosives to exercise such

reasonable supervision as will result in observance of utmost care by subordinates handling explosives.

Liability of master for servant's torts.

Cited in footnotes to *Nelson Business College Co. v. Lloyd*, 46 L. R. A. 314, which holds employer liable for servant's wilful or malicious acts in course of employment; *Baltimore Consol. R. Co. v. Pierce*, 45 L. R. A. 527, which holds master not relieved because injury by servant was wilful and malicious; *Alsever v. Minneapolis & St. L. R. Co.* 56 L. R. A. 748, which sustains liability for injuries caused by engineer operating blow-off cock to frighten children; *Galveston H. & S. A. R. Co. v. Zantzinger*, 47 L. R. A. 282, which sustains liability for engineer's ejection of trespasser from footboard of engine; *Southern R. Co. v. James*, 63 L. R. A. 257, which holds master liable for injury by night watchman shooting trespasser while running away after being arrested by him; *Dorsey v. Kansas City, P. & G. R. Co.* 52 L. R. A. 92, which holds carrier liable for death of trespasser falling under wheels in trying to escape from rocks thrown by brakeman; *Enright v. Pittsburgh Junction R. Co.* 53 L. R. A. 330, which denies right to eject or frighten ten-year-old boy from rapidly moving train; *Palmisano v. New Orleans City R. Co.* 58 L. R. A. 405, which denies master's liability for injury to boy running blindly against moving car after release by employee, who had caught and lectured him; *Guille v. Campbell*, 55 L. R. A. 111, which denies master's liability for injury to bystander by slipping of hook from servant's hand while pretending to throw at boys playing on cotton bales; *Lynch v. Florida C. & P. R. Co.* 54 L. R. A. 810, which denies company's liability for assault by station agent as result of personal quarrel; *Lamb v. Littman*, 53 L. R. A. 852, which holds employee liable for assault by cruel overseer on minor employee.

Admissibility of evidence of custom.

Cited in *Pennsylvania R. Co. v. Naive* (Tenn.) 64 L. R. A. 448, 79 S. W. 124, recognizing that evidence of custom which violates settled rule of law is inadmissible.

28 L. R. A. 439, *GREENBERG v. WHITCOMB LUMBER CO.* 90 Wis. 225, 43 Am. St. Rep. 911, 63 N. W. 93.

Master's duty to warn.

Cited in note (44 L. R. A. 60) on duty of master to instruct and warn servants as to perils of employment.

Liability of servant, agent, etc., for his acts.

Approved in *Luling v. Sheppard*, 112 Ala. 593, 21 So. 352, denying right to defend action of forcible entry and detainer on ground that defendant was acting as agent; *Lawlor v. French*, 14 Misc. 499, 35 N. Y. Supp. 1077, holding president and manager of theater company liable for injury to employee by kick of vicious horse used in play.

Cited in notes (28 L. R. A. 438, 442) on liability of agent or servant to third persons for his own negligence on nonfeasance; (28 L. R. A. 427) on personal liability of officers of corporation for its torts or negligence.

Joint action against master and servant.

Approved in *Charman v. Lake Erie & W. R. Co.* 105 Fed. 454, holding joint action maintainable against railroad company and foreman in switch yard for injury to servant through negligence of latter; *Howe v. Northern P. R. Co.* 30

Wash. 574, 60 L. R. A. 953, footnote p. 950, 70 Pac. 1100, authorizing joinder of master and negligent servant in action for injuries to other servant; Schumpert v. Southern R. Co. 65 S. C. 339, 95 Am. St. Rep. 802, 43 S. E. 813, sustaining joint action against railroad company and employee for injury from misconduct of latter, committed within scope of employment, and referring particularly to annotation in 28 L. R. A. 439.

Distinguished in Herman Berghoff Brewing Co. v. Przbylski, 82 Ill. App. 370, holding that judgment cannot be sustained jointly against master and servant, where master liable only on doctrine of *respondeat superior*; Helms v. Northern P. R. Co. 120 Fed. 393, denying joint action against railroad company and employee for injury to fellow employee, caused entirely by employee's negligence, when company's liability therefor is statutory only.

Disapproved in Warax v. Cincinnati, N. O. & T. P. R. Co. 72 Fed. 641, denying right to join master and servant in action for wrongful act of latter, for which former liable only on doctrine of *respondeat superior*.

28 L. R. A. 443, PATTEN PAPER CO. v. KAUKAUNA WATER-POWER CO. 90 Wis. 370, 48 Am. St. Rep. 937, 61 N. W. 1121, 63 N. W. 1019.

Rights in water.

Cited in Bigelow v. Draper, 6 N. D. 163, 69 N. W. 570, holding diversion of part of non-navigable stream not prevented by Constitution when needed for public use, if substantial integrity of stream is not impaired; Cox v. Howell, 108 Tenn. 134, 58 L. R. A. 491, 65 S. W. 868, holding grantor of undivided interest in mill to cotenant precluded from subsequently withdrawing water from stream for manufacturing purposes on his own land to injury of mill.

Cited in footnote to Priewe v. Wisconsin State Land & Improv. Co. 33 L. R. A. 645, which denies legislative power to authorize drainage of lake for private benefit, under guise of legislating for public health.

Overruled on second appeal in Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97, Reversing 93 Wis. 287, 66 N. W. 601, holding riparian owner not entitled to prevent diversion of surplus water power by grantees of government, which incidentally created such power in constructing works of public improvement to improve navigation, when opportunity to obtain compensation given (judgment in accordance with this decision was rendered in 104 Wis. 24, 83 N. W. 119).

28 L. R. A. 448, DOVER STAMPING CO. v. FELLOWS, 163 Mass. 191, 47 Am. St. Rep. 448, 40 N. E. 105.

Protection against imitation or unfair competition.

Approved in Hildreth v. D. S. McDonald Co. 164 Mass. 18, 49 Am. St. Rep. 440, 41 N. E. 56, holding manufacturer entitled to injunction against palpable imitation of particular combination of old and new features adopted by him to present his goods to public.

Cited in Flagg Mfg. Co. v. Holway, 178 Mass. 91, 59 N. E. 667, refusing to enjoin sale of zithers deliberately copied, as to form and arrangement, after unpatented zithers previously made and sold by another for use with patented music.

28 L. R. A. 451, *PATTEE v. PAIGE*, 163 Mass. 352, 47 Am. St. Rep. 459, 40 N. E. 108.

Situs of debt.

Approved in *Louisville & N. R. Co. v. Nash*, 118 Ala. 486, 41 L. R. A. 332, 72 Am. St. Rep. 181, 23 So. 825, holding situs of debt for purpose of garnishment at domicile of creditor.

28 L. R. A. 452, *BELL v. AMERICAN PROTECTIVE LEAGUE*, 163 Mass. 558, 47 Am. St. Rep. 481, 40 N. E. 857.

Liability of receiver or assignee for rent.

Approved in *Stoepele v. Union Trust Co.* 121 Mich. 282, 80 N. W. 13; *Dayton Hydraulic Co. v. Felsenthall*, 54 C. C. A. 541, 116 Fed. 965; *Johnston v. Robuck*, 114 Iowa, 532, 87 N. W. 491,—holding receiver surrendering leased premises occupied by him pending receivership not liable for rent subsequently accruing; *New Hampshire Trust Co. v. Taggart*, 68 N. H. 559, 44 Atl. 751, sustaining right of assignee of insolvent trust company to disaffirm lease, several months after appointment, where parties had agreed that his occupancy should not be adoption of lease; *Harrison v. J. J. Warren Co.* 183 Mass. 124, 66 N. E. 589, holding that possession by receiver of corporate property is possession by court, title thereto not vesting in him.

Cited in footnote to *Stokes v. Hoffman House*, 53 L. R. A. 870, which denies receiver's liability for rents accruing while in possession of leasehold property.

28 L. R. A. 455, *ATTY. GEN. v. SULLIVAN*, 163 Mass. 446, 40 N. E. 843.

When quo warranto lies, and its nature.

Cited in *Atty. Gen. v. Drohan*, 169 Mass. 535, 61 Am. St. Rep. 301, 48 N. E. 279, holding that information in nature of quo warranto will not lie to try membership in city committee of political party, as such office is not public one; *Haupt v. Rogers*, 170 Mass. 73, 48 N. E. 1080, holding remedy for incorporators of elevated railroad company and persons associated with them, whose rights have been violated by sale or attempted sale of corporate charter, is suit in their own names, instead of information in nature of quo warranto; *State ex rel. Folk v. Talty*, 166 Mo. 558, 66 S. W. 361, holding discretion, not controllable by courts, lodged with attorney general or circuit or prosecuting attorney to file or not to file information in nature of quo warranto to oust alleged usurper of office; *Atty. Gen. v. Adonai Shomo*, 167 Mass. 425, 45 N. E. 762, holding information in nature of quo warranto, to have charter forfeited for nonuser or misuser of franchise, a common-law proceeding not to be prosecuted by private attorney at expense of town.

Right to jury trial.

Cited in *State ex rel. Broatch v. Moore*, 56 Neb. 5, 76 N. W. 530, holding jury trial of issues of fact in quo warranto not demandable as matter of right.

Cited in footnote to *Salt Creek Valley Turnp. Co. v. Parks*, 28 L. R. A. 769, which upholds right to jury trial in proceedings to declare turnpike road abandoned.

28 L. R. A. 458, *GEIGER v. PERKIOMEN & R. TURNP. ROAD*, 167 Pa. 582, 31 Atl. 918.

Bicycle law.

Applied in *State ex rel. Bettis v. Missouri P. R. Co.* 71 Mo. App. 391, sustaining carrier's right to refuse to receive bicycle as ordinary baggage.

Cited in footnote to *Com. v. Forrest*, 29 L. R. A. 365, which holds use of bicycle on sidewalk along turnpike subject to penalty.

Cited in note (47 L. R. A. 290, 304) on bicycle law.

Distinguished in *Richardson v. Danvers*, 176 Mass. 414, 50 L. R. A. 127, 79 Am. St. Rep. 320, 57 N. E. 688, holding bicycle not within meaning of statute requiring highways to be kept reasonably safe for "carriages."

— License tax on bicycles.

Approved in *Green v. Erie*, 19 Pa. Co. Ct. 493, 6 Pa. Dist. R. 698, upholding license tax of \$1 a year on each bicycle owned by resident of borough; *Densmore v. Erie*, 20 Pa. Co. Ct. 520, 7 Pa. Dist. R. 359, upholding right of city to impose reasonable license tax to enforce police regulation on bicycles, but not as revenue measure.

Cited in footnote to *Davis v. Petrinovich*, 36 L. R. A. 615, which holds license tax on bicycles used for pleasure unauthorized.

— Tolls.

Cited in footnote to *Gloucester & S. Turnp. Co. v. Leppee*, 41 L. R. A. 457, which denies right to collect toll from bicycles on turnpike.

Disapproved in *Murfin v. Detroit & E. Pl. Road Co.* 113 Mich. 678, 38 L. R. A. 200, footnote p. 198, 67 Am. St. Rep. 489, 71 N. W. 1108, denying right to charge toll for bicycles.

Toll as tax.

Cited in *Johnstown, I. & W. Turnp. Co.'s Petition*, 5 Pa. Super. Ct. 67, 28 Pittsb. L. J. N. S. 60, 40 W. N. C. 484, holding reimbursement of turnpike company by levying toll, another method of levying taxes for keeping roads in repair.

28 L. R. A. 464, *LONGSHORE PRINTING & PUB. CO. v. HOWELL*, 26 Or. 527, 46 Am. St. Rep. 640, 38 Pac. 547.

Illegal combinations or conspiracies.

Approved in *Clemmitt v. Watson*, 14 Ind. App. 43, 42 N. E. 367, holding mere agreement between employees of coal mine to quit work unless certain employee is discharged, and quitting on refusal, causing working of mine to stop, not illegal conspiracy; *National Protective Asso. v. Cumming*, 170 N. Y. 348, 58 L. R. A. 148, 88 Am. St. Rep. 648, 63 N. E. 369, holding members of labor organization not liable for causing discharge of nonmembers by notifying employer that otherwise they will not work, if action taken for good of organization.

Cited in *Graham v. St. Charles Street R. Co.* 47 La. Ann. 217, 27 L. R. A. 417, 49 Am. St. Rep. 366, 16 So. 806, holding that compelling employees to withhold patronage from merchant as condition of employment may be actionable if actuated solely by malice; *Ætna Ins. Co. v. Com.* 106 Ky. 888, 45 L. R. A. 361, 51 S. W. 624, holding combination to maintain insurance rates not indictable at common law, though it may be a void contract.

Distinguished in *Beechley v. Mulville*, 102 Iowa, 611, 63 Am. St. Rep. 479,

71 N. W. 428, denying right of local insurance agent belonging to illegal combination to fix rates, to recover damages from other members for withdrawal of agency for violation of agreement; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 449, 57 L. R. A. 557, 90 Am. St. Rep. 126, 41 S. E. 553, holding illegal, combination of merchants to compel other merchant to sell at prices fixed by it, or prevent sales of goods to him.

Injunction against illegal combinations or strikes.

Approved in *Hopkins v. Oxley Stave Co.* 28 C. C. A. 123, 49 U. S. App. 709, 83 Fed. 936 (dissenting opinion), majority holding injunction authorized against members of unincorporated associations enforcing threatened boycott against contents of barrels, etc., not hooped by hand labor.

Cited in *Temple Iron Co. v. Carmanoskie*, 10 Kulp, 40, 7 Northampton Co. Rep. 261, holding injunction authorized against striking miners preventing, by force or intimidation, other employees from working.

Cited in footnote to *Plant v. Woods*, 51 L. R. A. 339, which sustains injunction against threats by labor union to make employers induce employees to leave other union and rejoin former.

Cited in note (28 L. R. A. 467) on injunction against strikes.

28 L. R. A. 476, *SHEAHAN v. DAVIS*, 27 Or. 278, 50 Am. St. Rep. 722, 40 Pac. 405.

Rights of accommodation indorser.

Approved in *Andrews v. Meadow*, 133 Ala. 446, 31 So. 971, holding accommodation indorser of bank check entitled to sue maker as if indorsement had been regular, if former is compelled to pay check.

28 L. R. A. 476, *TITUS v. ROCHESTER GERMAN INS. CO.* 97 Ky. 567, 53 Am. St. Rep. 426, 31 S. W. 127.

28 L. R. A. 480, *LEVI v. LOUISVILLE*, 97 Ky. 394, 30 S. W. 973.

Uniformity of taxation; what subject to tax.

Approved in *Gosnell v. Louisville*, 104 Ky. 215, 46 S. W. 722, holding street assessments not taxes within requirement for uniformity and equality; *Adams Exp. Co. v. Kentucky*, 166 U. S. 181, 41 L. ed. 964, 17 Sup. Ct. Rep. 527, upholding taxation of intangible property which has not been taxed as tangible property; *Western U. Teleg. Co. v. Norman*, 77 Fed. 26, upholding tax on tangible property owned by corporation, of such nature that it could not be owned by individual; *Elliott v. Louisville*, 101 Ky. 267, 40 S. W. 690, upholding license tax on attorneys as tax on business or vocation; *Bowser v. Thompson*, 103 Ky. 333, 45 S. W. 73, upholding license tax on vehicles used in city; *South Covington & C. Street R. Co. v. Bellevue*, 105 Ky. 293, 57 L. R. A. 61, 49 S. W. 23, holding ad valorem tax on franchise of street railroad company required by Constitution; *South Covington & C. Street R. Co. v. Bellevue*, 105 Ky. 293, 57 L. R. A. 61, 49 S. W. 23, sustaining collection of ad valorem tax on street railway company's franchise; *Bank of Kentucky v. Stone*, 88 Fed. 394, holding judgment that bank is exempt by statute from license tax conclusive against right to impose ad valorem tax on it.

Cited in footnotes to *Rode v. Siebe*, 39 L. R. A. 342, which holds discrimina-

tion between taxes on personalty and on realty justified by difference between them; *Pingree v. Dix*, 44 L. R. A. 679, which holds that taxation of telephone lines at average rate of taxes levied throughout state during previous year, violates rule as to uniformity.

Cited in note (60 L. R. A. 373) on constitutional equality in United States in relation to corporate taxation.

Validity of tax partly illegal.

Cited in *Whaley v. Com.* 110 Ky. 165, 61 S. W. 35, holding only that per cent of tax rate which goes beyond constitutional limitation is void.

Effect of failure to make valid levy.

Cited in *Somerset v. Somerset Bkg. Co.* 109 Ky. 556, 60 S. W. 5, holding that where city council has made void levy, it may subsequently make proper one; *Southern R. Co. v. Coulter*, 113 Ky. 676, 68 S. W. 873, sustaining retrospective assessment by existing board of valuation, of franchises of railroad corporations, for years when, under preceding boards, no certification thereof was made.

Injunction against taxes.

Cited in footnote to *Philadelphia Mortg. & T. Co. v. Omaha*, 57 L. R. A. 150, which denies right to restrain city from enforcing tax against property on which money loaned in reliance on treasurer's mistaken marking of taxes as paid.

Special legislation.

Cited in *Louisville v. Kuntz*, 104 Ky. 592, 47 S. W. 592, holding void, as special legislation, provision fixing limitation of six months for actions against cities of first class.

28 L. R. A. 486, *BAMBERGER v. CITIZENS' STREET R. CO.* 95 Tenn. 18, 49 Am. St. Rep. 909, 31 S. W. 163.

Presumption and burden of proof as to contributory negligence.

Approved in *Stewart v. Nashville*, 96 Tenn. 52, 33 S. W. 613, holding that blind person suing for injuries from falling into open water drain while unattended has burden of showing exercise of reasonable care.

Cited in footnote to *Parish v. Western & A. R. Co.* 40 L. R. A. 364, which holds presumption of negligence from killing person on track overcome by showing that person was sitting or lying on track at night.

Right of action for death of child.

Approved in *Holston v. Coal & I. Co.* 95 Tenn. 524, 32 S. W. 486, holding suit for wrongful killing of infant not maintainable by parent without administration; *Forsyth v. Central Mfg. Co.* 103 Tenn. 499, 53 S. W. 731, sustaining parent's right to recover for loss of services and expenses of care and treatment, of injured minor child, notwithstanding recovery by latter in action by himself; *Davidson Benedict Co. v. Severson*, 109 Tenn. 600, 72 S. W. 967, holding that statutory remedy for negligent killing provides for one action brought by personal representative, in which damages for injury to deceased, and incidental damages to his widow, children, or next of kin, are recoverable.

Contributory negligence of beneficiary of person killed.

Approved in *Wolf v. Lake Erie & W. R. Co.* 55 Ohio St. 532, 36 L. R. A. 815, footnote p. 812, 45 N. E. 708, holding that contributory negligence of beneficiaries, but not of administrator, will prevent recovery as to negligent benefi-

ciaries, but not as to those free from negligence; *Lewin v. Lehigh Valley R. Co.* 52 App. Div. 77, 65 N. Y. Supp. 49, sustaining father's right as administrator to recover for death of child killed by negligence, although he was contributorily negligent and is sole beneficiary.

Imputable negligence.

Cited in *Nashville R. Co. v. Howard* (Tenn.) 64 L. R. A. 439, footnote p. 437, 78 S. W. 1098, which holds mother's negligence in permitting four-year-old child to sit alone on seat of open street car, from which he is thrown by jolting due to defect in track, not imputable to him.

28 L. R. A. 492, *AMERICAN NAT. BANK v. JUNK BROS. LUMBER & MFG. CO.* 94 Tenn. 624, 30 S. W. 753.

Necessity of demand and notice of dishonor.

Approved in *Hutchinson v. Crutcher*, 98 Tenn. 436, 37 L. R. A. 93, 39 S. W. 725, Affirming on Rehearing 98 Tenn. 429, 37 L. R. A. 92, 39 S. W. 725, requiring presentation of note payable at insolvent bank to bank receiver administering at other place in same city.

Cited in footnotes to *Oakley v. Carr*, 60 L. R. A. 431, which holds notice of dishonor sufficient if sent to last indorser, who is agent for collection only, by first mail of day following dishonor; *Jackson v. McInnis*, 43 L. R. A. 128, which holds demand on receiver *pendente lite* of insolvent bank insufficient to bind indorser of certificate of deposit issued by bank; *Leonard v. Olson*, 35 L. R. A. 381, which requires notice to indorser of inability to make demand because of maker's removal from state; *Williams v. Parks*, 56 L. R. A. 759, which sustains notary's liability on bond for neglecting to give notice of dishonor.

Cited in note (61 L. R. A. 901) as to whom should notice of protest or non-payment be given after appointment of receiver, assignee, or other representative of insolvent.

28 L. R. A. 496, *LITTLE ROCK v. FITZGERALD*, 59 Ark. 494, 28 S. W. 32.

Expense of grading for sidewalk.

Cited in note (28 L. R. A. 496) on charging expense of grading for sidewalk on abutting owner.

28 L. R. A. 501, *ST. LOUIS S. W. R. CO. v. BERRY*, 60 Ark. 433, 46 Am. St. Rep. 212, 30 S. W. 764.

Other articles carried as baggage.

Approved in *Kansas City, Ft. S. & M. R. Co. v. McGahey*, 63 Ark. 348, 36 L. R. A. 783, 58 Am. St. Rep. 111, 38 S. W. 659, holding carrier knowingly receiving as baggage, property which it is not required to transport as such, estopped to deny that it was such; *Sherlock v. Chicago, R. I. & P. R. Co.* 85 Mo. App. 49, holding carrier liable for loss of other articles which carrier's agent chose to treat as baggage, if passenger ignorant of agent's want of authority.

28 L. R. A. 502, *STACKPOLE v. HALLAHAN*, 16 Mont. 40, 40 Pac. 80.

Adopted construction of statute.

Cited in *Stadler v. First Nat. Bank*, 22 Mont. 203, 74 Am. St. Rep. 582, 56 Pac. 111; *Murray v. Heinze*, 17 Mont. 364, 42 Pac. 1057; *Largey v. Chapman*,

18 Mont. 567, 46 Pac. 808,—holding construction of statute adopted with statute; *Oleson v. Wilson*, 20 Mont. 552, 63 Am. St. Rep. 639, 52 Pac. 372 (dissenting opinion), as to adoption of judicial construction of adopted statute; *King v. Pony Gold Min. Co.* 28 Mont. 86, 72 Pac. 309, overruling mistaken decisions in regard to construction of Code section adopted from other state, and adopting construction thereof of other state, previously overlooked.

Construction of statutes.

Cited in *Montana Ore Purchasing Co. v. Lindsay*, 25 Mont. 27, 63 Pac. 715, granting mandamus compelling exjudge to settle bill of exceptions in cause tried before him, when statute provides that judge whose term has expired "may" do so.

— Election statutes.

Approved in *Dickerman v. Gelsthorpe*, 19 Mont. 255, 47 Pac. 999, requiring liberal construction of election law; *State ex rel. Brooks v. Fransham*, 19 Mont. 289, 48 Pac. 1, and *Jones v. State*, 153 Ind. 451, 55 N. E. 229, holding that all provisions of election law should ordinarily, after election, be regarded as directory only in support of result; *State ex rel. Hewen v. Elliott*, 17 Wash. 23, 48 Pac. 734, holding one failing to have known errors in official ballots corrected, estopped, after defeat at polls, to complain of same; *Baker v. Scott*, 4 Idaho, 602, 43 Pac. 76, holding that defeated candidate, failing, before election, to avail himself of statutory permission to correct technical error in ballot, may not afterwards do so; *Blackmer v. Hildreth*, 181 Mass. 33, 63 N. E. 14, holding that informality in filing nomination paper does not render election thereafter held in good faith invalid; *Slaymaker v. Phillips*, 5 Wyo. 475, 47 L. R. A. 850, 40 Pac. 971 (dissenting opinion), majority holding void, ballot not stamped or indorsed with judge's name or initials; *Nall v. Tinsley*, 107 Ky. 460, 64 S. W. 187 (dissenting opinion), majority holding evidence insufficient to show that ballots were so thin as to render elections invalid; *Lynip v. Buckner*, 22 Nev. 439, 30 L. R. A. 357, 41 Pac. 702 (dissenting opinion), as to liberal construction of election law.

Cited in footnote to *Page v. Kuykendall*, 32 L. R. A. 656, which holds words "long term" after one of two names on ballot sufficient designation of office.

Nominations for office.

Cited in *State ex rel. Woody v. Rotwitt*, 18 Mont. 509, 46 Pac. 370, denying right to get one's name on ticket of regular party as regular nominee, solely by petition of voters nominating him as candidate of such party; *State ex rel. Russel v. Tooker*, 18 Mont. 547, 34 L. R. A. 318, 46 Pac. 530, holding nomination by political club not recognizable as that of county convention, where participants did not so consider themselves, minutes kept were those of club, and no notice had been given or primaries held.

Cited in footnote to *Todd v. Election Comrs.* 29 L. R. A. 330, which upholds requirement against candidate having name on official ballot more than once.

When new trial unnecessary after reversal.

Cited in *Kimpton v. Jubilee Placer Min. Co.* 16 Mont. 383, 41 Pac. 137, holding new trial unnecessary where error for which reversal is ordered arose in rendering wrong judgment on facts as found and undisputed.

28 L. R. A. 510, WEBSTER v. WIGGIN, 19 R. I. 73, 31 Atl. 824.

Affirmed in 19 R. I. 466, 34 Atl. 990, on motion to enter decision in accordance with opinion.

Application for allowance of interest on legacy in 19 R. I. 653, 35 Atl. 961.

Devise of subsequently acquired real estate.

Cited in Pierce's Petition, 20 R. I. 381, 39 Atl. 430, requiring testator's intention to devise land acquired after execution of will to clearly appear by express terms of will.

Charitable bequests and institutions.

Cited in Ingraham v. Ingraham, 169 Ill. 452, 48 N. E. 561, holding immediate and unconditional devotion of fund to charity, not time or manner of application or administration, test of validity of creation; Mason v. Perry, 22 R. I. 490, 48 Atl. 671, holding bequest to lodge of Free Masons for relief of needy members, with right to occasional "appropriations for proper forms of entertainment for members," invalid as permitting unapportioned application to other than charitable purposes.

Cited in footnotes to *Re John*, 36 L. R. A. 242, which sustains bequest for maintenance of free public schools; Alden v. St. Peter's Parish, 30 L. R. A. 232, which holds gift to rector, etc., of unincorporated religious society for church purposes, for charitable use; *People ex rel. Ellert v. Cogswell*, 35 L. R. A. 269, which sustains trust for educating boys and girls, not confined to poor ones; *People ex rel. New York Inst. for Blind v. Fitch*, 38 L. R. A. 591, which holds incorporated institution for blind, largely supported by state, subject to visitations and rules of board of charities.

28 L. R. A. 517, EDDY v. GRANGER, 19 R. I. 105, 31 Atl. 831.

Public grant of rights in streets or levees.

Cited in footnotes to Snyder v. Mt. Pulaski, 44 L. R. A. 407, which holds permission to use well in city street, license revocable at city's pleasure; Stevens v. Muskegon, 36 L. R. A. 777, which upholds city's power to grant, by contract, right to lay private sewer in highway; St. Paul v. Chicago, M. & St. P. R. Co. 34 L. R. A. 184, which denies power of legislature to give any part of levee as permanent site for freight warehouse.

Cited in note (61 L. R. A. 704) on duty and liability of municipality with respect to drainage.

28 L. R. A. 519, SCARVELL v. GRAND RAPIDS & I. R. CO. 103 Mich. 373, 61 N. W. 534.

Rights on revocation of license.

Cited in note (28 L. R. A. 519) on possession of licensee to defeat trespass after revocation of license.

28 L. R. A. 521, POWERS v. MORRISON, 88 Tex. 133, 53 Am. St. Rep. 738, 30 S. W. 851.

Setting off claims against heir or distributee.

Approved in Moore v. Moore, 89 Tex. 33, 33 S. W. 217, sustaining power to determine and allow, in partition suit, claim against decedent in favor of one of

heirs; *Oxsheer v. Nave*, 90 Tex. 573, 37 L. R. A. 101, footnote p. 98, 40 S. W. 7, sustaining right to set off indebtedness of distributee against distributive share, although purchased by creditor.

Cited in footnote to *Ainsworth v. Bank of California*, 39 L. R. A. 686, which authorizes setting off against claim due estate, debt due from deceased, though unmatured at time of death.

28 L. R. A. 523, *STATE ex rel. GUERGUIN v. McALLISTER*, 88 Tex. 284, 31 S. W. 187.

Construction of Constitution.

Approved in *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 186, 37 L. R. A. 194, 46 N. E. 77, sustaining, as practical construction of Constitution, practice followed for over forty years of circuit judges appointing city commissioners; *Bray v. Florence*, 62 S. C. 67, 39 S. E. 810, holding construction of constitutional provision by legislature, many members of which were members of constitutional convention, entitled to great consideration; *Ex parte Hart*, 41 Tex. Crim. Rep. 591, 56 S. W. 341 (dissenting opinion), majority construing state Constitution to allow establishment by legislature of corporation courts in cities, towns, and villages, in addition to justice's courts.

Constitutionality of provisions as to elections.

Approved in *People v. Dooley*, 69 App. Div. 544, 75 N. Y. Supp. 350 (dissenting opinion), majority holding void, act providing for election of city magistrates of Brooklyn in each congressional district, instead of having each elected by entire city.

Cited in footnote to *Denny v. State*, 31 L. R. A. 726, which denies right to create double districts, so as to give counties having less than population for one senator or representative a voice in electing more than one.

Cited in note (33 L. R. A. 142) on statutes restricting vote of electors to less than all, when several officers are to be chosen for same office.

28 L. R. A. 526, *WEATHERFORD, M. W. & N. W. R. CO. v. WOOD*, 88 Tex. 191, 30 S. W. 859.

Oral contracts not performable within year.

Approved in *Warner v. Texas & P. R. Co.* 164 U. S. 432, 41 L. ed. 503, 17 Sup. Ct. Rep. 147, holding oral contract by railroad company to maintain switch as long as other party needed it not within statute of frauds; *Johnston v. Bowersock*, 62 Kan. 160, 61 Pac. 740, sustaining oral contract to pay for certain horse power of water during continuance of written contract for ninety-nine years with privilege of terminating on three months' notice if business proves unprofitable; *Wynn v. Followill*, 98 Mo. App. 465, 72 S. W. 140, holding oral contract to provide hired help to care for infant child not within statute of frauds; *Clark v. Reese*, 26 Tex. Civ. App. 622, 64 S. W. 783, holding that contract to marry, to be within statute of frauds, must be expressly conditioned not to be performed within a year.

Cited in footnote to *Lewis v. Tapman*, 47 L. R. A. 385, which holds contract to marry "within three years" not within statute of frauds.

28 L. R. A. 528, *FAIRES v. COCKRILL*, 88 Tex. 428, 31 S. W. 190, 639.

Report of later appeal in *Mateer v. Cockrill*, 18 Tex. Civ. App. 392, 45 S. W. 751.

Right of subrogation or contribution.

Approved in *Darrow v. Summerhill*, 24 Tex. Civ. App. 217, 58 S. W. 158, holding surety paying principal's debt subrogated to rights of creditor; *Sparks v. Childers*, 2 Ind. Terr. 195, 47 S. W. 316, holding surety paying principal's note subrogated to rights of payee, and entitled to sue in equity on original obligation; *Merchants Nat. Bank v. McAnulty*, 89 Tex. 128, 33 S. W. 963, upholding existence of implied obligation that other co-obligors will contribute to indemnify one for any payment made by him in excess of his proportional part; *Armstrong v. Henderson*, 99 Va. 238, 37 S. E. 839, holding right of action for contribution by two of three joint purchasers, making several payments, several; *Hoxie v. Farmers & M. Nat. Bank*, 20 Tex. Civ. App. 466, 49 S. W. 637, holding right of contribution of executrix or deceased partner, paying judgment for firm debt against other partners, not barred by fact that judgment was in their favor; *Cleveland v. Carr*, 21 Tex. Civ. App. 410, 52 S. W. 1040, Prior Appeal in (Tex. Civ. App.) 40 S. W. 406, holding guarantors of notes secured by trust deed, becoming assignees of same, after applying maker's money without his consent to debt of partner due themselves, not entitled to foreclosure or recovery on same; *Deleshaw v. Edelen*, 31 Tex. Civ. App. 418, 72 S. W. 413, holding payment of judgment by one jointly liable, extinguishment thereof preventing claim for contribution although he takes an assignment of it.

Surety's rights against principal.

Approved in *Willis v. Chowning*, 90 Tex. 622, 59 Am. St. Rep. 842, 40 S. W. 395, sustaining right of action against principal debtor of surety paying debt valid as against him, though barred as to principal or his estate.

Distinguished in *Beville v. Boyd*, 16 Tex. Civ. App. 493, 41 S. W. 670, holding surety paying note which he has indorsed to himself entitled to sue principal maker and recover attorney's fees provided for therein.

Statute of limitation as to contribution.

Approved in *Darrow v. Summerhill*, 93 Tex. 105, 77 Am. St. Rep. 833, 53 S. W. 680, holding right of subrogation to securities held by another, arising on implied contract, subject to limitation of two years; *Miers v. Betterton*, 18 Tex. Civ. App. 434, 45 S. W. 430, holding claim against decedent's estate for amount paid as surety for decedent subject to two years' statute of limitations, as debt not evidenced by writing, where note not shown to belong to claimant; *Tate v. Winfree*, 99 Va. 256, 37 N. E. 956, holding statute of limitations of three years applicable to action by surety for contribution against cosurety as action is based on implied promise, not on written contract; *Darrow v. Summerhill*, 24 Tex. Civ. App. 218, 58 S. W. 158, holding that limitation does not begin to run against surety paying principal's debt, until such payment is made.

Cited in *Dwight v. Matthews*, 94 Tex. 536, 62 S. W. 1052, conceding action by factors to recover excess of draft paid by them over proceeds of merchandise sold by them for drawers not one for debt, evidenced by contract in writing within statute of limitations.

Parol evidence as to writing.

Cited in *Byars v. Byars*, 11 Tex. Civ. App. 567, 32 S. W. 925, holding parol

evidence inadmissible in action to cancel deed reciting cash consideration, that only consideration was grantee's promise to support grantors, which was rendered impossible by former's death.

28 L. R. A. 532, *HOUSE v. HOUSTON WATERWORKS CO.* 88 Tex. 233, 31 S. W. 179.

Liability to private individual for neglect of public duty.

Approved in *Missouri, K. & T. R. Co. v. Colburn*, 90 Tex. 233, 38 S. W. 153, denying right of individual to recover for depreciation, in value of investments near original depot grounds, from removal of depot in violation of statute; *Boston Safe Deposit & T. Co. v. Salem Water Co.* 94 Fed. 240, holding private citizen not entitled to recover from water company for loss of property by fire, due to its failure to maintain water pressure required by its contract with city; *Butterworth v. Henrietta*, 25 Tex. Civ. App. 468, 61 S. W. 975, denying liability of municipality undertaking to furnish water for prevention of fires, for loss to inhabitants resulting from failure to furnish sufficient supply.

Cited in *Adams v. Union R. Co.* 21 R. I. 139, 44 L. R. A. 276, 42 Atl. 515, holding benefit of contract by town with street car company, limiting rate of fare, available to passenger ejected after tendering amount allowed by contract.

Cited as *obiter* in *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 375, 35 S. W. 341, holding city voluntarily assuming, for its gain, to supply citizens with water, liable to patron for loss of property by fire through its negligence in failing to supply water.

Distinguished in *Missouri, K. & T. R. Co. v. Wood*, 95 Tex. 232, 56 L. R. A. 595, 93 Am. St. Rep. 834, 66 S. W. 449, holding railroad company negligently permitting escape of employee suffering from smallpox for whom it is caring, liable to persons to whom he communicates disease.

City's right of action on contract with it.

Cited in *Cleburne Water, Ice & Lighting Co. v. Cleburne*, 13 Tex. Civ. App. 143, 35 S. W. 733, sustaining right of city to maintain action to restrain water company from enforcing higher rates than those stipulated in its contract with such company.

Cited in footnote to *Ukiah City v. Ukiah Water & Improv. Co.* 64 L. R. A. 231, which holds contract to compensate municipality for loss of property by fire from negligent failure to furnish water not shown by mere acceptance of and payment for furnishing of water for general fire purposes.

Cited in note (61 L. R. A. 95, 96, 97) on establishment and regulation of municipal water supply.

28 L. R. A. 538, *GULF, C. & S. F. R. CO. v. SHIEDER*, 88 Tex. 152, 30 S. W. 902.

Cited without special discussion in *Gulf, C. & S. F. R. Co. v. Younger*, 10 Tex. Civ. App. 146, 29 S. W. 948.

Burden of proving contributory negligence.

Approved in *Houston & T. C. R. Co. v. White*, 23 Tex. Civ. App. 287, 56 S. W. 204; *Gulf, C. & S. F. R. Co. v. Finley*, 11 Tex. Civ. App. 72, 32 S. W. 51; *Hegan v. Missouri, K. & T. R. Co.* 88 Tex. 685, 32 S. W. 1035,—holding burden of proving contributory negligence on party alleging it; *Missouri, K. & T. R. Co. v. White*,

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22 Tex. Civ. App. 426, 55 S. W. 593; *Rigdon v. Temple Waterworks Co.* 11 Tex. Civ. App. 545, 32 S. W. 828; *Hillsboro v. Jackson*, 18 Tex. Civ. App. 326, 44 S. W. 1010; *Lee v. International & G. N. R. Co.* 89 Tex. 587, 36 S. W. 63; *Missouri, K. & T. R. Co. v. Scarborough*, 29 Tex. Civ. App. 198, 68 S. W. 196; *Missouri, K. & T. R. Co. v. Gist*, 31 Tex. Civ. App. 666, 73 S. W. 857; *Gulf, C. & S. F. R. Co. v. Hill*, 29 Tex. Civ. App. 19, 70 S. W. 103; *St. Louis, S. W. R. Co. v. Martin*, 26 Tex. Civ. App. 232, 63 S. W. 1089,—holding burden of proving contributory negligence on defendant, unless shown by plaintiff's pleadings or evidence; *Hammon v. San Antonio & A. P. R. Co.* 13 Tex. Civ. App. 635, 35 S. W. 872, holding suspicion of plaintiff's negligence, arising from facts adduced by him, insufficient to throw on him burden of disproving such negligence; *Blankenship v. Galveston, H. & S. A. R. Co.* 15 Tex. Civ. App. 56, 38 S. W. 216, requiring plaintiff whose allegations establish prima facie contributory negligence, to plead other facts rebutting such negligence.

Cited in *Texas & P. R. Co. v. Black*, 23 Tex. 126, 57 S. W. 330, holding facts as to contributory negligence, admitted in plaintiff's petition, available to plaintiff without being pleaded by it; *Chittim v. Martinez*, 94 Tex. 145, 58 S. W. 948, holding charge as to which party has burden of proof not improper merely because evidence on issue submitted to jury is conflicting; *Missouri, K. & T. R. Co. v. Jamison*, 12 Tex. Civ. App. 693, 34 S. W. 674, requiring defense of contributory negligence to be pleaded and proved; *Texas & P. R. Co. v. Curlin*, 13 Tex. Civ. App. 509, 36 S. W. 1003, holding it necessary to submit issue of contributory negligence to jury, where only allegation as to negligence was that those in charge of hired cab in which plaintiff was riding were negligent; *Kroeger v. Texas & P. R. Co.* 30 Tex. Civ. App. 91, 69 S. W. 809, denying that burden to show absence of contributory negligence is upon plaintiff in action to recover damages for being run over by train while walking upon railroad track.

Contributory negligence at railroad crossing.

Cited in footnote to *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 803, which holds that failure to look when within 30 feet of track does not prevent recovery.

Question for jury as to contributory negligence.

Approved in *Western U. Teleg. Co. v. Jeanes*, 88 Tex. 232, 31 S. W. 186, holding that contributory negligence in failing to send message for postponement of father's funeral after receiving delayed message announcing his death should be submitted to jury.

Sufficiency of pleadings.

Approved in *Woolley v. Sullivan*, 92 Tex. 37, 45 S. W. 377, holding demurrer to petition for new trial properly sustained, where no sufficient cause for setting aside the judgment is alleged in petition; *Texas & P. R. Co. v. Magrill*, 15 Tex. Civ. App. 358, 40 S. W. 188, holding disobedience of orders by brakeman's riding on engine at time of accident to him not raised by general plea of contributory negligence.

Right to instruction applying law to facts; repeating instructions.

Approved in *Mitchell v. Western U. Teleg. Co.* 12 Tex. Civ. App. 280, 33 S. W. 1016; *St. Louis S. W. R. Co. v. Casseday*, 92 Tex. 527, 50 S. W. 125; *Houston & T. C. R. Co. v. White*, 23 Tex. Civ. App. 288, 56 S. W. 204; *Dallas v. Jones*, 93 Tex. 44, 49 S. W. 577,—holding party entitled to special charge applying law to particular facts of case; *Missouri, K. & T. R. Co. v. McGlamory*, 89 Tex. 639.

35 S. W. 1058, upholding right of defendants to instruction requiring jury to find whether evidence establishes existence of any specified group of facts which would establish plea of contributory negligence; *Missouri, K. & T. R. Co. v. Rogers*, 91 Tex. 58, 40 S. W. 956, holding instruction as to failure to stop, look, and listen before driving on railroad track properly refused where it only leaves to jury, by inference, question whether such failure was negligence, or contributed to injury; *Texas & P. R. Co. v. Hagood*, 21 Tex. Civ. App. 443, 52 S. W. 574, and *Missouri, K. & T. R. Co. v. Parker*, 20 Tex. Civ. App. 474, 49 S. W. 717, holding instruction as to contributory negligence asked by defendant, properly refused where instruction submitting such negligence as specifically as pleaded, already given; *Houston & T. C. R. Co. v. Kelley*, 13 Tex. Civ. App. 10, 34 S. W. 809, holding instruction including erroneous proposition properly refused where correct part already given; *Houston & T. C. R. Co. v. Patterson*, 20 Tex. Civ. App. 260, 48 S. W. 747, holding refusal of specific charges as to facts and groups of facts pleaded as contributory negligence, reversible error, though general charge presented same, but less clearly; *Ft. Worth & R. G. R. Co. v. Greer*, 29 Tex. Civ. App. 563, 69 S. W. 421, holding that when contributory negligence is specially pleaded and sustained by evidence, specific charge thereon should be given if requested; *Galveston, H. & S. A. R. Co. v. Buch*, 27 Tex. Civ. App. 286, 65 S. W. 681, sustaining court's right to group facts established by evidence, which, if true, would be decisive of action; *Gulf, C. & S. F. R. Co. v. Mangham*, 29 Tex. Civ. App. 489, 69 S. W. 80, holding court charging generally and correctly on issue not required to make further and fuller charge thereon in absence of specific request therefor; *Travelers Ins. Co. v. Hunter*, 30 Tex. Civ. App. 495, 70 S. W. 798, sustaining court's refusal to charge as specifically requested, when matters were covered generally in main charge, and charge as requested was in part incorrect.

28 L. R. A. 540, *OHIO & M. R. CO. v. EARLY*, 141 Ind. 73, 40 N. E. 257.

Liability for medical aid to employee.

Cited in footnotes to *Godshaw v. J. N. Struck & Bro.* 51 L. R. A. 608, which denies foreman's implied authority to engage medical attendance for injured employee; *Spelman v. Gold Coin Min. & Mill. Co.* 55 L. R. A. 640, which denies presumption of general manager's implied authority to bind mining company for medical aid to injured employees; *St. Barnabas Hospital v. Minneapolis International Electric Co.* 40 L. R. A. 388, which denies right of employer to cancel agreement to care for employee at hospital at time when employee cannot be removed; *Holmes v. McAllister*, 48 L. R. A. 396, which denies employer's liability to physician summoned by manager of laundry in employer's absence to attend injured employee.

28 L. R. A. 552, *QUINN v. KANSAS CITY, M. & B. R. CO.* 94 Tenn. 713, 45 Am. St. Rep. 767, 30 S. W. 1036.

Liability of master or hospital for negligence of physician or surgeon employed.

Approved in *Louisville & N. R. Co. v. Foard*, 104 Ky. 463, 47 S. W. 342, holding evidence as to negligence of physician employed for injured servant inadmissible in absence of negligence in selecting him; *Southern P. Co. v. Mauldin*, 19 Tex. Civ. App. 169, 46 S. W. 650, holding railroad company furnishing surgical attendance to employee, only bound to use ordinary care in selection of surgeon, and

not answerable for latter's mistakes; *Powers v. Massachusetts Homoeopathic Hospital*, 47 C. C. A. 126, 109 Fed. 298, denying right of patient in public charitable hospital, though under private management, to recover for injuries from negligence of nurse selected with due care; *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 450, 74 S. W. 456, holding servant injured by malpractice of physician furnished by employer has no recourse against employer unless evidence shows want of care in physician's selection.

28 L. R. A. 556, *GATTON v. CHICAGO, R. I. & P. R. CO.* 95 Iowa, 112, 63 N. W. 589.

Common law in United States.

Cited in *Western U. Teleg. Co. v. Call Pub. Co.* 58 Neb. 195, 78 N. W. 519, holding principles of common law or general jurisprudence of state of action applicable and enforceable in action for damages from unjust discrimination by telegraph company.

Cited in footnotes to *Smith v. Allen*, 39 L. R. A. 82, which holds vendor's liens not adopted as part of common law of Washington; *Hudson Furniture Co. v. Harding*, 30 L. R. A. 513, which denies existence of common law in United States, except as adopted with reference to construction of powers granted to Federal Union.

What law controls interstate commerce.

Cited in *State ex rel. Crow v. Atchison, T. & S. F. R. Co.* 176 Mo. 715, 63 L. R. A. 777, 75 S. W. 776, denying state's right to forfeit franchises of railroad company for making unlawful charges upon traffic within provisions of interstate commerce law.

Cited in footnote to *Davis v. Chicago, M. & St. P. R. Co.* 33 L. R. A. 654, which authorizes resort to common law to determine validity of contract for interstate carriage.

28 L. R. A. 568, *POPE v. HANKE*, 155 Ill. 617, 40 N. E. 839.

Evidence as to intent.

Approved in *Counselman v. Reichart*, 103 Iowa, 433, 72 N. W. 490, holding that party to contract in grain futures, attacking it as gambling contract, may testify as to his intention as to delivery of grain at time of making purchase; *Weare Commission Co. v. People*, 209 Ill. 539, 70 N. E. 1076, holding intention of parties speculating in grain in alleged violation of law, question for jury, to be determined from consideration of all the evidence.

Option contracts.

Approved in *Waite v. Frank*, 14 S. D. 631, 86 N. W. 645, holding contract for sale of commodities in future, without intention to deliver them, void as mere wager; *McKeon v. Wolf*, 77 Ill. App. 338, holding contract by seller of bonds to buy them back at future time at same price void as option contract; *Jamieson v. Wallace*, 167 Ill. 396, 59 Am. St. Rep. 302, 47 N. E. 762, holding contract for purchase and sale of stocks between parties who intend to settle by payment of differences between contract price and market price when sold, unenforceable; *Schlee v. Guckenheimer*, 179 Ill. 598, 54 N. E. 302, upholding contract giving purchaser of barley privilege of purchasing additional quantity at same price if taken before certain day.

Cited in footnotes to *Booth v. People*, 50 L. R. A. 762, which sustains statute making unlawful, options for sale of commodities which have been subject of gambling operations; *Baxter v. Deneen* 64 L. R. A. 949, which refuses to enjoin broker from withdrawing from bank margins deposited with him on stock gambling transactions, in violation of his agreement to keep them in bank until transaction closed.

Cited in note (64 L. R. A. 162) on conflict of laws as to gambling and lottery contracts.

Note given for illegal consideration.

Approved in *Gardner v. Girtin*, 69 Ill. App. 426, holding note in consideration of entire or partial performance of gambling contract void, even in hands of innocent purchaser; *Schlee v. Guckenheimer*, 76 Ill. App. 686, holding note given in consideration of option to buy grain in future, made void by statute, invalid even in hands of bona fide purchaser.

Cited in *Hopmeyer v. Frederick*, 74 Ill. App. 303, holding note given for fine and costs for illegal sale of liquor valid in hands of bona fide purchaser; *Long v. Jones*, 69 Ill. App. 616, holding note to secure payment of money knowingly loaned to enable maker to bet on horse race valid in hands of innocent purchaser.

Comity.

Approved in *Buell v. Breese Mill & Grain Co.* 65 Ill. App. 275, holding that comity does not require execution of law of other state against public policy of forum; *Schlee v. Guckenheimer*, 76 Ill. App. 686, holding contract, valid where made, not enforceable on doctrine of comity in state under whose laws it is invalid; *Welling v. Eastern Bldg. & L. Asso.* 56 S. C. 297, 34 S. E. 409, holding courts not required by mere comity to follow laws of other state in construing building and loan contract of that state when injurious to interests of people of forum; *Gooch v. Faucett*, 122 N. C. 273, 39 L. R. A. 836, footnote p. 835, 29 S. E. 362, holding note to pay bet on horse race run in state where note presumed valid, unenforceable in North Carolina as contrary to public policy; *Rhodes v. Missouri Sav. & L. Co.* 173 Ill. 628, 42 L. R. A. 96, 50 N. E. 998, holding that comity does not require that foreign corporation be allowed to enforce contract in conflict with laws of forum, and which would give advantage to nonresidents; *Harding v. American Glucose Co.* 182 Ill. 636, 64 L. R. A. 771, 74 Am. St. Rep. 189, 55 N. E. 577, sustaining power of courts to restrain foreign corporation from transferring its property within state, consisting largely of real estate, to other foreign corporation in violation of laws against trusts; *Field v. Eastern Bldg. & L. Asso.* 117 Iowa, 206, 90 N. W. 717, refusing to hold binding, provision in foreign loan association contract, in opposition to settled policy of state; *Palmer v. Palmer*, 26 Utah, 40, 61 L. R. A. 645, 99 Am. St. Rep. 820, 72 Pac. 3, holding that contract between husband and wife contrary to settled policy of state will not be upheld on principle of comity.

Cited in footnote to *Swing v. Munson*, 58 L. R. A. 223, which holds insurance contract, valid where made, not enforceable in state where property located, whose laws directly violated.

28 L. R. A. 573, *SMITH v. CHICAGO, M. & ST. P. R. CO.* 6 S. D. 583, 62 N. W. 967.

Right of action for death.

Cited in *Lintz v. Holy Terror Min. Co.* 13 S. D. 493, 83 N. W. 570, denying right of action for death of person leaving neither widow nor children.

28 L. R. A. 577, *ERICKSON v. FIRST NAT. BANK*, 44 Neb. 622, 48 Am. St. Rep. 753, 62 N. W. 1078.

Alteration of instruments.

Cited in *Foxworthy v. Colby*, 64 Neb. 218, 62 L. R. A. 394, footnote p. 393, 89 N. W. 800, holding unauthorized insertion of word "gold" before word "dollars" in instrument, material alteration.

Cited in footnotes to *Brown v. Johnson Bros.* 51 L. R. A. 403, which holds maker released by payee's addition of name of other person as comaker; *Rochford v. McGee*, 61 L. R. A. 335, which holds removal of note written below perforated line on application for insurance, material alteration rendering it void.

Cited in note (35 L. R. A. 465) on alteration of note as affecting bona fide holders.

Right to equitable relief.

Approved in *Losey v. Neidig*, 52 Neb. 173, 71 N. W. 1067, denying right to equitable relief against law judgment which court had jurisdiction to render, unless there was a defense not available in law action, or party was fraudulently or accidentally prevented from presenting it; *Larabee v. Given*, 65 Neb. 703, 91 N. W. 504, holding amount of counterclaim may be ascertained in proceeding in equity to restrain sale of negotiable promissory note, but with privilege to defendant to demand jury trial on issue of damages, if he so desires.

Cited in footnote to *Lyle v. McCormick*, *Harvesting Mach. Co.* 51 L. R. A. 906, which authorizes action for payee's breach of contract against transfer of note, though maker insolvent.

Necessity of pleading estoppel.

Approved in *Henderson v. Keutzer*, 56 Neb. 461, 76 N. W. 881, and *Macfarland v. West Side Improv. Asso.* 56 Neb. 281, 76 N. W. 584, holding that facts constituting estoppel *in pais* must be pleaded; *Gaylord v. Nebraska Sav. & Exch. Bank*, 54 Neb. 109, 69 Am. St. Rep. 705, 74 N. W. 415, holding it proper to specially plead estoppel *in pais*.

28 L. R. A. 581, *EIDEMILLER ICE CO. v. GUTHRIE*, 42 Neb. 238, 60 N. W. 717.

Rights in ice.

Approved in *Gehlen Bros. v. Knorr*, 101 Iowa, 706, 36 L. R. A. 699, footnote p. 697, 63 Am. St. Rep. 416, 70 N. W. 757, upholding riparian right to build dam across non-navigable stream and take ice from pond.

Cited in footnotes to *Becker v. Hall*, 56 L. R. A. 573, which holds marking, staking, or cleaning ice not thick enough for harvesting, insufficient appropriation; *Sanborn v. People's Ice Co.* 51 L. R. A. 829, which holds taking of ice in large quantities from public lake not exercise of common right in its waters.

Cited in note (62 L. R. A. 688) on effect of bad motive to make actionable what would otherwise not be.

Dams.

Cited in note (59 L. R. A. 853) on liability for damming back water of stream.

Common law as to riparian rights.

Approved in *Crawford Co. v. Hathaway*, 60 Neb. 761, 84 N. W. 271, *Slattery*

v. Harley, 58 Neb. 577, 79 N. W. 151; Clark v. Cambridge & A. Irrig. & Improv. Co. 45 Neb. 806, 64 N. W. 239; Crawford Co. v. Hall (Neb.) 60 L. R. A. 896, 93 N. W. 781, — holding that common-law doctrine as to rights of riparian owners prevails in this country, except as modified or abrogated by statute; People v. Hulbert, 131 Mich. 170, 64 L. R. A. 274, 100 Am. St. Rep. 588, 91 N. W. 211, holding use by lower riparian proprietor of lake water for drinking and cooking does not render unlawful, reasonable use of lake water by upper proprietor for bathing purposes; Meng v. Coffey (Neb.) 60 L. R. A. 911, 93 N. W. 713, holding riparian owner entitled to reasonable use of stream for irrigation, what constitutes reasonable use depending upon circumstances of each case.

28 L. R. A. 588, LITTLEFIELD v. STATE, 42 Neb. 223, 47 Am. St. Rep. 697, 60 N. W. 724.

Amount of license.

Cited in footnote to Ottumwa v. Zekind, 29 L. R. A. 734, which holds fee of \$250 per month, of \$25 per day from transient merchants excessive.

Cited in note (30 L. R. A. 429, 430, 432, 433, 435) on limit of amount of license fees.

Regulation of sale of food.

Cited in footnote to State v. Layton, 62 L. R. A. 164, which sustains statutory prohibition against manufacture or sale of baking powder containing alum.

Distinguished in Pierce v. Aurora, 81 Ill. App. 674, holding ordinance against selling milk without license invalidated by provision exempting owners of two cows only, peddling milk by hand.

28 L. R. A. 591, PEOPLE v. BUTTON, 106 Cal. 623, 46 Am. St. Rep. 259, 39 Pac. 1073.

Availability of self defense to first aggressor.

Approved in People v. Conkling, 111 Cal. 627, 44 Pac. 314, holding right to kill in self defense not lost by feloniously assailing another, if assailant has desisted in good faith; People v. Farley, 124 Cal. 597, 57 Pac. 571, holding erroneous, instruction that real or apparent necessity brought about by defendant's design, contrivance or fault, is not available to him as defense; People v. Kennett, 114 Cal. 20, 45 Pac. 994, holding error in instructing that plea of necessity is a shield only for those without fault in occasioning difficulty cured by further instruction that defendant can show in justification that he changed his mind and endeavored to escape, but could not without striking the mortal blow; People v. Miller, 125 Cal. 47, 57 Pac. 770, holding instruction that plea of necessity is shield for those only without fault in occasioning it, erroneous unless qualified, and improper to be given.

Cited in People v. Scott, 123 Cal. 436, 56 Pac. 102, holding first aggressor required not only to decline further strife, but to make such declination known to adversary.

Cited in note (45 L. R. A. 707, 708, 712) on self defense set up by accused who begun conflict.

Distinguished in People v. Worthington, 122 Cal. 586, 55 Pac. 396, holding dazed condition of one committing homicide, not produced by deceased and not amounting to insanity, not ground for acquittal.

28 L. R. A. 594, SINNOTT v. COLOMBET, 107 Cal. 187, 40 Pac. 329.

28 L. R. A. 596, GIRAUDI v. ELECTRIC IMPROV. CO. 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108.

Presumption of negligence as to electrical appliances.

Cited in Snyder v. Wheeling Electrical Co. 43 W. Va. 669, 39 L. R. A. 503, 64 Am. St. Rep. 922, 28 S. E. 733, holding presumption of negligence from breaking of live electric wire not conclusive.

Distinguished in Kepner v. Harrisburg Traction Co. 183 Pa. 26, 38 Atl. 416, holding that presumption of negligence of traction company does not arise from mere breaking of trolley wire frightening horse.

Contributory negligence.

Approved in Dwyer v. Salt Lake City, 19 Utah, 527, 57 Pac. 535, holding momentary forgetfulness of embankment by one traveling carefully on street in dark, with knowledge of embankment, but without idea that it is close by, not contributory negligence *per se*; Perham v. Portland Electric Co. 33 Or. 473, 40 L. R. A. 808, 72 Am. St. Rep. 730, 53 Pac. 14, holding workman engaged in repairing bridge over which electric wires with apparently safe insulation are strung, entitled to assume that necessary contact with them will not be dangerous.

Cited in footnote to Neeley v. Southwestern Cotton Seed Oil Co. 64 L. R. A. 146, which holds contributory negligence of employee in using defective ladder to adjust belt, after complaining to manager and being told that it was all right, question for jury.

Cited in note (47 L. R. A. 166) on *volenti non fit injuria* as defense to actions by injured servants.

Distinguished in Danville Street Car Co. v. Watkins, 97 Va. 716, 34 S. E. 884, holding brakeman's ignorance of danger attending contact with electric wire, no excuse for failure to exercise reasonable care to avoid contact with sagging trolley, condition of which was known to him.

Negligence as to electrical appliances.

Approved in Chattanooga Electric R. Co. v. Mingle, 103 Tenn. 670, 76 Am. St. Rep. 703, 56 S. W. 23, holding high degree of care required of electric street railway company in construction and continued maintenance in safe condition of their lines; Brown v. Edison Electric Illuminating Co. 90 Md. 406, 46 L. R. A. 747, 78 Am. St. Rep. 442, 45 Atl. 182, holding electric light company using highly charged wires required to see to their proper placing and insulation, with reference to safety of persons entitled to be in their neighborhood; Perham v. Portland Electric Co. 33 Or. 482, 40 L. R. A. 811, 72 Am. St. Rep. 730, 53 Pac. 14, holding electric company whose wires carry highly dangerous current required to use utmost degree of care in their construction, inspection, and repair at places where people are liable to come in contact with them; Geismann v. Missouri-Edison Electric Co. 173 Mo. 678, 73 S. W. 654, holding electric company liable for failure to insulate wires near signs over store front, resulting in death of one engaged in removing signs.

Cited in notes (32 L. R. A. 401) on negligence as to electric wires on or in buildings; (46 L. R. A. 97) on liability to servant of third person for injuries received in performance of duties, by electric wire extending over premises of others.

Admissibility of expert's opinion as to safety.

Cited in *Luman v. Golden Ancient Channel Min. Co.* 140 Cal. 708, 74 Pac. 307, sustaining exclusion of expert's opinion as to safety of machinery, when he had given testimony from which court could decide whether machinery was safe or not.

28 L. R. A. 600, *STEVENOT v. KOCH*, 61 Minn. 104, 63 N. W. 256.

Effect on carrier's liability of seizure under legal process.

Approved in *Baldwin v. Great Northern R. Co.* 81 Minn. 249, 51 L. R. A. 641, footnote p. 640, 83 Am. St. Rep. 370, 83 N. W. 986, holding service of summons in garnishment on carrier no defense for unreasonable delay in forwarding goods.

Distinguished in *Merz v. Chicago & N. W. R. Co.* 86 Minn. 36, 90 N. W. 7, holding action for conversion not maintainable against carrier where property carried seized under legal process, if shipper promptly notified.

Liability of property of nonresidents to attachment.

Cited in *Connery v. Quincy, O. & K. C. R. Co. (Minn.)* 64 L. R. A. 626, 99 N. W. 365, holding foreign railroad car not subject to attachment.

28 L. R. A. 605, *MANSTON v. McINTOSH*, 58 Minn. 525, 60 N. W. 672.

Nominations; conventions; names of candidates on ballots.

Approved in *White v. Sanderson*, 74 Minn. 120, 42 L. R. A. 232, 73 Am. St. Rep. 334, 76 N. W. 1021, holding certificate of nomination executed by chairman and secretary of committee, authorized by convention to make nomination, sufficient without execution by president and secretary of convention; *Phillips v. Gallagher*, 73 Minn. 534, 42 L. R. A. 226, 76 N. W. 285 (criticized in dissenting opinion), holding that courts will follow determination of political convention as to nomination of candidate or other question within its jurisdiction.

Cited in *State ex rel. Cann v. Moore*, 23 Wash. 284, 62 Pac. 769, holding that nomination of certain person, announced by presiding officer of political convention without fraud or oppression, as result of ballot, will be upheld by courts where no objection was made till after adjournment *sine die*, though mistake made in computing ballots; *State ex rel. Blydenburg v. Burdick*, 6 Wyo. 465, 34 L. R. A. 850, 46 Pac. 854, denying right of committee of political party to contest validity of nominations made by chairman of state committee of entirely distinct party, with one hundred associates to fill vacancies in list of presidential electors similarly nominated.

Cited in footnotes to *State ex rel. Metcalf v. Johnson*, 34 L. R. A. 313, which holds unavailing, attempt of twenty-one persons to form new political party; *Todd v. Election Comrs.* 29 L. R. A. 330, which upholds requirement against candidate having name on official ballot more than once.

28 L. R. A. 608, *THOMPSON v. DODGE*, 58 Minn. 555, 49 Am. St. Rep. 533, 60 N. W. 545.

Law as to bicycles and steam motor carriages.

Applied in *State ex rel. Bettis v. Missouri P. R. Co.* 71 Mo. App. 391, sustaining carrier's right to refuse to receive bicycle as ordinary baggage.

Cited in *Davis v. Petrinovich*, 112 Ala. 659, 36 L. R. A. 617, 21 So. 344, hold-

ing license tax on bicycles used for pleasure unauthorized; *Laredo Electric & R. Co. v. Hamilton*, 23 Tex. Civ. App. 484, 56 S. W. 998, holding street railway company liable for injury to bicyclist due to failure to keep its roadbed in repair; *Nason v. West*, 31 Misc. 586, 65 N. Y. Supp. 651, denying right of action for runaway, from horse taking fright at steam motor carriage with smokestack emitting no more than usual amount of vapor; *North Chicago Street R. Co. v. Cossar*, 203 Ill. 614, 68 N. E. 88, holding bicycle is vehicle, rider of which must exercise same degree of care as drivers of other vehicles.

Cited in footnotes to *Myers v. Hinds*, 33 L. R. A. 356, which holds bicyclist liable for running into pedestrian in narrow path; *Com. v. Forrest*, 29 L. R. A. 365, which holds use of bicycle on sidewalk along turnpike subject to penalty; *Moore v. District of Columbia*, 41 L. R. A. 208, which holds reasonableness of ordinance prohibiting riding bicycle with handle bars more than 4 inches below saddle a question of fact.

Cited in note (47 L. R. A. 289, 295) on bicycle law.

Distinguished in *Richardson v. Danvers*, 176 Mass. 414, 50 L. R. A. 127, 79 Am. St. Rep. 320, 57 N. E. 688, holding bicycle not within meaning of statute requiring highways to be kept reasonably safe for "carriages."

28 L. R. A. 609, *ANDERSON v. MANCHESTER FIRE ASSUR. CO.* 59 Minn. 182, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241.

Standard insurance policy.

Approved in *Dowling v. Lancashire Ins. Co.* 92 Wis. 75, 31 L. R. A. 116, footnote p. 112, 65 N. W. 738, holding invalid, statute authorizing insurance commissioner to adopt standard policy.

Cited in *Gibson v. Connecticut F. Ins. Co.* 77 Fed. 566, holding force of employment of form of policy provided by state statute in determining whether it is a contract of that state not affected by unconstitutionality of such statute.

Distinguished in *Business Men's League v. Waddill*, 143 Mo. 500, 40 L. R. A. 502, footnote p. 501, 45 S. W. 262, denying injunction against approval of uniform insurance policy by superintendent of insurance under unconstitutional statute.

Delegation of power.

Approved in *State ex rel. Childs v. Copeland*, 66 Minn. 322, 34 L. R. A. 790, 61 Am. St. Rep. 410, 69 N. W. 27, holding void, local option law granting charter power to all cities of certain class, to take effect in each city on adoption by such city; *Potts v. Breen*, 167 Ill. 76, 39 L. R. A. 155, 59 Am. St. Rep. 262, 47 N. E. 81, holding that legislature will not be supposed to have, by mere implication conferred on school board, power to require vaccination as condition precedent to exercise of constitutional right to attend school.

Waiver or estoppel as to conditions of policy.

Approved in *Spalding v. New Hampshire F. Ins. Co.* 71 N. H. 443, 52 Atl. 858, holding company estopped to rely on lack of assent to other insurance, where insured stated facts to agent on applying for insurance; *Kells v. Northwestern Live-Stock Ins. Co.* 64 Minn. 392, 58 Am. St. Rep. 541, 67 N. W. 215, holding breach of provision as to sole ownership of insured property waived by failure of insurance agent with knowledge thereof, to make any objection; *Burnham v. Greenwich Ins. Co.* 63 Mo. App. 88, sustaining power of insurance agent to

orally waive condition in policy requiring assent to further insurance to be in writing indorsed on policy.

Cited in *Shaffer v. Milwaukee Mechanics' Ins. Co.* 17 Ind. App. 214, 46 N. E. 557, holding constructive notice from record of chattel mortgage on insured property insufficient to avoid condition in policy making it void if property mortgaged; *Brumbaugh v. Home Mut. F. Ins. Co.* 20 Pa. Super. Ct. 149, holding issuance of policy with knowledge of president and agent of company that other insurance exists on the property waives provision declaring company not liable under such circumstances; *German Ins. Co. v. Shader* (Neb.) 60 L. R. A. 920, 93 N. W. 972, as to general rule that insurance company cannot take advantage of conditions in policy making it void by reason of circumstances existing at time policy was issued, when those circumstances were known to agent; *Maupin v. Scottish Union & Nat. Ins. Co.* 53 W. Va. 582, 45 S. E. 1003 (dissenting opinion), majority holding oral evidence inadmissible to show waiver by agent of provision of policy, when policy expressly prohibits waiver of conditions by agents.

28 L. R. A. 612, *LAKE ERIE & W. R. CO. v. WHITHAM*, 155 Ill. 514, 46 Am. St. Rep. 355, 40 N. E. 1014.

Effect of relative position of names of husband and wife in deed, etc.

Approved in *Chapman v. Charter*, 46 W. Va. 779, 34 S. E. 768, holding conveyance of entire interest of husband not prevented by fact that his name follows his wife's and he is described as her husband; *Center v. Elgin City Bkg. Co.* 185 Ill. 538, 57 N. E. 439 (dissenting opinion), Affirming 83 Ill. App. 413, as to husband's interest passing by mortgage in which his name follows that of his wife and he is described as her husband.

Agreements by married woman.

Approved in *Granath v. Johnson*, 90 Ill. App. 310, holding married woman not bound by common law by agreement to pay her husband's indebtedness.

Presumption as to time deed delivered.

Approved in *Schaeppi v. Glade*, 95 Ill. App. 507, sustaining presumption that deed was delivered on day of its date, though apparently acknowledge later; *Paxton v. Bogardus*, 201 Ill. 634, 66 N. E. 853, sustaining presumption that contract was delivered upon day of its date.

Construction of deed.

Approved in *Mallory v. Mallory*, 86 Ill. App. 199, requiring deed to be construed in light of existing circumstances and relations of parties to title as well as with reference to words used.

Dedication of land.

Approved in *Minneapolis, St. P. & S. Ste. M. R. Co. v. Marble*, 112 Mich. 12, 70 N. W. 319, holding title to land designated in plat by its name not vested in railroad company by statutory dedication resulting from filing of plat.

How easement in land created.

Approved in *Wessels v. Colebank*, 174 Ill. 622, 51 N. E. 639, denying power to create easement in land by parol.

28 L. R. A. 618, *MEACHAM v. BUNTING*, 156 Ill. 586, 47 Am. St. Rep. 239, 41 N. E. 175.

Effect of divorce on curtesy.

Approved in *Doyle v. Rolwing*, 165 Mo. 241, 55 L. R. A. 335, footnote p. 332,

88 Am. St. Rep. 416, 65 S. W. 315, holding right of curtesy defeated by divorce for wife's fault.

Husband as trustee for wife.

Cited in footnote to *Stearns v. Fraleigh*, 39 L. R. A. 705, which sustains right to appoint husband a trustee of property conveyed by him in trust for wife and children.

Running of limitations against remainderman.

Approved in *Turner v. Hause*, 199 Ill. 472, 65 N. E. 445, holding that statute of limitations does not begin to run against remainderman till death of life tenant.

28 L. R. A. 621, *Re WEBER*, 4 N. D. 119, 59 N. W. 523.

Appealability of order for judgment.

Approved in *Re Eaton*, 7 N. D. 273, 74 N. W. 870, and *Prondzinski v. Garbutt*, 9 N. D. 244, 83 N. W. 23, holding order for judgment not appealable; *Hanberg v. National Bank*, 8 N. D. 329, 79 N. W. 336, holding judgment on order to show cause why action should not be dismissed not appealable; *Cameron v. Great Northern R. Co.* 8 N. D. 135, 77 N. W. 1016, holding order dismissing action at close of plaintiff's evidence for failure of proof not appealable; *Field v. Great Western Elevator Co.* 5 N. D. 401, 67 N. W. 147, holding order directing dismissal of appeal not appealable.

Cited in *Rolette County v. Pierce County*, 8 N. D. 614, 80 N. W. 804, holding right to appeal from order recorded as judgment, lost after payment and its being treated as judgment for more than ten years; *Travelers' Ins. Co. v. Weber*, 4 N. D. 136, 59 N. W. 529, holding sureties on appeal bond conditioned on affirmation of judgment not liable on dismissal of appeal on ground that determination appealed from was an order, not a judgment.

Distinguished in *Oliver v. Wilson*, 8 N. D. 593, 73 Am. St. Rep. 784, 80 N. W. 757, holding order granting peremptory writ of mandamus appealable.

Dismissal of appeal.

Approved in *Hazeltine v. Browne*, 9 S. D. 355, 69 N. W. 579, holding formal judgment of dismissal, necessary to dispose of appeal, ineffectual for any purpose from failure of sureties to justify in time.

Entry of judgment.

Approved in *Locke v. Hubbard*, 9 S. D. 370, 69 N. W. 588, holding form of judgment signed by judge or court not effective as judgment till entered by clerk; *Christie v. Iowa L. Ins. Co.* 111 Iowa, 179, 82 N. W. 499, holding judge's finding of facts with conclusions of law, ending with direction to enter judgment, filed with clerk, not judgment till spread on records of court; *McTavish v. Great Northern R. Co.* 8 N. D. 337, 79 N. W. 443, holding entry by clerk in judgment book of order that one of parties "have and recover judgment" for specified amount not entry of judgment.

Cited in footnotes to *Callanan v. Votruba*, 40 L. R. A. 375, which holds judgment no lien till entered on record of court; *Johnson v. Schlosser*, 36 L. R. A. 59, which upholds lien of judgment against bona fide purchaser, although clerk failed to enter same in docket.

28 L. R. A. 642, *PEOPLE'S BANK v. SCHOOL DIST. NO. 52*, 3 N. D. 496, 57 N. W. 787.

Validity of municipal bonds.

Approved in *Livingston v. School Dist. No. 7*, 11 S. D. 152, 76 N. W. 301, holding holder of bond issued for erection of school house, which is void for excessiveness, entitled to recover value of schoolhouse when retained by district; *Livingston v. School Dist. No. 7*, 9 S. D. 347, 69 N. W. 15, holding school district bond for more than \$500, reciting its issuance pursuant to statute prohibiting issuance in denominations exceeding that amount, void even in hands of innocent purchaser.

Cited in footnotes to *Erskine v. Steele County*, 28 L. R. A. 645, which holds municipal bonds void so far as they represent discount on county warrants; *W. N. Coler & Co. v. Dwight School Twp.* 28 L. R. A. 649, which holds school district bonds not void for failure to comply with provision regulating organization of district; *Wilkes County v. Call*, 44 L. R. A. 252, which denies possibility of there being a bona fide holder of county bonds issued under unconstitutional statute.

28 L. R. A. 645, *ERSKINE v. STEELE COUNTY*, 4 N. D. 339, 60 N. W. 1050.
Validity of municipal bonds or warrants.

Later action in Federal court in 39 C. C. A. 173, 98 Fed. 215, Affirming 87 Fed. 630, sustaining statute legalizing contract by county to pay for services in transcribing such records.

Cited in footnotes to *W. N. Coler & Co. v. Dwight School Twp.* 28 L. R. A. 649, which holds school district bonds not void for failure to comply with provision regulating organization of district; *People's Bank v. School Dist. No. 52*, 28 L. R. A. 642, which holds void, school district bonds payable in terms in eleven days less than minimum time fixed by statute.

28 L. R. A. 649, *W. N. COLER & CO. v. DWIGHT SCHOOL TWP.* 3 N. D. 249, 55 N. W. 587.

Validity of municipal bond or other obligations.

Cited in *Herring v. Modesto Irrig. Dist.* 95 Fed. 719, denying *de facto* irrigation district's right to set up illegality of organization as defense in action on its own obligations.

Cited in footnotes to *Erskine v. Steele County*, 28 L. R. A. 645, which holds municipal bonds void so far as they represent discount on county warrants; *People's Bank v. School Dist. No. 52*, 28 L. R. A. 642, which holds invalidity of municipal bonds leaves original liability of municipality unaffected; *Gilkey v. Howe*, 49 L. R. A. 483, which holds enforceable, orders issued by town attempting bona fide to incorporate.

Estoppel by recitals in bonds.

Approved in *Coler v. Rhoda School Twp.* 6 S. D. 653, 63 N. W. 158, holding recital on face of school district bonds of authority and regularity, estoppel against denying validity of bonds as against bona fide holder, though petition and notice required by statute were not given; *Thompson v. Mecosta*, 127 Mich. 528, 86 N. W. 1044, sustaining bona fide holder's right to rely on statement in bond of its issuance under authority of specified law and for purpose prescribed thereby.

Explained and held *obiter* in *Flagg v. School Dist. No. 70*, 4 N. D. 52, 25 L. R. A. 373, 58 N. W. 499, holding school district not estopped to set up invalidity of bond on ground that it did not own school site, by certificate of issuance in accordance with law and by authority of majority of legal voters.

Cited in *Flagg v. School Dist. No. 70*, 4 N. D. 42, 25 L. R. A. 369, 58 N. W. 499, holding certificate that school district bond was issued in accordance with law need not be made by officer of district.

Cited in footnotes to *Huron v. Second Ward Sav. Bank*, 49 L. R. A. 534, which holds city estopped by recitals in bonds as to purpose of issuance; *Independent School District v. Rew*, 55 L. R. A. 364, which holds municipal corporation estopped to deny truth of recitals in bonds held by innocent purchaser.

Enforceability of judgment.

Criticized on second appeal in *Coler v. Coppin*, 7 N. D. 419, 75 N. W. 795, holding judgment against school township on indebtedness of school district, for which township liable, enforceable same as any other judgment against it.

Reaffirmed on third appeal in *Coler v. Coppin*, 10 N. D. 87, 85 N. W. 988, holding school township liable for all debts of school districts included in its territory, and all judgments recovered thereon.

28 L. R. A. 655, *McCREERY v. DAVIS*, 44 S. C. 195, 51 Am. St. Rep. 794, 22 S. E. 178.

Jurisdiction of nonresident.

Approved in *Pepper v. Shearer*, 48 S. C. 493, 26 S. E. 797, holding jurisdiction of nonresident not acquired in action on contract by service by publication and personal service outside of state; *Townes v. Augusta*, 46 S. C. 31, 23 S. E. 984, holding jurisdiction of foreign corporation for all purposes acquired by its appearance and answering to the merits.

— In divorce suit.

Cited in *Atherton v. Atherton*, 181 U. S. 170, 45 L. ed. 802, 21 Sup. Ct. Rep. 544, holding jurisdiction acquired by mailing of letter to nonresident defendant in divorce suit, by attorney appointed to represent her, addressed to her at her residence with directions for return fully acquainting her with nature of suit.

Cited in footnotes to *Atherton v. Atherton*, 40 L. R. A. 291, which holds matrimonial domicile of wife leaving husband for cruelty may be changed by removal to other state; *Kempson v. Kempson*, 58 L. R. A. 484, which sustains jurisdiction in state where parties married and wife resides, of suit to enjoin fraudulent divorce suit by husband in other state.

Cited in note (59 L. R. A. 152, 166, 174) on conflict of laws on subject of divorce.

Effect of divorce or separation on dower.

Cited in footnotes to *Beaty v. Richardson*, 46 L. R. A. 517, which denies forfeiture of right of dower of woman living in adultery after husband's abandonment for other woman; *Land v. Shipp*, 50 L. R. A. 500, which holds wife's right of dower not affected by release made directly to husband in deed of separation.

28 L. R. A. 667, ST. JAMES MILITARY ACADEMY v. GAISER, 125 Mo. 517, 46 Am. St. Rep. 502, 28 S. W. 851.

What constitutes libel.

Approved in *Mosnat v. Snyder*, 105 Iowa, 504, 75 N. W. 356, holding letter stating that specified attorneys had apparently put their heads together to make as much as possible out of specified estate, and that charges made were an outrage, libelous *per se*.

Cited in footnotes to *Dowling v. Livingstone*, 32 L. R. A. 104, which holds criticism of book not libelous; *Cherry v. Des Moines Leader*, 54 L. R. A. 855, which holds not actionable, article ridiculing in exaggerated terms, extremely ridiculous entertainment; *Coffin v. Brown*, 55 L. R. A. 732, which denies right to falsely attack character of appointee of governor to prevent latter's re-election; *Wofford v. Meeks*, 55 L. R. A. 214, which holds libelous, publication imputing to county officials prostitution of county finances by awarding contracts to persons of same political faith; *Redgate v. Roush*, 48 L. R. A. 236, which holds privileged, defamatory statements as to pastor in church paper by church officers in performance of supposed duty; *Klos v. Zahorik*, 53 L. R. A. 235, which denies liability for properly commenting on action of priest in conducting public functions of calling.

Cited in notes (28 L. R. A. 667) on libel or slander by expressing opinions or comments without misstating facts; (32 L. R. A. 834) on constitutional freedom of speech and of the press; (52 L. R. A. 526, 527) on actions for libel or slander of corporation.

Questions for jury in libel suit.

Approved in *McCloskey v. Pulitzer Pub. Co.* 152 Mo. 348, 53 S. W. 1087, holding instruction that jury are sole judges of libelous character of article, correct even though publication is libelous *per se*.

Presumption of malice.

Approved in *Ferguson v. Evening Chronicle Pub. Co.* 72 Mo. App. 465, holding malice inferable from libelous publication.

28 L. R. A. 676, KRUTZ v. ROBBINS, 12 Wash. 7, 50 Am. St. Rep. 871, 40 Pac. 415.

Liquidated damages or penalty.

Cited in *Everett Land Co. v. Maney*, 16 Wash. 556, 48 Pac. 243, holding note for additional amount given by grantee, to be void if he should erect certain buildings within specified time, recoverable as liquidated damages; *McDaniels v. Gowey*, 30 Wash. 424, 71 Pac. 12, denying recovery of amount of bond given to secure mortgage and other encumbrances on land, after satisfaction of mortgage and the other encumbrances, without remaining damages to obligee, although mortgage was not satisfied until after maturity.

Cited in footnotes to *Salem v. Anson*, 56 L. R. A. 169, which holds stipulated amount to be paid to city for failure to complete electric light plant within specified time, liquidated damages; *Kilbourne v. Burt & B. Lumber Co.* 55 L. R. A. 275, which holds provision for retaining 15 cents per hundred feet for logs not delivered by specified date, one for liquidated damages; *State v. Larson*, 54 L. R. A. 487, which holds amount of liquor license bond, a penalty; *Chicago House-Wrecking Co. v. United States*, 53 L. R. A. 122, which holds stipu-

lation for certain sum as damages for failure to remove building by certain time, penalty, when actual damages easily assessable; *Meyer v. Estes*, 32 L. R. A. 283, which holds penalty provided for by contract that purchaser wrongfully using electrotype plates shall pay fine of ten times their price.

28 L. R. A. 679, *WALKER v. JAMESON*, 140 Ind. 591, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869.

Municipal contracts for removal of garbage, etc.

Approved in *Smiley v. MacDonald*, 42 Neb. 14, 27 L. R. A. 545, 47 Am. St. Rep. 684, 60 N. W. 355, sustaining city contract giving exclusive privilege of removing garbage; *California Reduction Co. v. Sanitary Reduction Works*, 61 C. C. A. 98, 126 Fed. 36, sustaining right of board of supervisors to give sole privilege to person or assigns to collect and cremate all garbage within county for term of fifty years; *Dupont v. District of Columbia*, 20 App. D. C. 497, sustaining act prohibiting removal and disposition of garbage by anyone else than garbage contractor, and its transportation outside municipal boundaries for feeding to animals; *Sanitary Reduction Works v. California Reduction Co.* 94 Fed. 700, sustaining power of board of supervisors of San Francisco to collect fixed charge for collection and cremation of garbage.

Cited in footnotes to *State v. Orr*, 34 L. R. A. 279, which sustains ordinance prohibiting transportation of garbage without license; *Iler v. Ross*, 57 L. R. A. 895, which denies city's right to grant monopoly by contract for removal of ashes, etc.; *State v. Hill*, 50 L. R. A. 473, which holds void, ordinance requiring license for scavenger work and empowering health board to decide who are competent bidders.

Cited in notes (27 L. R. A. 541) on monopoly in contract for removal of garbage; (36 L. R. A. 609) on power of municipal corporations to define, prevent, and abate nuisances; (38 L. R. A. 316) on municipal power over nuisances affecting safety, health, and personal comfort.

Acts in prevention of unjust discrimination.

Cited in *Adams Exp. Co. v. State*, 161 Ind. 346, 67 N. E. 1033, holding act prohibiting express companies from unjust discrimination in carrying goods, valid exercise of police power.

28 L. R. A. 683, *TAYLOR v. BLEAKLEY*, 55 Kan. 1, 49 Am. St. Rep. 233, 39 Pac. 1045.

Ballot law.

Followed in *Richardson v. Jamison*, 55 Kan. 17, 39 Pac. 1050, holding substantial compliance with provisions of ballot law necessary.

Approved in *Duvall v. Miller*, 94 Md. 715, 51 Atl. 570, and *Tebbe v. Smith*, 108 Cal. 108, 49 Am. St. Rep. 68, 41 Pac. 454, holding statutory provisions as to marking ballots, mandatory in nature; *Cole v. Tucker*, 164 Mass. 488, 29 L. R. A. 669, 41 N. E. 681, upholding statute requiring use of official ballot; *Moody v. Davis*, 13 S. D. 92, 82 N. W. 410, holding that ballot marked by cross in circle at head of ticket containing name of one candidate, and also in circle at head of other ticket containing no nominee for that office, cannot be counted.

Cited in *Parker v. Hughes*, 64 Kan. 235, 56 L. R. A. 283, 91 Am. St. Rep. 216, 67 Pac. 637, holding that ballot marked in two or more squares opposite

name of candidate whose name appears more than once on ballot must be counted; *People ex rel. Pierce v. Parkhurst*, 24 Misc. 451, 53 N. Y. Supp. 598, holding ballot not invalidated because cross marks partly within and partly without voting space; *Maddux v. Walthall*, 141 Cal. 414, 74 Pac. 1026, holding stamped ballots void as having distinguishing mark, notwithstanding their number.

Cited in footnotes to *Todd v. Election Comrs.* 29 L. R. A. 330, which upholds requirement against candidate having name on official ballot more than once; *Tebbe v. Smith*, 29 L. R. A. 673, as to what constitutes distinguishing mark on ballot.

Cited in note (47 L. R. A. 806, 807, 829) on marking official ballot.

Distinguished in *Dickerman v. Gelsthorpe*, 19 Mont. 258, 47 Pac. 999, holding provision of ballot law not mandatory.

28 L. R. A. 688, *BALTIMORE & O. R. CO. v. CAIN*, 81 Md. 87, 31 Atl. 801.

Arrest without warrant.

Approved in *Palmer v. Maine C. R. Co.* 92 Me. 409, 44 L. R. A. 675, 69 Am. St. Rep. 513, 42 Atl. 800, holding private individual procuring arrest of innocent person without warrant liable, notwithstanding good faith, lack of malice, and belief in guilt; *Kirk v. Garrett*, 84 Md. 407, 35 Atl. 1089, holding it duty of officer arresting without warrant to take prisoner before magistrate as soon as he reasonably can.

Cited in footnote to *McCullough v. Greenfield*, 62 L. R. A. 906, which holds that possession by officer of warrant will not justify arrest of accused by police department of other town, under direction by telephone by officer holding warrant.

Time to ask for special interrogatories.

Approved in *Caledonian F. Ins. Co. v. Traub*, '86 Md. 101, 37 Atl. 782, requiring record to show propounding of special interrogatories before argument to jury commenced, to obtain review.

28 L. R. A. 692, *UNION INS. CO. v. AMERICAN F. INS. CO.* 107 Cal. 327, 48 Am. St. Rep. 140, 40 Pac. 431.

Constructive notice of known usage.

Cited in *Pennsylvania R. Co. v. Naive* (Tenn.) 64 L. R. A. 447, 79 S. W. 124, holding consignor shipping poultry to agent bound to take notice of legal holiday, preventing prompt delivery by carrier.

Reinsurance.

Cited in footnotes to *Hunt v. New Hampshire Fire Underwriters' Asso.* 38 L. R. A. 514, which holds reinsurer liable for whole amount of loss on insolvency of prior insurer; *Chalaron v. Insurance Co. of N. A.* 36 L. R. A. 742, which holds failure of original insurer to bear any part of risk, because entire cargo not put on board as expected, not a void reinsurance for fraud.

28 L. R. A. 694, *ATWELL v. JENKINS*, 163 Mass. 362, 47 Am. St. Rep. 463, 40 N. E. 178.

Assumpsit for money received.

Cited in footnote to *Soderberg v. King County*, 33 L. R. A. 670, which author-
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izes assumpsit against county for fees erroneously paid by sheriff on foreclosure sale.

Transactions with insane persons.

Cited in footnote to *American Trust & Bkg. Co. v. Boone*, 40 L. R. A. 250, which holds bank liable for paying check of one judged insane in other state, though insanity not known to bank.

28 L. R. A. 696, *MISSOURI P. R. CO. v. HACKETT*, 54 Kan. 316, 38 Pac. 294.

Liability for obstructions or excavations in street.

Approved in *Clay Centre v. Jevons*, 2 Kan. App. 574, 44 Pac. 745, upholding right to recover for falling into unguarded excavation in street, though primary cause of injury was sudden and accidental going out of lights.

Cited in footnote to *Brunswick & W. R. Co. v. Hardey*, 52 L. R. A. 396, which authorizes recovery by merchant specially damaged by wilful obstruction of street.

28 L. R. A. 699, *PEOPLE v. GARDNER*, 144 N. Y. 119, 63 N. Y. S. R. 21, 43 Am. St. Rep. 741, 38 N. E. 1003.

Attempt to commit crime.

Approved in *People v. Spolascio*, 33 Misc. 25, 67 N. Y. Supp. 1114, holding reliance on false pretenses and parting with property not essential to crime of attempt to commit grand larceny by false pretenses; *Marley v. State*, 58 N. J. L. 212, 33 Atl. 208, holding conviction of intent to commit crime impossible where acts done were a mere nullity; *People v. Mills*, 91 App. Div. 342, 86 N. Y. Supp. 529, Affirmed in 178 N. Y. 285, 70 N. E. 786, holding fact that employees of district attorney's office pretended to favor unlawful delivery of indictments to accused, no defense when he took them into his possession with intent to commit crime.

Cited in footnote to *Groves v. State*, 59 L. R. A. 598, which holds mere preparatory acts for commission of crime not an attempt.

Compelling one to be witness against himself.

Approved in *People v. Altman*, 86 Hun, 570, 33 N. Y. Supp. 905, holding admission in evidence of paper found on defendant charged with forgery not invasion of right as to giving evidence against himself; *People v. Adams*, 85 App. Div. 400, 83 N. Y. Supp. 481, holding admission of incriminating papers belonging to accused, obtained by officers under search warrant, not invasion of right as to giving evidence against one's self; *Com. v. Craig*, 19 Pa. Super. Ct. 98, holding that accused who has testified in his own behalf cannot object to legitimate cross-examination on ground that answers will tend to incriminate him; *State v. Gartrell*, 171 Mo. 509, 71 S. W. 1045, holding identification of son jointly indicted with defendant not compelling one codefendant to testify against the other; *Thornton v. State*, 117 Wis. 343, 98 Am. St. Rep. 924, 93 N. W. 1107, and *People v. Van Wormer*, 175 N. Y. 195, 67 N. E. 299, holding comparison of prisoner's shoes with footprints in snow not compelling him to be witness against himself.

Cited in footnotes to *Williams v. State*, 39 L. R. A. 269, which holds evidence obtained by forcibly entering and searching house and owner's person admissible to show possession of articles tending to establish guilt; *State v. Height*, 59 L. R.

A. 438, which holds unlawful, disclosures by physicians of knowledge as to venereal disease, obtained by examination against his will of one accused of rape.

Lack of jurisdiction.

Approved in *O'Donoghue v. Boies*, 159 N. Y. 99, 53 N. E. 537, holding purchase by guardian of ward's land at judicial sale in her own name, presumptively fraudulent and void.

28 L. R. A. 707, *O'BEAR JEWELRY CO. v. VOLFER*, 106 Ala. 205, 54 Am. St. Rep. 31, 17 So. 525.

Preferences by insolvent corporations.

Approved in *Wilson v. Stevens*, 129 Ala. 637, 87 Am. St. Rep. 87, 29 So. 678, and *National Bank of Commerce v. Allen*, 33 C. C. A. 176, 61 U. S. App. 102, 90 Fed. 551, sustaining power of insolvent corporation to prefer debts.

— To officers or directors.

Approved in *Corey v. Wadsworth*, 118 Ala. 527, 44 L. R. A. 779, 25 So. 503, upholding preference by insolvent corporation of creditor, who was stockholder, director, and president, and participated in transaction giving preference.

Disapproved in *Love Mfg. Co. v. Queen City Mfg. Co.* 74 Miss. 304, 21 So. 146 (concurring opinion), majority denying right of directors of insolvent corporation to prefer themselves.

— Trust fund doctrine.

Approved in *Barrett v. Pollak Co.* 108 Ala. 396, 54 Am. St. Rep. 172, 18 So. 615; *Pollak Co. v. Muscogee Mfg. Co.* 108 Ala. 476, 54 Am. St. Rep. 165, 18 So. 611; *Henderson v. Hall*, 134 Ala. 505, 32 So. 840; *Corey v. Wadsworth*, 118 Ala. 497, 44 L. R. A. 768, 25 So. 503,—holding assets of insolvent corporation not trust fund for payment of debts; *Hall v. Henderson*, 134 Ala. 505, 63 L. R. A. 704, 32 So. 840, holding subscriptions to stock not trust fund for benefit of creditors, which may be reached by suit in chancery; *Adams & W. Co. v. Deyette*, 8 S. D. 141, 31 L. R. A. 506, 59 Am. St. Rep. 751, 65 N. W. 471 (dissenting opinion), majority holding assets of corporation not trust fund for creditors.

What constitutes insolvency.

Cited in *Coal City Coal & Coke Co. v. Hazard Powder Co.* 108 Ala. 223, 19 So. 392, holding averment that grantor is insolvent, and was so at time of executing conveyance attacked as fraudulent, sufficient allegation of insolvency.

Creation of trust; existence of trust relation.

Approved in *Waller v. Jones*, 107 Ala. 341, 18 So. 277, holding one redeeming in his own name another's property from tax sale with his own means, under agreement by other to repay when able, trustee for such other; *Sanders v. Steele*, 124 Ala. 418, 26 So. 882, holding that trust results in favor of one furnishing part of consideration for purchase of land, taken in name of one furnishing balance, in proportion to amount furnished by him; *Adler v. Van Kirk Land & Constr. Co.* 114 Ala. 560, 62 Am. St. Rep. 133, 21 So. 490, holding mortgagor not relieved from necessity of exercising diligence to discover facts in settlement with mortgagee, as relation between them is not one of trust and confidence.

Administration of insolvent's property.

Approved in *McCreery v. Berney Nat. Bank*, 116 Ala. 233, 67 Am. St. Rep.

105, 22 So. 577, holding insolvency alone insufficient to authorize court of equity to administer debtor's property for benefit of his creditors.

Cited in *Smith-Dimmick Lumber Co. v. Teague*, 119 Ala. 392, 24 So. 4, holding creditor not entitled to appointment of receiver or other equitable relief, from mere fact that debtor is about to remove his property from state.

Enforcing stockholder's liability.

Approved in *Hall v. Henderson*, 114 Ala. 609, 62 Am. St. Rep. 141, 21 So. 1020, holding bill in equity maintainable by single judgment creditor of insolvent corporation to subject unpaid subscriptions to stock or other equitable assets to payment of debts; *Hawkins v. Donnerberg*, 40 Or. 107, 66 Pac. 691, denying right of corporate creditors to enforce liability of stockholders for unpaid subscriptions after corporation's right to collect same is barred by limitation.

Right of creditor to attack insolvent corporation.

Cited in *Force v. Age-Herald Co.* 136 Ala. 278, 33 So. 866 holding that creditor has no right to attack *ultra vires* act of corporation in transferring property in payment of subscriptions, in absence of fraud.

28 L. R. A. 716, *PRINCE v. ALABAMA STATE FAIR*, 106 Ala. 340, 17 So. 449.
Care required from bailee.

Approved in *Higman v. Camody*, 112 Ala. 272, 57 Am. St. Rep. 33, 20 So. 480, holding bailee for hire and use required to exercise degree of care which man of average prudence would bestow on his own property.

Presumption of bailee's negligence.

Approved in *First Nat. Bank v. First Nat. Bank*, 116 Ala. 537, 22 So. 976, holding that loss, by bank, of papers sent to it for collection raises presumption of negligence on its part; *Davis v. Hurt*, 114 Ala. 149, 21 So. 468, holding that negligence will, *prima facie*, be imputed to warehousemen on their failure on demand to deliver goods intrusted to their care or to account for nondelivery.

28 L. R. A. 718, *SOLAN v. CHICAGO, M. & ST. P. R. CO.* 95 Iowa, 260, 58 Am. St. Rep. 430, 63 N. W. 692.

Prohibition of contracts limiting liability as applied to interstate business.

Affirmed in 169 U. S. 135, 42 L. ed. 690, 18 Sup. Ct. Rep. 289, upholding state statute prohibiting contracts to exempt carriers from liability, as applied to interstate business.

Approved in *McCann v. Eddy*, 133 Mo. 70, 35 L. R. A. 113, footnote p. 110, 33 S. W. 71, holding statute prohibiting carrier from contracting for exemption from connecting carrier's negligence not void as regulation of commerce; *Armstrong v. Galveston, H. & S. A. R. Co.* 92 Tex. 121, 46 S. W. 33, upholding statutory prohibition of contracts restricting time for bringing suit to less than two years, and for notice of claim for damages before suit, as applied to interstate transportation; *McMillan v. American Exp. Co.* 123 Iowa, 238, 98 N. W. 629, holding provisions in contract made in Indiana, limiting liability of common carrier, void in Iowa.

Cited in footnotes to *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 41 L. R. A. 511, which sustains state statute making initial carrier liable for whole

distance in absence of written contract to contrary; *Western U. Teleg. Co. v. Howell*, 30 L. R. A. 158, which sustains state law subjecting telegraph companies to penalties for acts of negligence entirely within state.

28 L. R. A. 721, *GOLDBERG v. DOBBERTINE*, 46 La. Ann. 1303, 16 So. 192.

Effect of mutual fault or wrongdoing.

Cited in footnote to *Gutzman v. Clancy*, 58 L. R. A. 744, which sustains right to counterclaim for injuries by adversary in action for assault.

— Libel or slander.

Approved in *C. S. Burt Co. v. Casey & H. Mfg. Co.* 107 La. 235, 31 So. 667, holding that one seeking to recover damages for alleged libel must show himself free from fault; *Bloom v. Crescioni*, 109 La. 668, 94 Am. St. Rep. 456, 33 So. 724, denying recovery for slander and abuse, when there was an interchange of approbrious epithets; *Mihojevich v. Bodechtel*, 48 La. Ann. 619, 19 So. 672, holding vile epithets by woman of eighty as defense against real or fancied wrongs not actionable.

Cited in note (28 L. R. A. 724) on mutual vituperation or defamation as affecting remedy for libel or slander.

Criticized in *Brewer v. Chase*, 121 Mich. 538, 46 L. R. A. 402, footnote p. 397, 80 Am. St. Rep. 527, 80 N. W. 575, holding that qualified privilege to answer libel extends only to fair answer, and not to unconnected libelous charges tending to degrade first libeler.

Mode of pleading damages.

Cited in *Bickham v. Hutchinson*, 50 La. Ann. 767, 23 So. 902, holding that damages claimed in reconventional demand may be stated in gross sum, though itemizing is better.

28 L. R. A. 727, *COLUMBIAN ATHLETIC CLUB v. STATE*, 143 Ind. 98, 52 Am. St. Rep. 407, 40 N. E. 914.

Injunction against criminal acts.

Approved in *Chicago Fair Grounds Asso. v. People*, 60 Ill. App. 497, sustaining right to enjoin, in name of people, corporation from doing *ultra vires* and unlawful acts tending to public injury, though such acts are indictable; *State v. Ohio Oil Co.* 150 Ind. 36, 47 L. R. A. 633, 49 N. E. 809, sustaining right of state to maintain action to enjoin unlawful escape of natural gas into open air, though different remedy provided by statute; *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 106, 60 L. R. A. 828, 66 N. E. 436, as to attorney general, as representative of public, being proper person to enjoin corporate excesses.

Distinguished in *State v. O'Leary*, 155 Ind. 532, 52 L. R. A. 303, footnote p. 299, 58 N. E. 703, denying state's right to injunction to suppress gambling house remote from other houses.

Power to appoint receiver.

Cited in footnote to *Sternberg v. Wolff*, 39 L. R. A. 762, which authorizes appointment of receiver of trading corporation in case of deadlock from dissensions of stockholder.

28 L. R. A. 732, *NEWCOMB v. INDIANAPOLIS*, 141 Ind. 451, 40 N. E. 919.

Civil service; veterans.

Cited in footnotes to *Re Keymer*, 35 L. R. A. 447, which holds exemption of vet-

erans from competitive examination unconstitutional; Opinion of Justices, 34 L. R. A. 58, which sustains act preferring veterans to all persons except women, in civil service.

28 L. R. A. 737, *CARR v. COKE*, 116 N. C. 223, 47 Am. St. Rep. 801, 22 S. E. 16.

Conclusiveness of enrolled bill.

Followed without discussion in *Wyatt v. Wheeler & W. Mfg. Co.* 116 N. C. 272, 22 S. E. 120; *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. C. 294, 41 S. E. 488; *New Hanover County v. DeRosset*, 129 N. C. 279, 40 S. E. 43.

Approved in *Black v. Buncombe County*, 129 N. C. 126, 39 S. E. 818, holding certificate of ratification of statute conclusive evidence that it was read three several times in each house; *Lafferty v. Huffman*, 99 Ky. 93, 32 L. R. A. 206, 35 S. W. 123, denying right to impeach, by reference to journals, enrolled bill signed by governor and presiding officers; *Russell v. Ayer*, 120 N. C. 187, 37 L. R. A. 247, 27 S. E. 133, denying right to prove mistake to contradict provisions of statute regular on face, which has passed its several readings and been duly ratified; *Wrought Iron Range Co. v. Carver*, 118 N. C. 337, 24 S. E. 352, holding statute valid if regularly passed in other respects, though ratification not attested by signatures of presiding officers.

Cited in *Smathers v. Madison County*, 125 N. C. 486, 34 S. E. 554, holding certificate of ratification conclusive of ratification only, and not of compliance with constitutional requirement as to entry of yeas and nays; *Graves v. Moore County*, 135 N. C. 54, 47 S. E. 134, recognizing distinction between ordinary legislation, and acts coming within constitutional provision providing for their passage in specified way; *New Hanover County v. Armour Packing Co.* 135 N. C. 66, 47 S. E. 411, holding ratification of bill unimpeachable, unless of a kind that Constitution requires must be passed in certain way, when journals may be referred to as evidence; *Price v. Moundsville*, 43 W. Va. 526, 64 Am. St. Rep. 878, 27 S. E. 218, holding court not precluded by enrolment of bill from inquiring as to whether constitutional requirements have been fulfilled in its enactment; *State ex rel. Stanford v. Ellington*, 117 N. C. 160, 30 L. R. A. 532, 53 Am. St. Rep. 580, 23 S. E. 250, upholding right to resort to records of proceedings of the two houses, where title to office depends on passage of bill acted on by legislature, but not evidenced by signatures of presiding officers; *Union Bank v. Oxford*, 90 Fed. 11, commending holding of state court that courts cannot go behind ratification of bill by presiding officers, to inquire whether it was fraudulently or erroneously enrolled before passing requisite readings; *Wilson v. Markley*, 133 N. C. 620, 45 S. E. 1023, holding legislative journals inadmissible to contradict certificate of presiding officer as to reading and passage of bill; *Henderson County v. Travelers' Ins. Co.* 63 C. C. A. 475, 128 Fed. 825, holding certification by presiding officer that bill had passed three readings conclusive of that fact, although journal mentions only second and third readings; *Charlotte v. Shepard*, 122 N. C. 607, 29 S. E. 842 (concurring opinion), majority holding act nullity where agreed facts and facts appearing by record show that it was not read on three several days, and yeas and nays recorded.

Limited in *Stanly County v. Coler*, 37 C. C. A. 491, 96 Fed. 291, Affirming 89 Fed. 263, holding statute not a law, unless journals contain record of yeas and nays on passage of act, of which fact journals are evidence.

Distinguished in *Stanly County v. Snuggs*, 121 N. C. 399, 39 L. R. A. 441, 28 S.

E. 539, holding legislative journals competent evidence to show that bill was not passed in accordance with mandatory provisions of Constitution; *Union Bank v. Oxford*, 119 N. C. 222, 34 L. R. A. 488, 25 S. E. 966, holding certificate of speakers that act was ratified not conclusive that it was read on three several days in each house and that yeas and nays were properly entered on journals.

Fraud or corruption in passage of statute or resolution.

Cited in footnote to *Weston v. Syracuse*, 43 L. R. A. 678, which sustains city's right to set up, as defense, corruption in passage of resolution by city council.

Who may bring action.

Cited in *Jackson v. Corporation Commission*, 130 N. C. 415, 42 S. E. 123 (dissenting opinion), as to proper party to bring mandamus to compel corporation commission to assess railroad property.

28 L. R. A. 749, *CONDRAN v. CHICAGO, M. & ST. P. R. CO.* 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522.

Who are passengers.

Approved in *Purple v. Union P. R. Co.* 57 L. R. A. 703, 51 C. C. A. 567, 114 Fed. 126, holding one riding on train which he knows, or should know, is prohibited from carrying passengers, not a passenger; *Johnson v. Chicago, St. P. M. & O. R. Co.* 94 Fed. 474, holding one persisting in boarding moving freight car after several warnings to desist, not a passenger.

Cited in footnotes to *Chattanooga Rapid Transit Co. v. Venable*, 51 L. R. A. 886, which holds night watchman at depot getting on train to announce readiness to resume duty, a passenger; *Louisville & N. R. Co. v. Weaver*, 50 L. R. A. 381, which holds station agent riding on train without paying fare, several hours after work ended, a passenger; *Mendenhall v. Atchison, T. & S. F. R. Co.* 61 L. R. A. 120, which holds one riding on platform of baggage car at direction of brakeman, to whom money paid, not passenger.

Distinguished in *St. Louis S. W. R. Co. v. Harper*, 69 Ark. 188, 53 L. R. A. 220, 86 Am. St. Rep. 190, 61 S. W. 911, holding one boarding train which he should know does not stop at his station, and refusing demand for fare to first stopping place, a passenger.

Right of wrongdoer to protection of statute.

Cited in *McNeill v. Durham & C. R. Co.* 135 N. C. 728, 47 S. E. 765 (dissenting opinion), majority holding gratuitous passenger not *in pari delicto* with carrier, so as to prevent his recovery for personal injury.

Cited in footnote to *Queen v. Dayton Coal & I. Co.* 30 L. R. A. 82, which holds violation of statute against hiring boy under twelve to work in mine, negligence *per se*.

Judicial notice.

Approved in *United R. & Electric Co. v. Hardesty*, 94 Md. 664, 57 L. R. A. 277, 51 Atl. 406, holding it matter of common knowledge, of which court will take judicial notice, that passenger trains are operated to carry passengers for hire.

Duty to trespasser.

Approved in *Great Northern R. Co. v. Bruyere*, 51 C. C. A. 578, 114 Fed. 544 (dissenting opinion), as to duty owed to trespasser on train.

Discretion as to grant or refusal of new trial.

. Approved in *Keener v. Baker*, 35 C. C. A. 351, 93 Fed. 378; *Manning v. German Ins. Co.* 46 C. C. A. 145, 107 Fed. 54; *Willis v. Wyandotte County*, 30 C. C. A. 451, 58 U. S. App. 665, 86 Fed. 877,—holding grant or refusal of new trial not reviewable on error

28 L. R. A. 753, *NASH v. MINNESOTA TITLE INS. & T. CO.* 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. 1039.

Liability for false representations.

Cited in *Latham v. Aldrich*, 166 Mass. 161, 44 N. E. 137, without special discussion; *Fromer v. Stanley*, 95 Wis. 63, 69 N. W. 820, holding mere casual statement by buyer to seller's agent, not made with view to purchase, as to how much he considers himself worth, mere expression of opinion; *Boddy v. Henry*, 113 Iowa, 469, 53 L. R. A. 773, footnote p. 760, 85 N. W. 771, denying liability for deceit, of landowner making false representations as to quantity, under belief in their truth; *Lynch v. Murphy*, 171 Mass. 308, 50 N. E. 623, holding representations by known promoter as to value in future as investment, of stock of company organized to make and sell certain machines, known to be unperfected, mere expression of opinion; *Conant v. Alvord*, 166 Mass. 315, 44 N. E. 250, holding that action will lie in favor of one damaged by misrepresentation, whether fraudulent or not, that he had right to accept order in behalf of bank; *Corey v. Eastman*, 166 Mass. 287, 55 Am. St. Rep. 401, 44 N. E. 217, holding architect liable to owner for negligently erroneous statements and imprudent advice, in reliance on which he makes payment in excess of amount due, after which builder abandons contract; *Boddy v. Henry*, 113 Iowa, 469, 53 L. R. A. 773, 85 N. W. 771, holding liability for deceit by landowner falsely representing amount in tract, though representation believed true, on which purchaser relies, not to be predicated on fact that he might have known of its falsity.

Cited in footnotes to *James v. Crosthwait*, 36 L. R. A. 631, which holds bank liable for loss incurred in reliance on false entry of credit on bank book, induced by conduct authorizing belief that credit is genuine; *Kountze v. Kennedy*, 29 L. R. A. 360, holding president not liable for fraud and deceit to purchaser of corporate bonds, on account of omission from statement of assets and liabilities of claim in litigation not believed valid; *H. W. Williams Transp. Line v. Darius Cole Transp. Co.* 56 L. R. A. 939, which denies right to rely on false representations as to speed of steamboat, if warranty as to speed is inserted in contract.

Evidence as to intent.

Approved in *Faxon v. Jones*, 176 Mass. 209, 57 N. E. 359, holding evidence that defendant in action for slander had no hostile feelings towards plaintiff, and did not intend to accuse her of stealing, competent; *Honsucle v. Ruffin*, 172 Mass. 422, 52 N. E. 538, upholding right of writer of paper put in merely as admission, to explain same, though contradictory to proper construction of written words; *State v. Kirby*, 62 Kan. 442, 63 Pac. 752, holding testimony by defendant as to meaning and intent of threatening language, proved by prosecution to have been used by him, admissible.

Measure of damages for fraud and deceit.

Approved in *Kilgore v. Bruce*, 166 Mass. 139, 44 N. E. 108, authorizing deduction from purchase money note, of additional amount maker is induced to pay by

fraudulent statements as to price another is paying; *Coffing v. Dodge*, 167 Mass. 237, 45 N. E. 928, holding one inducing another to take insufficient mortgages for money loaned, by false representations as to value of property, liable for difference between safe mortgages and those taken; *Whiting v. Price*, 172 Mass. 242, 78 Am. St. Rep. 262, 51 N. E. 1084, holding measure of damages for false representations inducing purchase of bond, difference between actual value at time of purchase and its value if as represented; *McKindley v. Drew*, 69 Vt. 216, 37 Atl. 285, holding measure of damages for falsely inducing purchase of life insurance policy is amount of premiums paid, less value of insurance had, where insurance repudiated on discovery of fraud; *Hunt County Oil Co. v. Scott*, 28 Tex. Civ. App. 216, 67 S. W. 451, holding measure of damages upon rescission of contract for fraud is consideration paid and special damage or expense reasonably incurred, but not difference between contract and market price of goods contracted for; *Fellows v. Judge*, 72 N. H. 468, 57 Atl. 653, raising, but not deciding, whether, in action for deceit, rule of damages is same where property is retained as where it is returned.

Cited in footnote to *Rockefeller v. Merritt*, 35 L. R. A. 633, which holds measure of damage for fraud in inducing exchange of property to be difference between actual value of property parted with and that received.

28 L. R. A. 759, *PAGE v. COOK*, 164 Mass. 116, 49 Am. St. Rep. 449, 41 N. E. 115.

Construction of contract as to time of payment.

Cited in *Orass v. Scruggs*, 115 Ala. 266, 22 So. 81, holding that construction of contract in which time of payment is stated in doubtful terms will be adopted which avoids conversion of absolute into conditional engagement; *Pistel v. Imperial Mut. L. Ins. Co.* 88 Md. 558, 43 L. R. A. 221, footnote p. 219, 42 Atl. 210, holding that promise to pay when debtor feels able creates moral obligation to pay when debtor is able; *Johnston v. Schenck*, 15 Utah, 494, 50 Pac. 921, holding owners of mining claim receipting for money to be repaid on demand if claim sold within year, required to repay at end of year, if no sale made; *Whitten v. New England Live Stock Ins. Co.* 165 Mass. 344, 43 N. E. 121, denying right of insurance company to defeat policy by refusing to have executive board act under provision in policy for payment in sixty days after approval by such board.

28 L. R. A. 760, *MERCHANTS NAT. BANK v. ROBINSON*, 97 Ky. 552, 31 S. W. 136.

Set-off by bank.

Approved in *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 807, 77 N. W. 346, denying bank's right as against holder of check, to apply insolvent maker's account to unmatured indebtedness due to it.

Cited in footnote to *Niblack v. Park Nat. Bank*, 39 L. R. A. 159, which denies bank's right to appropriate fund to own claim against depositor, after presentation by holder of check constituting equitable assignment of fund.

Distinguished in *Thomas v. Exchange Bank*, 99 Iowa 210, 35 L. R. A. 381, 68 N. W. 780, sustaining bank's right to offset, as against unmatured debt of insolvent, any sum owing by it to him, unless such sum is pledged to some specific purpose or impressed with trust.

28 L. R. A. 761, *HOUSTON & T. C. R. CO. v. CRAWFORD*, 88 Tex. 277, 53 Am. St. Rep. 752, 31 S. W. 176.

Liability of purchaser of railroad from receiver.

Modified on final proceedings in error in 89 Tex. 89, 33 S. W. 534, *Affirming* (Tex. Civ. App.) 32 S. W. 155, requiring complaint seeking to hold purchaser of railroad from receiver on claim for personal injuries while road in receiver's hands after sale, to allege making of improvements after sale, paid for out of subsequent earnings.

Approved in *Holman v. Galveston, H. & S. A. R. Co.* 14 Tex. Civ. App. 503, 37 S. W. 464, denying liability of purchaser of railroad, for damage to freight shipped over road under contract with receiver, in absence of proof that funds from operation were invested in betterments or turned over to purchaser.

Cited in *San Antonio & A. P. R. Co. v. Bowles*, 88 Tex. 639, 32 S. W. 880, refusing, from insufficiency of assignments of error, to pass on question as to sufficiency of allegation as to improvements by receiver with funds derived from operation of road.

Distinguished in *Houston & T. C. R. Co. v. Bath*, 17 Tex. Civ. App. 707, 44 S. W. 595, holding purchaser of railroad from receiver liable for damage to freight shipped over road after sale, while operated by receiver, for purchaser's benefit, in opposition to orders of court, though no betterments made.

Where claim against receiver presented.

Followed in *San Antonio & A. P. R. Co. v. Bowles*, 88 Tex. 640, 32 S. W. 880, holding claim for injuries during receivership of railroad not barred by failure to present it in court in which receivership was pending.

28 L. R. A. 765, *MUTUAL L. INS. CO. v. SIMPSON*, 88 Tex. 333, 53 Am. St. Rep. 757, 31 S. W. 501.

Breach of warranty as to health of insured, etc.

Cited in *Mutual L. Ins. Co. v. Baker*, 10 Tex. Civ. App. 525, 31 S. W. 1072, holding applicant's omission to mention death of infant brother, of which he had no knowledge, not breach of warranty avoiding policy.

Cited in footnotes to *Barnes v. Fidelity Mut. Life Asso.* 45 L. R. A. 264, which holds that person in bed with cold may be "in good health" within meaning of policy, though pneumonia, terminating fatally, sets in soon after; *Globe Mut. L. Ins. Asso. v. Wagner*, 52 L. R. A. 649, which holds policy not avoided by false statement that none of applicant's brothers dead; *Black v. Travelers' Ins. Co.* 61 L. R. A. 500, which holds injury not bodily infirmity as matter of law, unless physical health of insured affected.

Limitation of agent's authority.

Cited in *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 544, 64 S. W. 867, holding applicant for insurance bound by terms of application in regard to extent of agent's authority.

28 L. R. A. 769, *SALT CREEK VALLEY TURNP. CO. v. PARKS*, 50 Ohio St. 568, 35 N. E. 304.

Followed without special discussion in *West Alexandria & E. Turnp. Road Co. v. Gay*, 50 Ohio St. 583, 35 N. E. 308.

Right to jury trial.

Cited in *Cincinnati v. Steinkamp*, 9 Ohio C. C. 181, holding void, statute authorizing court of equity to issue injunction against use or occupation of certain buildings in absence of fire escapes on same.

28 L. R. A. 773, *ROBINSON v. SOUTHERN P. CO.* 105 Cal. 526, 541, 38 Pac. 94, 722.

Stop-over privileges.

Cited in *Southern P. Co. v. Robinson*, 132 Cal. 412, 64 Pac. 572, holding decision that passenger entitled to stop-over privileges under statute not *stare decisis* as to one repeatedly seeking such privilege in order to have refusals as basis of many actions for penalty.

Cited in footnote to *Louisville & N. R. Co. v. Klyman*, 56 L. R. A. 769, which sustains right to eject one stopping over on ticket good only for continuous passage.

Extent of repeal or amendment of statute.

Cited in *Home Bldg. & L. Asso. v. Nolan*, 21 Mont. 214, 53 Pac. 738, holding previously existing corporations not electing to come within its provisions not affected by statute providing that it shall not affect any existing corporation unless it elects to come under its provisions; *Murphy v. Pacific Bank*, 119 Cal. 342, 51 Pac. 317, holding statute as to savings banks not repealed as to bank not electing to continue existence under Civil Code, by section thereof providing that existing corporations not electing to continue under Code not affected by its provisions; *Anderson v. Byrnes*, 122 Cal. 277, 54 Pac. 821, holding amendment of act limiting liability of corporate directors not invalidated by invalidity of previous provision limiting its operation to certain class of corporation, in absence of anything to indicate that former limitation would not have been made in any event.

Disqualification of judge.

Cited in footnotes to *State ex rel. Perez v. Wall*, 49 L. R. A. 548, which holds judge disqualified in suit by sister of father-in-law; *First Nat. Bank v. McGuire*, 47 L. R. A. 413, which holds judge disqualified to try case in which plaintiff is corporation of which his wife is shareholder.

28 L. R. A. 783, *DAVOCK v. MOORE*, 105 Mich. 120, 63 N. W. 424.

Who are public officers; eligibility.

Approved in *Atty. Gen. ex rel. Moreland v. Detroit*, 112 Mich. 159, 37 L. R. A. 217, 70 N. W. 450, holding mayor of city within prohibition against person holding office under "state," executing office of governor.

Cited in footnote to *State v. Loechner*, 59 L. R. A. 916, which holds member of city board of education a ministerial officer.

Local self-government; powers of legislature or governor.

Cited in *State ex rel. White v. Barker*, 116 Iowa, 104, 57 L. R. A. 250, 93 Am. St. Rep. 222, 89 N. W. 204, denying power of legislature to take from appointees of municipality, management of its water supply system; *Brockenbrough v. Water Comrs.* 134 N. C. 18, 46 S. E. 28, sustaining legislative power to authorize city board of water commissioners to issue bonds for water works and execute mortgage securing same; *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo.

390, 34 L. R. A. 840, 71 Am. St. Rep. 926, 45 Pac. 494, requiring compulsory obligations imposed by legislature to be included in determining whether county indebtedness exceeds constitutional limitation; Atty. Gen. *ex rel.* Moreland v. Detroit, 112 Mich. 170, 37 L. R. A. 220, 70 N. W. 450, holding statutory power of governor to remove mayor of city authorized by Constitution; Adams v. Kuykendall, 83 Miss. 592, 35 So. 830, holding appointment of state revenue agent to collect uncollected taxes for past years not invasion of local self-government.

Cited in footnotes to Simon v. Northup, 30 L. R. A. 171, which upholds legislative power to require city to incur debt for bridges and ferries; State *ex rel.* McCausland v. Freeman, 47 L. P. A. 67, which sustains statute arbitrarily establishing high school and requiring its maintenance by people of county; Rathbone v. Wirth, 34 L. R. A. 408, which holds void, statute for bipartisan police board of four members, to be selected by all members of common council voting for two members only.

Cited in note (48 L. R. A. 467, 491) on power of legislature to impose burdens on municipalities, and to control their local administration and property.

Amendment of statute.

Cited in Detroit v. Schmid, 128 Mich. 386, 92 Am. St. Rep. 468, 87 N. W. 383, holding that title to amendatory act need not be more specific than that of amended act, if nothing is in later act which could not have been included in earlier one.

28 L. R. A. 793, DETROIT, G. H. & M. R. CO. v. GRAND RAPIDS, 106 Mich. 13, 58 Am. St. Rep. 466, 63 N. W. 1007.

What property subject to local improvement assessment.

Approved in Boston v. Boston & A. R. Co. 170 Mass. 100, 49 N. E. 95, holding railroad right of way not more than 5 rods wide exempt from street improvement assessment.

Cited in footnotes to Storrie v. Houston City Street R. Co. 44 L. R. A. 716, which holds street railway company required to pave between rails, and 6 inches each side; Cincinnati, L. & N. R. Co. v. Cincinnati, 49 L. R. A. 566, which denies right to assess entire cost of land taken for highway on remaining land of same owner.

Cited in notes (28 L. R. A. 252) on liability of railroad right of way to assessment for local improvements; (35 L. R. A. 40) on liability to local assessments for benefits of property exempt from general taxation.

Limited in Kansas City, P. & G. R. Co. v. Waterworks Improv. Dist. No. 1, 68 Ark. 381, 59 S. W. 248, holding right of way and depot grounds assessable for local improvements which benefit them.

Disapproved in effect in Pittsburgh, C. C. & St. L. R. Co. v. Hays, 17 Ind. App. 264, 44 N. E. 375, holding railroad right of way assessable for improvement of highways.

28 L. R. A. 796, DUGGER v. MECHANICS' & T. INS. CO. 95 Tenn. 245, 32 S. W. 5.

Equal protection of laws.

Approved in Leeper v. State, 103 Tenn. 516, 48 L. R. A. 170, 53 S. W. 962, upholding statute providing for selection of text-books of all schools of state

by commission, and their purchase from lowest bidder; *Henley v. State*, 98 Tenn. 698, 39 L. R. A. 136, 41 S. W. 352, sustaining act for payment by state or county of costs of criminal prosecution in certain classes of cases only; *Knoxville Iron Co. v. Harbison*, 183 U. S. 20, 46 L. ed. 61, 22 Sup. Ct. Rep. 1, Affirming 103 Tenn. 441, 56 L. R. A. 320, 76 Am. St. Rep. 682, 53 S. W. 955, sustaining act requiring redemption in money of store orders, scrip, etc., given in payment of wages.

Extent of recovery on policy.

Approved in *Hickerson v. German-American Ins. Co.* 96 Tenn. 208, 32 L. R. A. 176, 33 S. W. 1041, holding market value of property, destroyed so far as covered by insurance, amount recoverable on policy; *Western Assur. Co. v. Phelps*, 77 Miss. 660, 27 So. 745, holding statute against insurance company denying that insured property was worth full value placed on it not waived by acceptance of policy prescribing different rule for fixing amount of loss; *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 47, 33 S. W. 992, holding clause in policy allowing company to rebuild void in case of total loss.

Cited in footnote to *Daggs v. Orient Ins. Co.* 35 L. R. A. 227, which upholds statute requiring payment of full amount of policy on total loss.

Forfeiture of policy.

Cited in footnote to *McGannon v. Michigan Millers' Mut. F. Ins. Co.* 54 L. R. A. 739, which holds policy not avoided by temporary absence of competent watchman from mill.

Invalidity of statute in part.

Approved in *State v. Scott*, 98 Tenn. 262, 36 L. R. A. 463, 39 S. W. 1, holding other provisions of statute not affected by holding separate and independent provision void as interference with interstate commerce.

Distinguished in *Reelfoot Lake Levee District v. Dawson*, 97 Tenn. 179, 34 L. R. A. 732, 36 S. W. 1041, holding statute void *in toto* when enforcement impracticable on elimination of unconstitutional provision.

Foreign corporations.

Approved in *State ex rel. Astor v. Schlitz Brewing Co.* 104 Tenn. 753, 78 Am. St. Rep. 941, 59 S. W. 1033; *State v. Connecticut Mut. L. Ins. Co.* 106 Tenn. 285, 61 S. W. 75; *North British & M. Ins. Co. v. Craig*, 106 Tenn. 631, 62 S. W. 155; *Daggs v. Orient Ins. Co.* 136 Mo. 391, 35 L. R. A. 229, 58 Am. St. Rep. 638, 38 S. W. 85,—upholding right of state to impose on foreign corporations such conditions as it deems proper, or to wholly exclude them.

Corporation as "person."

Approved in *Dayton Coal & I. Co. v. Barton*, 103 Tenn. 611, 53 S. W. 970, holding corporation within protection of constitutional provision against depriving any "man" or any "person" of life, liberty, or property without due process.

28 L. R. A. 801, *Ex parte HART*, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249.

Extradition proceedings.

Followed without special discussion in *Ex parte Dinsmore*, 11 C. C. A. 588, 25 U. S. App. 46, 63 Fed. 261.

Approved in *Ex parte Rowland*, 35 Tex. Crim. Rep. 109, 31 S. W. 651, holding

complaint on which extradition demanded, insufficient when made on affiant's information and belief.

Cited in footnotes to *State ex rel. Nisbett v. Toole*, 38 L. R. A. 224, which sustains governor's right to revoke warrant for surrender of fugitive before removal from state; *State ex rel. McNichols v. Justus*, 55 L. R. A. 325, which holds that requisition for extradition "by the acting governor" is made by chief magistrate; *State v. McNaspy*, 38 L. R. A. 756, which holds waiver of requisition papers and submission to arrest, voluntary return authorizing prosecution for any crime.

Questions considered on habeas corpus in extradition cases.

Approved in *Armstrong v. Van De Vanter*, 21 Wash. 693, 59 Pac. 510, holding courts authorized to inquire into sufficiency of indictment found in demanding state on habeas corpus to obtain discharge from arrest in extradition proceedings; *Bruce v. Rayner*, 62 C. C. A. 502, 124 Fed. 482, holding person arrested under extradition statute entitled to judicial inquiry of state or Federal court into sufficiency of indictment under which he is demanded.

Annotation in 28 L. R. A. 801, referred to particularly in *Ex parte Devine*, 74 Miss. 719, 22 So. 3, upholding right of relator in habeas corpus to secure release from custody in extradition, to traverse return by showing that there was no copy of indictment or affidavit as basis of extradition warrant.

28 L. R. A. 811, *BRASHEAR v. HOUSTON C. A. & N. R. CO.* 47 La. Ann. 735, 49 Am. St. Rep. 382, 17 So. 260.

Contributory negligence of passenger.

Cited in footnotes to *Distler v. Long Island R. Co.* 35 L. R. A. 762, which holds stepping from station platform onto slowly moving train not negligence *per se*; *Jones v. New York C. & H. R. R. Co.* 41 L. R. A. 490, which denies right of one attempting to enter car of mixed train at distance from station to recover for injury from sudden jolting of car in coupling.

Distinguished in *Bemiss v. New Orleans City & Lake R. Co.* 47 La. Ann. 1676, 18 So. 711, holding attempt to go from one car to another while train is in motion, contributory negligence.

28 L. R. A. 812, *STATE v. APPLGARTH*, 81 Md. 293, 31 Atl. 961.

Discrimination; uniformity.

Approved in *Hughes v. State*, 87 Md. 301, 39 Atl. 747, sustaining act against fishing in certain waters with seines or nets, except from shore in usual and customary manner; *Applegarth v. State*, 89 Md. 143, 42 Atl. 941, sustaining act requiring license by person engaged in business of packing and canning oysters for sale and transportation; *Simpson v. Hopkins*, 82 Md. 480, 33 Atl. 714, upholding taxation of corporate bonds secured by mortgage, though individual debts secured by mortgage are exempt; *Lacy v. Armour Packing Co.* 134 N. C. 573, 47 S. E. 53, holding valid, act taxing all meat-packing houses doing business within state, specified amount for each county in which business is carried on.

Cited in footnote to *Levi v. Louisville*, 28 L. R. A. 480, which holds void, for lack of uniformity, ad valorem tax on realty and license tax on personality.

28 L. R. A. 816, *EDGEComb v. BUCKHOUT*, 146 N. Y. 332, 66 N. Y. S. R. 641, 40 N. E. 991.

Ground for servant's discharge.

Cited in *Jerome v. Queen City Cycle Co.* 163 N. Y. 356, 57 N. E. 485, holding day's absence in defiance of orders, for unimportant private purpose of superintendent in charge of extensive manufactory, ground for his discharge.

Nature of services performed by "housekeeper."

Cited in *Taylor v. Beatty*, 202 Pa. 125, 51 Atl. 771, holding admissible, extrinsic evidence as to services actually performed by so-called "housekeeper," so as to determine whether she is a servant within rule as to presumption of periodical payment of wages; *Schrader v. Beatty*, 206 Pa. 186, 55 Atl. 958, as to nature of services performed by housekeeper.

Evidence as to value of services.

Approved in *Gall v. Gall*, 27 App. Div. 177, 50 N. Y. Supp. 563, holding value of confidential services proper subject of expert testimony, though some elements involved are not within experience of the experts; *Re Benton*, 71 App. Div. 524, 75 N. Y. Supp. 859, holding witness familiar with management of property and acquainted with particular property in question, competent to testify as to value of services in managing same.

28 L. R. A. 820, *Re SMITH*, 146 N. Y. 68, 66 N. Y. S. R. 241, 48 Am. St. Rep. 769, 40 N. E. 497.

Contagious diseases; powers of health officers as to.

Approved in *Wilson v. Alabama G. S. R. Co.* 77 Miss. 718, 52 L. R. A. 358, footnote p. 357, 78 Am. St. Rep. 543, 28 So. 567, holding void, order of board of health against any person entering state until further order of board, as applied to persons coming from noninfected places; *Jew Ho v. Williamson*, 103 Fed. 20, holding establishment of general quarantine in district in which over 10,000 persons reside, and prohibiting persons entering or leaving it, but permitting free intercourse within district, unreasonable where nine persons are supposed to have died from contagious disease, but no living person known to have contracted it; *Pierce v. Dillingham*, 203 Ill. 156, 62 L. R. A. 893, 67 N. E. 846, holding that statute permitting restrictions on account of existence of diseases, as to localities from which cattle may be imported, will not permit prohibition of importation of cattle, unless tested, from all states and territories, upon report that contagious diseases prevail therein to "greater or less extent;" *Re Boyce*, 43 Misc. 301, 88 N. Y. Supp. 841, holding county liable for rent and damages, from sheriff's taking possession of property as place to care for prisoner afflicted with smallpox.

Applied in *Regan v. Fosdick*, 19 Misc. 495, 43 N. Y. Supp. 1102, holding tenant not liable for rent beyond time of occupation, where health officers forbid his removal at end of term and he removes as soon as they permit.

Cited in footnote to *Compagnie Francaise De Navigation A Vapeur v. State Bd. of Health* 56 L. R. A. 795, which sustains power of state health board to prohibit landing within infected district, of healthy persons from vessel from foreign port.

— Vaccination.

Approved in *State ex rel. Adams v. Burdge*, 95 Wis. 405, 37 L. R. A. 162,

footnote p. 157, 60 Am. St. Rep. 123, 70 N. W. 347, holding void, rule of board of health excluding unvaccinated children from school, when smallpox epidemic not probable.

Cited in *Morris v. Columbus*, 102 Ga. 799, 42 L. R. A. 179, footnote p. 175, 66 Am. St. Rep. 243, 30 S. E. 850, sustaining legislative power to authorize compulsory vaccination within city limits where smallpox exists; *Com. v. Pear*, 183 Mass. 245, 66 N. E. 719, holding constitutional, statute authorizing boards of health of cities and towns, in their discretion, to require vaccination of all inhabitants; *Smith v. Emery*, 11 App. Div. 13, 42 N. Y. Supp. 258, holding detention of person, shortly before, or at the time, exposed to smallpox, justified.

Cited in footnotes to *Potts v. Breen*, 39 L. R. A. 152, which denies power to compel school children to be vaccinated as condition of attending school; *Blue v. Beach*, 50 L. R. A. 64, which holds exclusion of unvaccinated pupils from public schools during smallpox epidemic justified only as public emergency; *Bissell v. Davison*, 29 L. R. A. 251, which upholds act authorizing vaccination as condition of attending school.

Mandamus to review decision of civil service commission.

Cited in *Re Donovan*, 89 App. Div. 58, 85 N. Y. Supp. 406 (dissenting opinion), majority holding decision by municipal civil service commission as to similarity of duties of new positions with those of old position abolished, so as to allow certification of name of former incumbent, not reviewable by mandamus.

28 L. R. A. 824, CHICAGO, B. & Q. R. CO. v. METCALF, 44 Neb. 848, 63 N. W. 51.

Necessity of signals at highway crossing.

Cited in *Littlejohn v. Richmond & D. R. Co.* 49 S. C. 16, 26 S. E. 967, holding person attempting to cross train standing across highway by climbing between cars, within protection of statute as to injury by collision at crossing; *Omaha & R. Valley R. Co. v. Kraysenbuhl*, 48 Neb. 555, 67 N. W. 447, holding instruction that crossing signals were for benefit of persons on highway, and that failure to give them would not make railway liable for injury to employee shoveling snow from track, not prejudicial to company.

Cited in footnotes to *Louisville & N. R. Co. v. Bodine*, 56 L. R. A. 506, which requires signals at private crossing used by public for peculiarly dangerous special train; *Czech v. Great Northern R. Co.* 38 L. R. A. 302, which holds company liable for failure to give signals at particularly dangerous farm crossings, when required in exercise of reasonable care; *Passman v. West Jersey & S. R. Co.* 61 L. R. A. 609, which holds cutting of train on side track at highway crossing not invitation to cross without using ordinary precaution.

Damages for injury to property.

Distinguished in *Overpeck v. Rapid City*, 14 S. D. 510, 85 N. W. 990, holding measure of damages for injury to horse, difference in value before and after injury, and also expense of medicine and of caring for it.

Conclusiveness of verdict.

Cited in *Omaha Street R. Co. v. Emminger*, 57 Neb. 243, 77 N. W. 675, holding verdict conclusive on question of fact as to which evidence is so conflicting that different minds might reasonably reach different conclusions.

Presumption as to negligence of railroad company.

Approved in *Kansas City & O. R. Co. v. Rogers*, 48 Neb. 658, 67 N. W. 602, holding setting of fire to combustible materials on right of way merely evidence of negligence on part of company, and not conclusive as to its liability.

— At highway crossing.

Reaffirmed in *Missouri P. R. Co. v. Geist*, 49 Neb. 496, 68 N. W. 640, holding negligence not established, as matter of law, by failure to ring bell or blow whistle on approaching crossing.

Approved in *Geist v. Missouri P. R. Co.* 62 Neb. 323, 87 N. W. 43; *Chicago, St. P. M. & O. R. Co. v. Brady*, 51 Neb. 760, 71 N. W. 721; *Omaha & R. Valley R. Co. v. Talbot*, 48 Neb. 638, 67 N. W. 599,—holding inference of negligence not necessarily demanded from failure to ring bell or blow whistle on approaching crossing; *Coulter v. Great Northern R. Co.* 5 N. D. 574, 67 N. W. 1046, holding regulations by ordinance as to signals at crossings not sole criterion of care to be exercised.

28 L. R. A. 829, *GAGE v. GAGE*, 66 N. H. 282, 29 Atl. 543.

Form of remedy.

Approved in *Fowler v. Owen*, 68 N. H. 271, 73 Am. St. Rep. 588, 39 Atl. 329, holding expenses incurred and actually paid in regaining possession of land, recoverable in trespass, as form of remedy is immaterial; *Atty. Gen. v. Taggart*, 66 N. H. 369, 25 L. R. A. 616, 29 Atl. 1027, holding mandamus by attorney general authorized to determine whether vacancy exists in office of governor; *Paul v. Cragnaz*, 25 Nev. 316, 47 L. R. A. 543, footnote p. 540, 59 Pac. 857, sustaining right of lessee of undivided interest in mine to bring action for damages against other owners for exclusion from mine; *Reynolds v. Burgess Sulphite Fibre Co.* 71 N. H. 345, 57 L. R. A. 955, 93 Am. St. Rep. 535, 51 Atl. 1075, holding that bill of discovery will lie to compel employer to produce for plaintiff's inspection, broken parts of machinery, defects in which are alleged to have caused death of plaintiff's intestate, where action commenced cannot otherwise be satisfactorily prepared for trial; *Smith v. Bank of New England*, 69 N. H. 257, 45 Atl. 1082, sustaining right of separate claimants having community of interest against same defendant, to join as plaintiffs in bill in equity to prevent multiplicity of suits, though each has adequate remedy at law.

Right to amend pleading.

Approved in *Jenness v. Jones*, 68 N. H. 476, 44 Atl. 607, and *Morgan v. Joyce*, 66 N. H. 476, 30 Atl. 1119, holding justice of amendment changing form of action, question of fact determinable at trial term; *State v. Sunapee Dam Co.* 72 N. H. 131, 55 Atl. 899, recognizing right of amendment upon trial, if plaintiff has misconceived his remedy; *Morse v. Glover*, 68 N. H. 120, 40 Atl. 396, holding that plaintiff suing in case would be allowed to amend by filing count in trespass, if examination showed case not maintainable.

Implied promise.

Approved in *Concord Coal Co. v. Ferrin*, 71 N. H. 36, 93 Am. St. Rep. 496, 51 Atl. 283, and *Clark v. Sanborn*, 68 N. H. 412, 36 Atl. 14, holding promise to pay what it is one's legal duty to pay implied by law.

Rights and liabilities of cotenants.

Approved in *Morrill v. Weeks*, 70 N. H. 181, 46 Atl. 32, holding joint owner
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appropriating common property required to account to cotenants for all used in excess of his share; *Porter v. Ayer*, 66 N. H. 401, 29 Atl. 1027, holding tenant in common of mill and machinery using more than his share liable to cotenants for balance due, to be found by estimation, without itemized account; *Ela v. Ela*, 70 N. H. 164, 47 Atl. 414, holding tenant in common collecting rents, bound to account therefor to cotenants after demand for accounting; *Leavitt v. Locke*, 68 N. H. 17, 40 Atl. 395, holding committee to make partition required to consider claim of one tenant in common to buildings erected by him on common property; *Moreland v. Strong*, 115 Mich. 217, 69 Am. St. Rep. 553, 73 N. W. 140, holding that tenant in common may be permitted to share, on accounting on bill for partition, if justice require it, proceeds of growing crops put in by cotenant in exclusive possession; *Pickering v. Moore*, 67 N. H. 536, 31 L. R. A. 702, 68 Am. St. Rep. 695, 32 Atl. 828, upholding right of tenant in common of manure to take away his share without division by court.

Cited in note (29 L. R. A. 449, 452, 457) on liability of cotenants for improvements and repairs.

Right to mesne profits.

Cited in footnote to *Credle v. Ayers*, 48 L. R. A. 751, which holds defaulting vendee chargeable with mesne profits for time possession of land withheld pending ejectment against him.



